

BURHENN & GEST LLP
624 SOUTH GRAND AVENUE
SUITE 2200
LOS ANGELES, CALIFORNIA 90017-3321
(213) 688-7715
FACSIMILE (213) 624-1376



WRITER'S DIRECT NUMBER
(213) 629-8788

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

January 6, 2017

VIA DROPBOX

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

Re: Joint Test Claimants' Rebuttal Comments Concerning California
Regional Water Quality Control Board, San Diego Region, Order
No. R9-2009-0002, 10-TC-11

Dear Ms. Halsey:

Attached please find the Joint Test Claimants' Narrative Statement and supporting attachments and documentation in Rebuttal to the (1) Comments of the State Water Resources Control Board and the California Regional Water Quality Control Board, San Diego Region and (2) the Comments of the Department of Finance regarding the above-referenced Test Claim.

The documents submitted are the Narrative Statement, Attachments 1 and 2 and Documentation, Tabs 1-32.

Please contact me if you or your staff has any questions regarding these documents. Thank you.

Very truly yours,

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

David W. Burhenn

DB:dwb

**REBUTTAL COMMENTS OF
JOINT TEST CLAIMANTS**

**CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD, SAN DIEGO REGION,
ORDER NO. R9-2009-0002, TC-10-11**

TABLE OF CONTENTS

		PAGE
I.	INTRODUCTION	1
II.	DOF AND THE WATERBOARDS DO NOT ADDRESS THE HOLDING IN <i>DEPARTMENT OF FINANCE v. COMMISSION ON STATE MANDATES</i>	1
III.	THE 2009 PERMIT IS AN EXECUTIVE ORDER WITHIN THE MEANING OF GOVERNMENT CODE §17516.....	3
IV.	THE PERMIT PROVISIONS AT ISSUE WERE NOT THE RESULT OF CLAIMANTS’ DISCRETION	3
V.	EACH OF THE ELEVEN MANDATES AT ISSUE IN THIS TEST CLAIM CONSTITUTE NEW PROGRAMS OR HIGHER LEVELS OF SERVICE; NONE WAS COMPELLED BY FEDERAL LAW	4
A.	PROHIBITION AGAINST DISCHARGE OF LANDSCAPE IRRIGATION, IRRIGATION WATER AND LAWN WATERING INTO STORM SEWERS (2009 PERMIT, SECTION B).....	6
1.	The Prohibition is a New Program or Higher Level of Service.....	6
2.	The 2009 Permit, including this Prohibition, is a “Program” Within the Meaning of Article XIII B, Section 6	6
3.	The Prohibition is Not Federally Mandated.....	7
a.	The Fact that the 2009 Permit is Also an NPDES Permit Does Not Establish that the Requirements Contained Therein are Federal	7
(1)	In <i>Dept. of Finance</i> , the Supreme Court Expressly Rejected the Water Boards’ MEP Argument Made Here	8
(2)	The Water Boards’ Assertion that the Regional Board Disclaimed State Law Authority Is Contradicted by the Permit’s Language Itself.....	10
(3)	2009 Permit Finding E.6 Does Not Represent the Regional Board’s Assessment of the Allegedly Federal Nature of Permit Requirements, but instead is Boilerplate Language Not Entitled to Deference	12

b.	The Categorical Prohibition Against Landscape Irrigation, Irrigation Watering and Lawn Watering Runoff Was Not Compelled by Federal Law.....	14
B.	TMDL-RELATED MANDATES (2009 PERMIT, SECTION I).....	16
1.	The TMDL Mandates are a New Program or Higher Level Of Service	17
2.	The TMDL Mandates are Not Federally Required; They Were Imposed as a Result of the Regional Board’s Exercise of its Discretion.....	18
a.	Because Federal Law Does Not Compel the Inclusion of Water Quality Standards in Municipal Stormwater Permits, Federal Law Does Not Compel the Inclusion of TMDLs or TMDL-Related Requirements Adopted to Accomplish Those Standards	18
b.	Even if the TMDL Mandates Were Federally Required, Federal Law Does Not Compel their Inclusion in the Form of Numeric Effluent Limits.....	21
C.	THE DEVELOPMENT OF MONITORING, INVESTIGATION AND COMPLIANCE PROGRAMS TO MEET NON-STORMWATER DRY WEATHER ACTION LEVELS (2009 PERMIT, SECTIONS C AND F.4(d) AND (e)	23
1.	The Development of Monitoring, Investigation and Compliance Programs to Meet Non-Stormwater Dry Weather Action Levels Is a New Program or Higher Level of Service.....	23
2.	The Permit Requirements Associated with NALs Are Not Federally Mandated	24
D.	THE PROGRAMS ASSOCIATED WITH OR TRIGGERED BY STORMWATER ACTION LEVELS ARE STATE MANDATES (2009 PERMIT, SECTION D)	25
1.	Programs Associated with Stormwater Action Levels or Triggered by Their Exceedance Are New Programs or Higher Levels of Service.....	25
2.	The Permit Requirement Associated with SALs Are Not Federally Mandated	26

E.	THE 2009 PERMIT'S LOW IMPACT DEVELOPMENT AND HYDROMODIFICATION REQUIREMENTS ARE STATE MANDATES (2009 PERMIT, SECTIONS F.1.d(4) AND (7) AND F.1.h)	27
1.	The Permit's Low Impact Development and Hydromodification Requirements are New Programs or Higher Levels of Service	27
2.	The LID and Hydromodification Requirements are not Federally Mandated	28
F.	THE 2009 PERMIT'S NEW REPORTING REQUIREMENTS INCLUDING AN ANNUAL EFFECTIVENESS ASSESSMENT AND A WORK PLAN TO ADDRESS WATER QUALITY ISSUES ARE STATE MANDATES (2009 PERMIT, SECTION J).....	31
1.	The Permit's New Assessment and Reporting Requirement are New Programs or Higher Levels of Service	31
2.	Section J's Reporting and Effective Assessments and Work Plan are not Federally Mandated	32
G.	THE 2009 PERMIT'S PUBLIC MEETING REQUIREMENT FOR WATERSHED WORK PLANS IS A STATE MANDATE (2009 PERMIT, SECTIONS G.6 AND K.1.B(4)(n)).....	33
1.	The Public Meeting Requirement is a New Program or Higher Level of Service	33
2.	The Annual Public Meeting Requirement is not Federally Mandated.....	33
H.	THE 2009 PERMIT'S NEW REPORTING REQUIREMENTS ARE STATE MANDATES (2009 PERMIT, SECTIONS F.1.D(7)(i), F.3.a(4)(c), K.3.a(3) AND ATTACHMENT D).....	33
1.	The Permit's New Reporting Requirements are New Programs or Higher Levels of Service	33
2.	The New Reporting Requirements are not Federally Mandated	34

I.	THE 2009 PERMIT’S MANDATE TO USE GEOGRAPHICAL INFORMATION SYSTEM (GIS) IS A STATE MANDATE (2009 PERMIT, SECTION F.4.b).....	35
1.	The Requirements to Use GIS in Mapping is a New Program or Higher Level of Service	35
2.	The Requirement to Use GIS is Not Federally Mandated	35
J.	THE 2009 PERMIT’S REQUIREMENT FOR DEVELOPING AND IMPLEMENTING A RETROFITTING PROGRAM IS A STATE MANDATE (2009 PERMIT, SECTION F.3.d)	36
1.	The Retrofitting Requirement is a New Program or Higher Level of Service	36
2.	The Retrofitting Program is not Mandated by Federal Law	36
K.	THE PERMIT’S BMP MAINTENANCE TRACKING REQUIREMENT IS A STATE MANDATE (2009 PERMIT, SECTION F.1.f).....	37
1.	The BMP Maintenance Tracking Requirement is a New Program Or Higher Level of Service.....	37
2.	The BMP Maintenance Tracking Requirements are not Federally Mandated.....	38
VI.	THE TEST CLAIMANTS DO NOT HAVE AUTHORITY TO LEVY SERVICE CHARGES, FEES OR ASSESSMENTS TO FUND THE MANDATED PROGRAMS	39
VII.	CONCLUSION	42

NARRATIVE STATEMENT IN REBUTTAL TO COMMENTS OF STATE WATER RESOURCES CONTROL BOARD AND CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION AND DEPARTMENT OF FINANCE CONCERNING TEST CLAIM 10-TC-11, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO. R9-2009-0002

I. INTRODUCTION

Claimants County of Orange and the Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo and San Juan Capistrano (“Claimants”) seek in this Test Claim a subvention of funds for 11 mandates imposed by California Regional Water Quality Control Board San Diego Region Order No. R9-2009-0002 (the “2009 Permit”), a municipal stormwater permit issued by the California Regional Water Quality Control Board, San Diego Region (“Regional Board”). This 2009 Permit replaced a prior, 2002 stormwater permit (the “2002 Permit”) which had previously regulated Claimants’ municipal stormwater discharges.

The State Water Resources Control Board and the Regional Board (collectively, “Water Boards”) contend that Claimants are not entitled to a subvention of funds because the mandates are not “new programs or higher levels of service” within the meaning of article XIII B, section 6 of the California Constitution, the mandates are federal rather than state, and Claimants have fee authority to pay for the mandates. The Department of Finance (“DOF”) likewise contends that Claimants have fee authority to pay for these mandates.¹

None of these arguments has merit. The mandates in the Test Claim are programs that require services and the carrying out of uniquely governmental functions, have never been previously required of Claimants, are not compelled by federal law, and cannot be funded through fees or assessments.

Claimants will first address the fact that the 2009 Permit is an executive order within the meaning of Government Code § 17516, and that the Permit’s requirements are not the result of Claimants’ discretion. Claimants will then address the fact that each mandate is a state mandate within the meaning of article XIII B, section 6, *i.e.*, that it is a new program or higher level of service and that it is not compelled by federal law. Claimants will then address the fact that they do not have fee authority to pay for these mandates.

II. DOF AND THE WATERBOARDS DO NOT ADDRESS THE HOLDING IN DEPARTMENT OF FINANCE v. COMMISSION ON STATE MANDATES

Before turning to the Water Boards’ and DOF’s specific arguments, Claimants note that the state agencies fail to address the holding in the Supreme Court’s decision in *Department of*

¹ DOF’s comments are directed solely at Claimants’ alleged fee authority and specifically do not address other aspects of the test claim.

Finance v. Commission on State Mandates (“*Dept. of Finance*”).² In *Dept. of Finance*, the Supreme Court held that the Commission is the governmental body tasked with determining what is, and is not, a federal mandate and that the burden is on the State to prove that a particular permit term or condition is compelled by federal law. In reaching this result, the Supreme Court rejected the arguments the Water Boards make here, including the assertion that the Commission should defer to the Regional Board in determining whether a mandate is state or federal.³

The Water Boards instead attempt to distinguish *Dept. of Finance*, arguing that the 2009 Permit does not contain the “proscriptive provisions” set forth in the Los Angeles County permit.⁴ As is demonstrated by the text of the Permit provisions at issue set forth in Claimants’ Narrative Statement and as discussed further below, the 2009 Permit is replete with far more detailed, prescriptive and costly requirements than the trash receptacle and inspection mandates at issue in *Dept. of Finance*.

The Water Boards also attempt to distinguish *Dept. of Finance* on the grounds that a particular finding in the 2009 Permit, Finding E.6, represented “an explicit finding” by the Regional Board “that the permit requirements were required to meet the federal standard.”⁵ As is discussed in greater detail below,⁶ this catch-all finding is entitled to no deference by the Commission and should be given none, as it is not a finding by the Regional Board supported by evidence in the record as to the alleged federal nature of any of the specific Permit requirements, including those at issue herein. In fact, the finding is administrative boilerplate, inserted in stormwater permits throughout the state in almost identical language (examples of which have been attached as exhibits hereto.) Finding E.6 in no sense is a “case specific” regional board finding, “based among other things on local factual circumstances,” one that finds that the specific permit requirements in question were the only means by which the federal “maximum extent practicable” standard for stormwater permits could be achieved. This is the only kind of finding that the Supreme Court identified as possibly entitled to deference on the issue of what constitutes a federal mandate.⁷

The Claimants have already discussed the importance of *Dept. of Finance* in their Supplemental Briefing of October 21, 2016 and in the supplemental brief of the City of Dana Point of October 28, 2016, and will not repeat that same analysis here. *Dept. of Finance* controls the Commission’s consideration of whether the mandates at issue in this test claim are state or federal. As set forth below, all the mandates in the Joint Test Claims are state mandates.

² *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749.

³ *Id.* at 765, 768-69.

⁴ Water Boards’ Comments (“WB Comments”) at 4.

⁵ WB Comments at 5.

⁶ See text *infra* at 12-14.

⁷ See *Dept. of Finance, supra*, 1 Cal.5th at 768 and n.15.

III. THE 2009 PERMIT IS AN EXECUTIVE ORDER WITHIN THE MEANING OF GOVERNMENT CODE §17516

As an initial matter, it is undisputed that the 2009 Permit is an “Executive Order” within the meaning of Government Code § 17516. Government Code § 17516 defines an “Executive Order” to be “any order, plan, requirement, rule or regulation issued by. . . (c) Any agency, department, board, or commission of state government.”

The 2009 Permit falls within this definition. It is an order (No. R9-2009-0002) issued by the Regional Board, a state agency.⁸ It contains a plan for addressing pollution and requirements with which claimants must comply. The Water Boards do not contend otherwise.

IV. THE PERMIT PROVISIONS AT ISSUE WERE NOT THE RESULT OF CLAIMANTS’ DISCRETION

There is also no dispute that the 2009 Permit provisions at issue in the Test Claim were not the result of claimants’ discretion. Under federal and state law, all operators of municipal storm sewer systems are required to have a National Pollutant Discharge Elimination System (“NPDES”) permit and/or Waste Discharge Requirements issued by the Regional Board.⁹

As the Commission found in both the test claim on the 2001 Los Angeles Regional Water Quality Control Board permit and the 2007 San Diego Regional Water Quality Control Board permit for the County of San Diego and certain cities contained therein, municipal stormwater permittees do not voluntarily participate in the NPDES permit and therefore the content of prescriptive permit conditions imposed by regional boards are not the result of the permittees’ discretion.¹⁰

Obtaining the 2009 Permit was not a discretionary choice. The Water Boards do not contend otherwise.

⁸ Water Code § 13201(a).

⁹ 33 U.S.C. § 1342(p) (Volume I, Tab 25 of Documentation in Support of Narrative Statement filed June 30, 2011 (“2011 Narrative Statement”); Water Code §§ 13260, 13263, 13376 and 13377 (attached as Tabs 23, 24, 25 and 26 to Documentation in Support of Rebuttal (“Rebuttal Documentation”)). See also 40 C.F.R. §§ 122.21(a) and 123.25(a)(4) (requiring any person who discharges or proposes to discharge pollutants to submit an application for issuance of a permit) (attached as Tabs 11 and 12 to Rebuttal Documentation). An NPDES permit is required where there is a discharge of a pollutant from a “point source” to a water of the United States. 33 U.S.C. § 1342(a).

¹⁰ See *In re* Test Claim on Los Angeles Regional Water Quality Control Board Order No. 01-182, Test Claim Case Nos. 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, Statement of Decision (“Los Angeles County Statement of Decision”) at 19-21 (July 31, 2009) (attached as Tab 31 to Rebuttal Documentation); *In re* Test Claim on San Diego Regional Water Quality Control Board Order No. R9-2007-001, Case No. 07-TC-09, Statement of Decision (“San Diego County Statement of Decision”) at 33-35 (March 26, 2010) (Volume II, Tab 4 of Documentation in Support of 2011 Narrative Statement).

V. EACH OF THE ELEVEN MANDATES AT ISSUE IN THIS TEST CLAIM CONSTITUTE NEW PROGRAMS OR HIGHER LEVELS OF SERVICE; NONE WAS COMPELLED BY FEDERAL LAW

As the California Supreme Court held in *Dept. of Finance*, “[u]nder our state Constitution, if the Legislature or a state agency requires a local government to provide a new program or higher level of service, the local government is entitled to reimbursement from the state for the associated costs.”¹¹ The 2009 Permit provisions at issue in the Test Claim represent new programs and higher levels of service. None was compelled by federal law.

A program that carries out a governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments, is a “program” within the meaning of article XIII B, section 6.¹² A program is “new” if the local governmental entity had not previously been required to institute it. A “higher level of service” exists where the mandate results in an increase in the actual level or quality of governmental services provided.¹³

A program requirement is federally mandated only where “federal law compels the state to impose, or itself imposes” the requirement.¹⁴ On the other hand, “if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a ‘true choice,’ the requirement is not federally mandated.”¹⁵

Once claimants show that a new program or higher level of service is being imposed, the Supreme Court has held that the burden shifts to the state to prove that the mandate is federally required or that some other exception to subvention is present.¹⁶ A local agency is entitled to a subvention of funds whenever the state does not meet this burden.

There are 11 permit requirements that constitute unfunded state mandates in this Test Claim:

1. Prohibitions against landscape irrigation, irrigation water and lawn watering as set forth in Section B of the 2009 Permit;

¹¹ 1 Cal.5th at 749, citing Cal. Const., art. XIII B, §6, subd. (a).

¹² *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189. *See also County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

¹³ *See San Diego Unified School District v Commission on State Mandates* (2004) 33 Cal.4th 859, 877-78.

¹⁴ *Dept. of Finance, supra*, 1 Cal.5th at 765.

¹⁵ *Id.*

¹⁶ *Id.* at 769.

2. New Total Maximum Daily Loads and Water Quality Based Effluent Limitation requirements set forth in Section I of the Permit;
3. New requirements involving implementation of non-stormwater dry weather numeric action levels (“NALs”) set forth in Section C of the Permit;
4. New requirements involving implementation of stormwater numeric action levels (“SALS”) as set forth in Section D of the Permit;
5. New Low Impact Development (“LID”) and Hydromodification requirements, including a Hydromodification Management Plan as set forth in Sections F.1.d and F.1.h of the Permit;
6. New reporting requirements including an annual assessment of the effectiveness of the Jurisdictional Runoff Management Program and a work plan demonstrating a responsive and adoptive approach for the use of resources as set forth in Section J of the Permit;
7. New public meeting requirements related to the Watershed Workplan report as set forth in Section k.1.b of the Permit;
8. New reporting requirements, including describing all activities a Copermittee will undertake pursuant to the 2009 Permit and an individual Jurisdictional Runoff Management Report, as set forth in Sections K.1.a and K.3 of the Permit;
9. New requirements mandating the use of geographical information system (“GIS”) maps set forth in in Section F.4.b of the Permit;
10. New requirements involving and implementing a retrofitting program for existing development as set forth in Section F.3.d of the Permit; and
11. New BMP maintenance tracking requirements as set forth in Section F.1.f of the Permit.

Each of these 2009 Permit provisions is a state-mandated new program or higher level of service within the meaning of article XIII B, section 6.

A. PROHIBITION AGAINST DISCHARGE OF LANDSCAPE IRRIGATION, IRRIGATION WATER AND LAWN WATERING INTO STORM SEWERS (2009 PERMIT, SECTION B)

1. The Prohibition is a New Program or Higher Level of Service

As set forth in Section IV.A. of Claimants' Section 5 Narrative Statement,¹⁷ the 2009 Permit, for the first time, required Claimants to prohibit landscape irrigation, irrigation water and lawn watering flows from entering their municipal separate storm sewer systems ("MS4"). This requirement is new. While the 2002 Permit allowed the entry of such irrigation waters into MS4 systems (*see* 2002 Permit, Section B.2 (pp. 8-9)), the 2009 Permit required Claimants to take steps, including public education, monitoring and enforcement, to prohibit such entry.

The Water Boards nevertheless contend that this is not a new program and that Claimants were previously obligated to address "illicit," non-stormwater discharges.¹⁸ The Water Boards, however, do not deny that the 2002 Permit did not require Claimants to prohibit these categories of runoff waters from entering Claimants' storm sewer systems, and further do not deny that the federal regulations exempt these discharges from the non-stormwater illicit discharge prohibitions and should be addressed only when they become identified as sources of pollutants.¹⁹

There is thus no question that this prohibition is new; Claimants had not previously been required to institute it. The prohibition on the entry of these categories of discharge is thus a new program or higher level of service.²⁰

2. The 2009 Permit, including this Prohibition, is a "Program" within the Meaning of Article XIII B, Section 6

The Water Boards also make a general argument that all mandated activities in the 2009 Permit, including this prohibition, are not "programs" within the meaning of article XIII, section 6 of the Constitution because the NPDES permit program is a general program that applies to all dischargers.²¹

¹⁷ While the Narrative Statement has been revised to address the specific issues raised in the Commission's November 18, 2016 Notice Letter, the arguments and section numbers in the original Narrative Statement are unchanged.

¹⁸ WB Comments at 15 and 24.

¹⁹ *See* 40 C.F.R. § 122.26(d)(2)(iv)(B)(1) (Volume I, Tab 27 to Documentation in Support of 2011 Narrative Statement).

²⁰ *See San Diego Unified School District, supra*, 33 Cal.4th at 859 (education requirements new where they did not exist prior to mandate); *County of Los Angeles, supra*, 110 Cal.App.4th at 1189 (program is new if local governmental agency had not previously been required to implement it).

²¹ WB Comments at 19-20.

The Commission has, however, already rejected this argument. In the test claim on the 2001 Los Angeles County Municipal Stormwater Permit, the Commission found that

the issue is not whether NPDES permits generally constitute a “program” within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim . . . constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities . . . in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.²²

The Commission reached the same conclusion with respect to the San Diego County stormwater permit.²³

The same reasoning applies here. As the Commission held in its consideration of test claims filed under the 2001 Los Angeles County and 2007 San Diego County stormwater permits, the 2009 Permit at issue here carries out a governmental function of providing services to the public and imposes unique requirements on Claimants. The permit provisions apply exclusively to local agencies. The permit is therefore a “program” within the meaning of article XIII B, section 6.

3. The Prohibition is Not Federally Mandated

Claimants having shown that the prohibition against landscape irrigation, irrigation water and lawn watering is a new program or higher level of service, the burden is on the State to prove that the mandate is federally compelled or that some other exception to subvention is present.²⁴ With regard to whether the prohibition is federally compelled, the Water Boards make both a general argument applicable to the permit as a whole²⁵ and arguments specific to the prohibition.²⁶ None of these arguments has merit.

a. The Fact that the 2009 Permit is also an NPDES Permit Does Not Establish that the Requirements Contained Therein are Federal

The Water Boards first make the general argument that all mandated activities in the 2009

²² Los Angeles County Statement of Decision at 49.

²³ San Diego County Statement of Decision at 35-37. These Statements of Decision applied the holding of the Court of Appeal in *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919 that “the applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6.” See Los Angeles County Statement of Decision at 49; San Diego County Statement of Decision at 36.

²⁴ *Dept. of Finance, supra*, 1 Cal.5th at 769.

²⁵ WB Comments at 16-19.

²⁶ *Id.* at 21-23.

Permit are federal mandates because (1) under federal law, all municipal stormwater permits are required to contain controls to reduce the discharge of pollutants to the maximum extent practicable (“MEP”); (2) federal law gives the Water Boards discretion to decide what permit requirements are necessary to meet MEP; and (3) the permit contains a finding (Finding E.6) in which the Regional Board states that the permit is not an unfunded state mandate subject to article XIII B, section 6.²⁷

The Water Boards’ first two arguments were specifically rejected by the Supreme Court in *Dept. of Finance*²⁸ and, as further held by the Supreme Court, Regional Board findings on the existence of state mandates are not entitled to deference.²⁹ The third argument ignores the fact that Finding E.6 is mere boilerplate, inserted almost verbatim in several other stormwater permits across the state and not tied to any evidence in the record considered by the Regional Board.

(1) In *Dept. of Finance*, the Supreme Court Expressly Rejected the Water Boards’ MEP Argument Made Here

In *Dept. of Finance*, the State made the same argument that the Water Boards are making here, that trash receptacle and inspection requirements in the 2001 Los Angeles County stormwater permit were federal mandates because they necessarily fell within the federal MEP standard and that the state and regional water boards had discretion to decide what requirements were necessary to meet that standard.³⁰ The Supreme Court squarely rejected the argument, holding that the mere fact that the permit was an NPDES permit which required controls to reduce the discharge of pollutants to the MEP, and the regional boards had discretion to decide what permit requirements were necessary to comply with that standard, did not render all permit provisions federal in nature, especially in light of the fact that the regional boards have discretion to incorporate state law into NPDES permits. The Supreme Court analyzed the issue as follows:

We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the Permit. In issuing the Permit, the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. [Citation.] It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.³¹

In reaching this result, the Supreme Court applied the well-established rule that NPDES permits can contain both federal and state requirements³² and that where a permit contains state

²⁷ *Id.* at 16-19.

²⁸ 1 Cal.5th at 767-68.

²⁹ *Id.* at 768.

³⁰ *Id.* at 767-68.

³¹ *Id.* at 768.

³² *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613, 627-28 (Volume I, Tab 8 to Documentation in Support of 2011 Narrative Statement); 33 U.S.C. § 1370 (Volume I, Tab 26 to Documentation in Support of 2011 Narrative Statement); Water Code § 13377.

requirements, the state must comply with state law, including the requirements of the California Constitution.³³

The Supreme Court also applied the holding of *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 (“*Hayes*”) that even where a mandate is a result of a federal program, that conclusion marks “the starting point rather than the end of the consideration.” *Id.* at 1592. Discussing *Hayes*, the Court held:

If the state “has adopted an implementing statute or regulation pursuant to the federal mandate,” and had “no ‘true choice’” as to the manner of implementation, the local government is not entitled to reimbursement. [Citation.] If, on the other hand, “the manner of implementation of the federal program was left to the true discretion of the state,” the local government might be entitled to reimbursement. [Citation.]

According to the *Hayes* court, the essential question is how the costs came to be imposed upon the agency required to bear them. “If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless of whether the costs were imposed upon the state by the federal government.”³⁴

Based on *Hayes* as well as on *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 and *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, the Supreme Court held that the test as to whether a mandate is federal is not whether the mandate derives from federal law, but the following:

If federal law *compels* the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a ‘true choice,’ the requirement is not federally mandated.³⁵

Because the trash receptacle and inspection obligations were not compelled by federal law, the Supreme Court found that these were state, not federal mandates.³⁶ As for the State’s MEP

³³ *City of Burbank, supra*, 35 Cal. 4th at 627-28.

³⁴ *Dept. of Finance, supra*, 1 Cal.5th at 765.

³⁵ *Id.* (emphasis added). The “true choice” standard derives from the Supreme Court’s decision in *City of Sacramento*, in which the Court held that, because the penalties that would be imposed on California and its businesses were so severe if California did not require local governments to provide unemployment insurance, California had no discretion to depart from the federal requirements and therefore the state was acting in response to a federal mandate. 50 Cal.3d at 74. In *Dept. of Finance*, the Supreme Court found that the MEP standard of the CWA did not restrain the Water Board’s discretion in implementing that standard. 1 Cal.5th at 770-72.

³⁶ *Id.* at 770-72.

arguments, the Supreme Court specifically rejected them, finding that the MEP provision did not *expressly* require the permittees to perform inspections or install receptacles.³⁷

Thus, just because the federal Clean Water Act (“CWA”) requires municipal stormwater permits to contain controls that reduce the discharge of pollutants to the MEP, and just because the CWA may give the state discretion as to how to implement that standard, does not mean that municipal stormwater requirements are federal mandates. Instead, as the Supreme Court held, the test is whether federal law *compels* the state to impose the requirement. If federal law does not, and instead the state imposes the requirement through the exercise of its discretion, the requirement is a state, not federal, mandate.³⁸

(2) The Water Boards’ Assertion that the Regional Board Disclaimed State Law Authority Is Contradicted by the Permit’s Language Itself

The Water Boards assert that the 2009 Permit is based solely on federal authority and that this is supported by Permit Finding E.6.³⁹ This assertion is incorrect on several grounds and is contradicted by the Permit terms themselves.

First, the Water Boards assert that “[t]he San Diego Water Board disclaimed any reliance on the Porter-Cologne Act”⁴⁰ (even though that Act established the existence of the regional boards and authorizes them to act).⁴¹ This statement is erroneous. The Regional Board’s very first finding in the Permit, Finding A.1, states:

This Order is based on the federal Clean Water Act (CWA), the *Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, commencing with Section 13000)*, applicable State and federal regulations, all applicable provisions of statewide *Water Quality Control Plans and Policies adopted by the State Water Resources Control Board (State 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*.

³⁷ *Id.*

³⁸ *Id.* at 765.

³⁹ WB Comments at 16, 18-19. The reasons why Finding E.6 should be given no deference are discussed in Section III.A.3.a(3) below.

⁴⁰ WB Comments at 16.

⁴¹ Water Code § 13201 (attached as Tab 20 to Rebuttal Documentation).

2009 Permit at 1 (emphasis supplied). Each one of the italicized authorities in Finding A.1 represents *California*, not *federal*, authority. See also 2009 Permit, Attachment A (setting forth Basin Plan prohibitions pursuant to Water Code § 13243).⁴²

Notwithstanding the express language of Permit Finding A.1, if there was any doubt that the 2009 Permit was in fact also based on California law, the Permit's Fact Sheet⁴³ puts those doubts to rest. Section VIII of the Fact Sheet discusses Permit Finding A.1, a discussion which specifically cites the Regional Board's authority under both federal *and* state law to adopt the Permit. As to state law authority, the Fact Sheet states:

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

As a means for achieving those water quality objectives, Porter-Cologne (section 13243) further authorizes the Regional Water Quality Control Boards to establish waste discharge requirements (WDRs) to prohibit was discharges in certain conditions or areas. . . The Order will renew Order No. R9-2002-02 to comply with the CWA *and attain water quality objectives in the Basin Plan.*

. . .⁴⁴

The italicized reference to the Basin Plan, a California-required water quality control plan for the San Diego region, reflects again that the Permit was adopted to meet both California and federal requirements, not simply the latter. Moreover, Fact Sheet Section VII, discussing the legal authority for the 2009 Permit, cites as authority Water Code § 13377, which provides that when a regional board is issuing NPDES permits, the board can include not only federal requirements but also state requirements, *i.e.*, “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.”⁴⁵

⁴² Attached as Tab 29 to the Rebuttal Documentation.

⁴³ Fact Sheets in NPDES permits are required, *inter alia*, to set forth a “brief summary of the basis for the draft permit conditions including references to applicable statutory and regulatory provisions . . .” 40 CFR § 124.8(b)(4) (attached as Tab 13 to the Rebuttal Documentation). The Fact Sheet for the 2009 Permit is attached as Tab 28 to the Rebuttal Documentation.

⁴⁴ Fact Sheet at 21 (emphasis supplied).

⁴⁵ *Id.* at 20.

(3) 2009 Permit Finding E.6 Does Not Represent the Regional Board’s Assessment of the Allegedly Federal Nature of Permit Requirements, but instead is Boilerplate Language Not Entitled to Deference

Despite the clear evidence in the 2009 Permit itself that it is based on both federal and state law, the Water Boards contend that Finding E.6 in the 2009 Permit, in which the Regional Board found that the Permit requirements in their entirety are not unfunded state mandates, is entitled to deference.⁴⁶ Permit Finding E.6 begins: “This Order does not constitute an unfunded local governmental mandate subject to subvention under Article XIII B, Section 6 of the California Constitution” and then lists five arguments in support.⁴⁷

This finding is entitled to no deference and no weight for several reasons. First, the Supreme Court in *Dept. of Finance* explicitly rejected the Water Boards’ contention that board findings on whether a requirement is federal or state are entitled to deference: “We also disagree that the Commission should have deferred to the Regional Board’s conclusion that the challenged requirements were federally mandated.”⁴⁸ As the Supreme Court found, “The State’s proposed rule, requiring the Commission to defer to the Regional Board, would leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature’s intent in creating the Commission.”⁴⁹

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

Third, the finding does not refer to, nor appear to be based on, the specific requirements of the 2009 Permit, including any of the provisions at issue in this Test Claim. The Regional Board made no reference to evidence in the record to support the finding. Indeed, the finding repeats, almost word for word, findings placed in other municipal stormwater permits throughout the state. For example, Finding E.7 in the municipal stormwater permit issued by the Los Angeles Regional Board to Ventura County dischargers, issued in May 2009 *prior* to the issuance of the 2009 Permit, repeats almost exactly the same rationale for why the Ventura County permit did not constitute an unfunded state mandate.⁵⁰ The Ventura County permit was not the first where this language

⁴⁶ WB Comments at 18-19.

⁴⁷ 2009 Permit at 13.

⁴⁸ 1 Cal.5th at 768.

⁴⁹ *Id.* at 769.

⁵⁰ *Compare* Fact Sheet, Ventura County Municipal Separate Storm Sewer System Permit, Order No. 09-0057, Finding E.7 (pages 11-13) *with* 2009 Permit Fact Sheet at 91-92. An excerpt of the Ventura County permit is attached as Exhibit A to the Declaration of David W. Burhenn (“Burhenn Decl.”), attached hereto as Attachment 1. The Commission may take administrative notice of this evidence pursuant to Evidence Code § 452(c) (official acts of the legislative departments of any state of the United States) (attached as

appeared. One year earlier, on May 12, 2008, the Central Valley Regional Board incorporated a finding in the municipal stormwater permit for the City of Stockton that also was almost identical to the discussion of Finding E.6 in the 2009 Permit Fact Sheet.⁵¹

Other water boards have inserted this same finding language as well. In the municipal stormwater permit issued by the San Francisco Bay Regional Board for San Francisco Bay municipalities (as revised in 2011), the Fact Sheet discussion of why the Permit “does not constitute an unfunded local government mandate” is nearly word for word the same as the language in Finding E.6.⁵² A fourth regional board, the Santa Ana Regional Board, adopted a conceptually identical but streamlined finding in a permit issued to the dischargers in Riverside County about a month after the adoption of the 2009 Permit.⁵³

This pattern establishes that Finding E.6, despite the claims made for it by the Water Boards, is not based on any specific Regional Board determination as to the alleged federal mandate requirements of the 2009 Permit, but rather was a boilerplate finding inserted by regional boards across the state.

Finally, Finding E.6 is not the kind of specific finding which the Supreme Court identified in *Dept. of Finance* as one as to which the Commission should defer, *i.e.*, where a regional board finds that the requirements “were the only means by which the maximum extent practicable standard could be implemented.” *Dept. of Finance, supra*, 1 Cal.5th at 768.

Tab 16 to the Rebuttal Documentation), Govt. Code § 11515 (attached as Tab 17 to the Rebuttal Documentation in Support of Rebuttal) and Cal. Code Regs., tit.2, section 1187.5, subd. (c).

⁵¹ *Compare* Waste Discharge Requirements for City of Modesto, Order No. R5-2008-0092, Finding 30 *with* 2009 Permit Fact Sheet at 91-92. A relevant excerpt of the City of Modesto permit language is attached as Exhibit B to the Burhenn Decl., attached hereto. The Commission may take administrative notice of this evidence pursuant to Evidence Code § 452(c) (official acts of the legislative departments of any state of the United States), Govt. Code § 11515 and Cal. Code Regs., tit.2, section 1187.5, subd. (c).

⁵² *Compare* Fact Sheet, Municipal Regional Stormwater Permit, Order No. R2-2009-0074 (as revised November 28, 2011), Pages App I-12 to 13 *with* 2009 Permit Finding E.6. An excerpt of the San Francisco Bay permit Fact Sheet is attached as Exhibit C to the Burhenn Decl., attached hereto. The Commission may take administrative notice of this evidence pursuant to Evidence Code § 452(c) (official acts of the legislative departments of any state of the United States), Govt. Code § 11515 and Cal. Code Regs., tit.2, section 1187.5, subd. (c).

⁵³ *Compare* Order No. R8-2010-0033, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge requirements for the Riverside County Flood Control and Water Conservation District, the County of Riverside, and the Incorporated Cities of Riverside County within the Santa Ana Region, Finding B.10, *with* 2009 Permit Finding E.6. An excerpt of this permit is attached as Exhibit D to the Burhenn Decl., attached hereto. The Commission may take administrative notice of this evidence pursuant to Evidence Code § 452(c) (official acts of the legislative departments of any state of the United States), Govt. Code § 11515 and Cal. Code Regs., tit.2, section 1187.5, subd. (c).

To avoid duplicative arguments, the Claimants specifically incorporate and re-assert these arguments and the attached evidence in full with respect to every citation to Finding E.6 by the Water Boards in their Comments.⁵⁴

b. The Categorical Prohibition against Landscape Irrigation, Irrigation Watering and Lawn Watering Runoff was Not Compelled by Federal Law

The Water Boards' only specific arguments as to why this prohibition was federally compelled are that (1) permittees are generally required to effectively prohibit non-stormwater discharges, including "illicit discharges" into their storm sewer systems, and (2) federal regulations provide that where municipalities identify irrigation waters as a potential source of pollutants, those sources should be prohibited.⁵⁵

The Water Boards themselves acknowledge, however, that the federal regulations exempt landscape irrigation, irrigation water and lawn watering from the prohibition against non-stormwater entering storm sewers.⁵⁶ The Water Boards nevertheless contend that, because the permittees have identified these waters as sources of pollutants, the federal regulations *require* that they be prohibited.

The regulations, however, do not require that the identification of irrigation waters as potential sources of pollutants compels them to be prohibited from entering the MS4. Instead, the regulations provide that municipalities, like Claimants, must "address" these sources, much as Claimants address other non-point sources of pollution that may enter their MS4s.⁵⁷ This could be accomplished through public information and educational campaigns advising constituents of the costs and consequences associated with overwatering, similar to the public information campaigns that advise citizens of the cost and consequences of disposing of oil and grease on the street or in catch basins. This approach, and associated level of service, is reasonably anticipated to be far more cost effective than an enforcement program designed to totally prohibit all landscape irrigation runoff from private property.

⁵⁴ In addition to the discussion in WB Comments page 23 regarding the non-stormwater discharge prohibition, the Water Boards raise Finding E.6 as a principal rationale for their conclusion that the 2009 Permit is exclusively federal on pages 18-19 (general response to Test Claim), 28 (specific response to Section I TMDL requirements), 30 (Section C and F non-stormwater action levels requirement), 31 (Section D storm water action levels requirement), 32 (Section F.1. LID and hydromodification requirements), 37 (Section J annual assessment of jurisdictional runoff management program effectiveness), 39 (Section G.6 and K.1 public meeting for watershed workplan requirements), 40 (Section F.1, F.3 and K.3 reporting requirements), 41 (Section F.4.b GIS mapping requirements), 44 (Section F.3.d existing development retrofitting requirements) and 45 (BMP maintenance tracking requirement).

⁵⁵ WB Comments at 21-24.

⁵⁶ 40 C.F.R. 122.26(d)(2)(iv)(B)(1). *See* WB Comments at 22.

⁵⁷ 40 C.F.R. 122.26(d)(2)(iv)(B)(1).

Indeed, EPA's guidance manual does not support the Water Board's contention that identification of irrigation waters as a source requires a categorical ban. The guidance manual provides that:

If an applicant knows . . . that landscape irrigation water from a particular site flows through and picks up pesticides or excess nutrients from fertilizer applications . . . the applicant should contact the NPDES permitting authority to request that the authority order the discharger to the MS4 to obtain a separate NPDES permit (or in this case, the discharge could be controlled through the storm water management program of the MS4).⁵⁸

Thus, the guidance manual does not state that the entire category of irrigation water should be barred, but instead recommends that irrigation water be "addressed" on an individual source by source basis.

In furtherance of this point, all that is required by federal regulation is that the Claimants have a two-step program for dealing with illicit discharges. First, a claimant must perform a screening analysis intended to provide sufficient information to develop priorities to detect and remove illicit discharges.⁵⁹ Secondly, a claimant must develop a site specific management plan to detect and remove the illicit discharge and control improper disposal to MS4s.⁶⁰ No other actions or prohibitions are required by federal law.

This is thus a circumstance where the Regional Board had discretion as to how to address these non-stormwater discharges, and, by exercising that discretion to require the prohibition, imposed a state mandate. That is one of the key teachings of the Supreme Court in *Dept. of Finance*: "If federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated."⁶¹ The Regional Board was not required to impose this categorical ban; no sanctions would have been imposed by EPA or any other federal agency had the Board allowed Claimants the ability to address irrigation waters in a different fashion from enforcing a total ban. The Regional Board chose to mandate a total ban on irrigation runoff, and their choice was one that was not compelled by federal law.

Moreover, a state mandate is created where municipalities are given discretion as to how to design their programs, and the state usurps that discretion and mandates requirements the

⁵⁸ EPA Guidance Manual, Part 2 at p. 6-33 (Volume III, Exhibit 1 to Documents in Support of 2011 Narrative Statement).

⁵⁹ 40 C.F.R. 122.26(d)(1)(iv)(D).

⁶⁰ 40 C.F.R. 122.26(d)(1)(iv)(D) and 122.26(d)(2)(B).

⁶¹ *Dept. of Finance, supra*, 1 Cal.5th at 765.

municipalities must follow.⁶² Here, the Regional Board usurped the municipalities' discretion as to how to address these irrigation waters and the pollutants that may (or may not) be carried by them. As discussed above, Claimants could have taken a different approach to these non-stormwater runoff sources, such as public education and information efforts. The Regional Board's mandate, however, precluded Claimants from doing so.

Finally, it is significant that stormwater permits issued by the EPA itself do not contain this prohibition. None of the permits issued to Albuquerque and Boise in 2012, to Washington D.C. in 2011 or to Boston in 1999 contain a prohibition on landscape irrigation runoff entering MS4s.⁶³ As the Supreme Court observed in *Dept. of Finance*, that such EPA-issued permits do not contain similar prohibitions undermines the argument that this requirement is federally mandated.⁶⁴

The State has not carried its burden of showing that the categorical prohibition against the entry of landscape irrigation, irrigation water, and lawn watering discharges into the Claimants' MS4 is compelled by federal law. Instead, there are at least four pieces of evidence that rebut that assertion: (1) this prohibition was not included in prior permits; (2) neither the statute nor federal regulations require a categorical prohibition; (3) EPA-issued permits do not include this prohibition; and (4) EPA's guidance manual provides that, if irrigation waters are to be addressed, they are to be "addressed" on an individual source by individual source basis. The inclusion of the boilerplate Finding E.6 in the 2009 Permit, upon which the Water Boards so heavily rely to characterize the Permit as federally mandated, is entitled to no weight and, in light of *Dept. of Finance*, the Water Boards' arguments should be disregarded as being without merit.

B. TMDL-RELATED MANDATES (2009 PERMIT, SECTION I)

The second mandate at issue in this Test Claim relates to the Bacterial Indicator TMDL applicable to Baby Beach in Orange County. As set forth in Claimants' Narrative Statement at Section IV.B, the 2009 Permit requires Claimants in the Baby Beach watershed⁶⁵ to (1) implement Best Management Practices ("BMPs")⁶⁶ capable of achieving interim and final bacterial waste load allocations ("WLAs"), (2) conduct monitoring and submit annual reports reflecting

⁶² *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173 ("*Long Beach Unified*") (where state removes the discretion of local agency as to how to comply with federal program and instead directs the manner of compliance, the state has created a state mandate).

⁶³ See Declaration of Karen Ashby, ¶ 8 and Exhibits 2-5 to that declaration, all attached hereto as Attachment 2.

⁶⁴ *Dept. of Finance, supra*, 1 Cal.5th at 772.

⁶⁵ These Claimants are the County of Orange and the City of Dana Point.

⁶⁶ The Permit defines "Best Management Practices" to be "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States," citing 40 C.F.R. 122.2. (Vol. I, Tab 28 of Documentation in Support of 2011 Narrative Statement). See 2009 Permit, Attachment C, p. C-2 (attached as Tab 30 to Rebuttal Documents).

permittees' monitoring and activities, (3) meet final bacterial WLAs by 2014 and 2019, and (4) meet numeric targets in Baby Beach "receiving waters" by 2014 and 2019.⁶⁷

As set forth below, these TMDL-related mandates constitute a new program or higher level of service and are not federally mandated.

1. The TMDL Mandates are a New Program or Higher Level of Service

Like the irrigation flow prohibitions discussed in Section III.A above, the 2002 permit contained none of the TMDL-related mandates that are the subject of this test claim.

Nevertheless, the Water Boards contend that the TMDL-related mandates are not a new program or higher level of service because the 2009 Permit, as well as the permittees' Report of Waste Discharge, recognized that TMDLs were being developed and that the permittees, including Claimants, may be subject to them in the future.⁶⁸ The Water Boards, however, do not explain why that fact negates the newness of the TMDL mandates. Instead, it is an acknowledgement that the TMDL was not previously in the permit and thus is a new requirement. The TMDL-related mandates are a new program that was not previously required of Claimants under the 2002 Permit.

The Water Boards also imply that the Claimants may have done some work prior to the 2009 Permit that was of use in implementing the TMDL mandates once they were placed in the Permit.⁶⁹ Again, the Water Boards do not explain how this work negates the fact that the TMDL mandates were a new program or higher level of service. The Water Boards do not specifically assert that Claimants were implementing the TMDL prior to the 2009 Permit's adoption but, even if Claimants had done so, such implementation would be irrelevant to the issue of whether the TMDL represented a state mandate.

Govt. Code § 17565 specifically provides that if a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state must reimburse the agency or district for those costs incurred after the operative date of the mandate. In the Los Angeles County Statement of Decision, the Commission applied this rule to the Water Boards' argument that claimants had been installing trash receptacles prior to the mandate, finding that whether they did so was not relevant to the finding that the trash receptacle requirement was a state mandate.⁷⁰

⁶⁷ 2009 Permit Section I.

⁶⁸ WB Comments at 28-29.

⁶⁹ *Id.*

⁷⁰ Los Angeles County Statement of Decision at 49.

2. The TMDL Mandates are Not Federally Required; They Were Imposed as a Result of the Regional Board's Exercise of its Discretion

The Water Boards argue that the TMDL mandates are federal mandates because federal regulations compelled both their inclusion and their inclusion in the form of numeric effluent limits.⁷¹ Both contentions are incorrect.

a. Because Federal Law Does Not Compel the Inclusion of Water Quality Standards in Municipal Stormwater Permits, Federal Law Does Not Compel the Inclusion of TMDLs or TMDL-Related Requirements Adopted to Accomplish Those Standards

Under the CWA, states are required to adopt “water quality standards,” composed of “designated uses” and “water quality criteria.”⁷² A water quality standard defines the water quality goals of a water body by designating the use or uses to be made of the water body, such as fishing or recreation, and setting criteria to protect those uses.⁷³ In California, designated uses are known as “beneficial uses,” and water quality criteria as “water quality objectives.”⁷⁴

TMDLs are adopted and implemented solely for the purpose of achieving water quality standards. Under the CWA, states are required to identify those water bodies for which other effluent limitations are not stringent enough to bring the water body into compliance with water quality standards.⁷⁵ For each of those water bodies, the state is then required to adopt TMDLs “at a level necessary to implement the applicable water quality standards”⁷⁶

A TMDL is composed of “load allocations” (“LAs”) and “waste load allocations” (“WLAs”), which are the amount of pollution from “non-point sources” and “point sources,” respectively, that can be discharged to a water body without violating that water body’s water quality standards.⁷⁷ As set forth in the 2009 Permit Fact Sheet, “A TMDL is the total amount of a particular pollutant that water body can receive and still meet Water Quality Standards The Numeric Target of a TMDL interprets and applies the numeric and/or narrative [Water Quality Objectives] of the [Water Quality Standards] as the basis for Waste Load Allocations.”⁷⁸

⁷¹ WB Comments at 25.

⁷² 33 U.S.C. § 1313(c)(1) and (2) (Vol. I, Tab 24 of Documentation in Support of 2011 Narrative Statement).

⁷³ 40 C.F.R. §§ 130.3 (Vol. I, Tab 31 of Documentation in Support of 2011 Narrative Statement); 131.2 (attached as Tab 14 to Rebuttal Documentation). *See also* 40 C.F.R. § 131.3(b) and (f) (attached as Tab 15 to Rebuttal Documentation).

⁷⁴ Water Code §§ 13050(f), (h) (attached as Tab 18 to Rebuttal Documentation). *See also* Water Code § 13241 (attached as Tab 22 to Rebuttal Documentation).

⁷⁵ 33 U.S.C. § 1313(d)(1)(A).

⁷⁶ *Id.*, subd. (d)(1)(C).

⁷⁷ *See* 40 C.F.R. § 130.2 (f)-(i) (Vol. I, Tab 30 of Documentation in Support of 2011 Narrative Statement).

⁷⁸ 2009 Permit Fact Sheet, Finding E.11, (p. 96). *See also* 2009 Permit, Attachment C, (p. C-11).

It is well established, however, that municipal stormwater permits, such as the 2009 Permit, are *not* required to contain provisions to meet water quality standards.⁷⁹ The Regional Board can include such provisions, but that is solely a discretionary choice by the Regional Board. What is required of MS4s by federal law is that they reduce pollutants to the maximum extent practicable, not that they achieve a specific water quality based effluent limit before stormwater enters a receiving water.⁸⁰ As the State Board acknowledged in *In the Matter of Review of Order No. R4-2012-0175, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges with the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating From the City of Long Beach MS4*, State Board Order No. WQ-2015-0075:

In the context of NPDES permits for [municipal storm sewers], however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards.⁸¹

[T]he 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.⁸²

And:

“[B]oth the Clean Water Act and the Porter-Cologne Act afford some discretion to not require strict compliance with water quality standards for [municipal storm sewer] discharges.”⁸³

Moreover, the State Board explicitly determined in Order No. WQ-2015-0075 that the Los Angeles Regional Board, in implementing TMDLs in the Los Angeles County stormwater permit,

acted within its legal authority when establishing numeric [Water Quality Based Effluent Limits], and further that its choice of numeric WQBELs *was a reasonable exercise of its policy discretion*.⁸⁴

Thus, because federal law does not compel municipal stormwater permits to include provisions to meet water quality standards and such provisions are included solely at the permitting authority’s discretion, and because TMDLs are adopted solely to implement water quality standards, federal law does not compel the inclusion of TMDLs into municipal stormwater permits. If those provisions are included, they are included at the discretion of the permitting authority, here

⁷⁹ *Defenders of Wildlife, supra*, 191 F.3d at 1164-65.

⁸⁰ *Id.* at 1167-68.

⁸¹ State Board Order No. WQ-2015-0075 at 10. A copy of this State Board order is attached as Tab 27 to the Rebuttal Documentation.

⁸² *Id.* at 11.

⁸³ *Id.* at 13.

⁸⁴ *Id.* at 57 (emphasis added).

the Regional Board, as part of its exercise of discretion to include provisions to meet water quality standards.

Stated another way, if the Regional Board exercised its discretion to not require compliance with water quality standards, as the State Board set forth in Order No. WQ-2015-0075, the Regional Board had the authority to do so. The Regional Board also would have the discretion to not include TMDL-related provisions designed to meet water quality standards because, as just discussed, the water quality standards that those TMDLs are implementing are not required to be part of a municipal stormwater permit. The inclusion of TMDL-related provisions is a discretionary choice of the permitting agency, based on its discretionary decision to include permit provisions designed to achieve water quality standards. As the Supreme Court held, where federal law does not compel a permit requirement, but it is imposed as a matter of the Regional Board's discretion, the requirement is not a federal mandate.⁸⁵ That rule applies here.

The Water Boards nevertheless cite 40 C.F.R. § 122.44(d)(1)(vii)(B) in support of their contention that inclusion of the TMDL requirements is federally mandated. This regulation states that a permitting authority should assure that a permit's effluent limitations are consistent with the assumptions and requirements of any available waste load allocation developed pursuant to 40 C.F.R. 130.7 (which sets forth the process for developing TMDLs).⁸⁶

Section 122.44, however, is a general regulation applicable to NPDES permits. It is not specific to MS4 discharges. Because it is general, the regulation specifically provides that its provisions apply only "*when applicable*."⁸⁷ Because of this limitation, section 122.44(d)(1)(vii)(B) is not applicable to municipal stormwater permits. This is clear from the regulatory language. Section 122.44(d)(1) addresses the inclusion of permit requirements "to achieve water quality standards." As set forth above, municipal stormwater permits are not required to include provisions to meet water quality standards.⁸⁸ The language of Section 122.44(d)(1)(vii)(B) itself states that it is directed to effluent limits developed to protect a narrative or numeric "water quality criterion." Because municipal stormwater permits are not required to comply with water quality standards, this regulation directed towards implementing those standards is also not applicable.

Although 40 C.F.R. § 122.44(d)(1)(vii)(B) might apply to other NPDES permits, it does not apply to municipal stormwater permits. The Water Boards have not shown that federal law

⁸⁵ *Dept. of Finance, supra*, 1 Cal.5th at 765.

⁸⁶ WB Comments at 25.

⁸⁷ 40 C.F.R. § 122.44, first paragraph (emphasis supplied) (Vol. I, Tab 29 of Documentation in Support of 2011 Narrative Statement).

⁸⁸ *Defenders of Wildlife, supra*, 191 F.3d at 1164-65 (Vol. I, Tab 3 of Documentation in Support of 2011 Narrative Statement); State Board Order No. WQ-2015-0075 at 11 and 13. Accord *Tualatin River Keepers v. Oregon Dept. of Environmental Quality* (Ore. App. 2010) 235 Ore. App. 132 n.10 (Vol. I, Tab 22 of Documentation in Support of 2011 Narrative Statement).

compels the inclusion of the TMDL mandates at issue here. The Water Boards can include TMDL provisions as a matter of discretion, but that does not make them federally mandated.⁸⁹

b. Even if the TMDL Mandates Were Federally Required, Federal Law Does Not Compel their Inclusion in the Form of Numeric Effluent Limits

As set forth in Claimants' Narrative Statement,⁹⁰ even if inclusion of the TMDL mandates were federally required, federal law does not require their inclusion in the form of numeric effluent limits ("NELs") in municipal stormwater permits. Instead, federal law only requires controls to reduce the discharge of pollutants to the maximum extent practicable, which controls are ordinarily set forth in the form of BMPs. Such BMPs can be structural (such as pollution control devices) or non-structural (such as street sweeping or public education programs). That such TMDL mandates were included in the 2009 Permit as NELs was the result of the Regional Board exercising its discretion to do so by virtue of a "true choice," not one compelled by federal law.⁹¹

The Water Boards contend that EPA guidance supports their contention that NELs are compelled by federal law, citing EPA guidance issued in 1996, 2002, 2010 and 2011.⁹² Those documents, however, along with the cases cited herein, support Claimants' position that federal law does not compel the inclusion of numeric effluent limits and such inclusion is solely discretionary.

The 2002 EPA guidance provides the following:

[I]n light of 33 U.S.C 1342(p)(3)(B)(III), EPA recommends that for NPDES-regulated municipal and small construction storm water discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits. *See Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 FR 43761 (Aug. 26, 1996). The Interim Permitting Approach Policy recognizes the need for an iterative approach to control pollutants in storm water discharges. Specifically, the policy anticipates that a suite of BMPs will be used in the initial rounds of permits and that these BMPs will be tailed in subsequent rounds.

EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges. .

⁸⁹ *Dept. of Finance*, 1 Cal.5th at 765.

⁹⁰ Claimants' Narrative Statement, Section IV.B.3.

⁹¹ *See Id.*; *Defenders of Wildlife*, *supra*, 191 F.3d at 1166-67.

⁹² WB Comments at 25-26.

. Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances.⁹³

EPA's 2010 Memorandum reiterated the fact that the inclusion of NELs is discretionary, stating:

The CWA provides that stormwater permits for MS4 discharges shall contain controls to reduce the discharge of pollutants to the "maximum extent practicable" and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. CWA section 402(p)(3)(B)(iii). Under this provision, the NPDES permitting authority has the *discretion* to include requirements for reducing pollutants in stormwater discharges as necessary for compliance with water quality standards. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999).

Where the NPDES authority determines that MS4 discharges have reasonable potential to cause or contribute to a water quality excursion, EPA recommends that, where feasible, the NPDES permitting authority *exercise its discretion* to include numeric effluent limitations as necessary to meet water quality standards.⁹⁴

EPA's 2011 memorandum did not change this position. Instead it explicitly pointed out that the 2010 memorandum was solely guidance and "does not impose legally binding requirements on EPA, States, or the regulated community . . ." ⁹⁵ Indeed, guidance and similar letters of support cannot create federal mandates without following the formal rulemaking procedures required by the Administrative Procedures Act.⁹⁶

Nor does 40 C.F.R. § 122.44(d)(1)(vii)(B) require the inclusion of TMDLs in the form of numeric effluent limits. As set forth above, this regulation is not applicable to municipal stormwater permits. Even if it was, however, the regulation only provides that a permit's effluent limits be consistent with the assumptions and requirements of the TMDL. Those limits can be expressed in terms of BMPs, not NELs.

⁹³ EPA Memorandum November 22, 2002 at 4 (emphasis added).

⁹⁴ EPA Memorandum, November 12, 2010 at 2 (emphasis added).

⁹⁵ EPA Memorandum, March 1, 2011 at 2.

⁹⁶ See *Appalachian Power Co. v. EPA* (D.C. Cir. 2000) 208 F.3d 1015 (attached as Tab 1 of Rebuttal Documentation); see also *Natural Res. Def. Council v. EPA* (9th Cir. 2015) 779 F.3d 1119 (attached as Tab 6 of Rebuttal Documentation); *Nat'l Env'tl. Dev. Assn's Clean Air Project v. EPA*, (D.C. Cir. 2014) 752 F.3d 999 (attached as Tab 4 of Rebuttal Documentation); *Iowa League of Cities v. EPA* (8th Cir. 2013) 711 F.3d 844, 862 (attached as Tab 3 of Rebuttal Documentation); *Sierra Club v. EPA* (D.C. Cir. 2012) 699 F.3d 530 (attached as Tab 7 of Rebuttal Documentation); *Natural Res. Def. Council v. EPA* (D.C. Cir. 2011) 643 F.3d 311, 321 (attached as Tab 5 of Rebuttal Documentation).

Finally, no EPA-issued permit implements TMDLs through numeric effluent limits.⁹⁷ This is further evidence that federal law does not mandate NELs.

Thus, the EPA guidance cited by the Water Boards do not provide that numeric effluent limits are compelled by federal law. Neither does 40 C.F.R. § 122.44(d)(1)(vii)(B). Instead, they support Claimants' position that numeric effluent limits are, at most, discretionary. This is reflected by the fact that EPA-issued permits themselves do not contain NELs. Where federal law does not compel a permit requirement, but it is imposed as a matter of the Regional Board's discretion, the requirement is not federal mandate.⁹⁸

The Water Boards have not satisfied their burden of establishing that federal law compelled the inclusion of numeric effluent limits. Their inclusion was not federally mandated.⁹⁹

C. THE DEVELOPMENT OF MONITORING, INVESTIGATION AND COMPLIANCE PROGRAMS TO MEET NON-STORMWATER DRY WEATHER ACTION LEVELS (2009 PERMIT, SECTIONS C AND F.4(d) AND (e))

1. The Development of Monitoring, Investigation and Compliance Programs to Meet Non-Stormwater Dry Weather Action Levels is a New Program or Higher Level of Service

Sections C.1 and F.4 of the 2009 Permit require the permittees, including Claimants, to comply with a number of new requirements triggered by the presence of "non-stormwater dry weather action levels ("NALs")." Under these Permit requirements, Claimants are required to routinely monitor outfalls and, if exceedances of the action levels are determined, conduct follow-up source investigations, undertake reporting obligations (including a possible prioritization plan and timeline) as well as potential enforcement actions. None of these NAL requirements was contained in the 2002 Permit.

While the Water Boards argue that the NAL provisions "are designed to help achieve compliance with the federal standard [the effective prohibition of non-stormwater discharges into

⁹⁷ Ashby Dec., ¶ 9.

⁹⁸ *Dept. of Finance*, 1 Cal.5th at 765. The Water Boards also cite EPA's support for the Permit's inclusion of numeric effluent limits (WB Comments at 25). That support, however, only addressed the Regional Board's intent to include numeric effluent limits. The EPA letter did not state that the Regional Board was compelled under federal law to include numeric effluent limits (EPA comment letter, dated May 14, 2009, at 4).

⁹⁹ The Water Boards, although they contend that *Divers' Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal.App.4th 246 (Vol. I, Tab 14 of Documentation in Support of 2011 Narrative Statement) was decided 10 years ago, and that *Tualatin River Keepers*, *supra*, did not address federal law, do not dispute that the courts in those cases held that the permitting agency was *not required* to include waste load allocations in the form of NELs. *Divers*, 145 Cal.App.4th at 262; *Tualatin*, 235 Ore. App. at 148-49.

MS4s], not to implement a new program or higher level of service,¹⁰⁰ they do not dispute that these requirements are new requirements that had never been previously imposed on Claimants. Indeed, even if these requirements were not viewed as a new program, they certainly constitute a “higher level of service” in that they reflect an increase in the actual level or quality of the governmental services being provided.¹⁰¹ These requirements are a new program or higher level of service within the meaning of article XIII B, section 6.

2. The Permit Requirements Associated with NALs Are Not Federally Mandated

No federal statute or regulation requires the programs set forth in Section C and F of the 2009 Permit, and the Water Boards identify none. Indeed, the Water Boards themselves state that the action levels “are based on applicable water quality objectives from the Basin Plan and other water quality control plans . . .” and are included “to result in compliance with applicable water quality standards.”¹⁰²

The “water quality control plans” containing the water quality objectives on which the NALs are based, the Basin Plan and the California Ocean Plan, are California, not federal, water quality plans.¹⁰³ As noted above, the Basin Plan is a California law-required water quality control plan for the San Diego region. Measures included in a stormwater permit to implement California water quality control plans cannot constitute a federal mandate. Moreover, as set forth above, discharges from municipal storm sewers are not required to meet water quality standards. Imposition of such requirements is thus discretionary on the part of the Regional Board.¹⁰⁴ See also Claimants’ Narrative Statement at Section IV.C.2.

The Water Boards assert that the federal nature of the NALs requirements is supported by EPA staff comments made on a different permit or to a different regional board (on the 2013 San Diego County permit and to the Santa Ana Regional Board) that were supportive of the action level concept.¹⁰⁵ Neither of these comments suggests that EPA viewed action levels as a federally mandated requirement, but simply a concept which EPA agency staff thought to be a good idea. Mere statements of agency support or desired preferences do not constitute a legal or binding regulatory determination that NALS are required by the CWA. Indeed, if EPA staff determined that NALS are required in municipal stormwater permits, such a determination would have been invalid unless preceded by notice and comments rulemaking.¹⁰⁶ Indeed, no EPA-issued permit

¹⁰⁰ WB Comments at 30.

¹⁰¹ See *San Diego Unified School District, supra*, 33 Cal.4th at 877.

¹⁰² WB Comments at 29. The Water Boards cite to the California Ocean Plan as the other water quality control plan. *Id.* at 29 n.129.

¹⁰³ See Water Code § 13170.2 (Ocean Plan) (attached as Tab 19 to Rebuttal Documentation) and §§ 13240 (attached as Tab 21 to Rebuttal Documentation) and 13241 (water quality control plans).

¹⁰⁴ *Defenders of Wildlife, supra*, 191 F.3d at 1166.

¹⁰⁵ WB Comments at 29-30.

¹⁰⁶ See *U.S. Telecom. Ass’n v. FCC* (D.C. Cir. 2005) 400 F.3d 29, 35 (attached as Tab 8 to Rebuttal Documentation) (“[I]f an agency adopts ‘a new position inconsistent with’ an existing regulation, or effects

contains NALs or their related requirements.¹⁰⁷ The absence of NALs and their related requirements in EPA regulations and permits evidences the fact that these requirements are not federally mandated.

Finally, the Water Boards have not shown that the NALs and the accompanying programs are the only way to effectively prohibit pollutants in non-stormwater from being discharged into the MS4. The Regional Board, by imposing the specific Permit requirement instead of allowing the Claimants to design their own programs, usurped the discretion that Claimants are given under the CWA's regulations. See 40 CFR §122.26(d)(2)(iv)(A) (permittees are to submit program to detect and remove illicit discharges, i.e. non-stormwater discharges into the storm sewer system). By usurping the Claimants' ability to design and implement their own programs and instead mandating what Claimants must do, the Regional Board imposed state mandates on Claimants.¹⁰⁸

NALs were not included in the 2002 Permit, are not required by any federal statute or regulation, and are not present in EPA-issued permits. The Water Boards have not shown that NALs and the accompanying programs are compelled by federal law. As specific requirements imposed on Claimants at the discretion of the Regional Board, the NALs requirements are state mandates.¹⁰⁹

D. THE PROGRAMS ASSOCIATED WITH OR TRIGGERED BY STORMWATER ACTION LEVELS ARE STATE MANDATES (2009 PERMIT, SECTION D)

1. Programs Associated with Stormwater Action Levels or Triggered by Their Exceedance Are New Programs or Higher Level of Service

Like Section C, Section D of the 2009 Permit requires Claimants to comply with a number of new requirements triggered by the presence of "Stormwater Action Levels" ("SALs"). Beginning in year three, when a running average of twenty percent or greater discharges exceed the designated SALs, claimants were required to adopt additional control measures to reduce the levels of pollutants in the discharges. Claimants also were required to develop a monitoring plan to sample discharges from major outfalls, including those at which the SALs have been exceeded,

'a substantive change in the regulation,' Notice and comment are required."). Whenever a federal agency creates a new substantive requirement that amends or adds to a preexisting rule, it must conduct "rulemaking" in accordance with the Federal Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500 et seq. *Iowa League of Cities, supra*, 711 F.3d at 855. EPA may not "escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." *Defenders of Wildlife v. EPA* (10th Cir. 2005) 415 F.3d 1121, 1127 (attached as Tab 2 of Rebuttal Documentation) (quoting *Appalachian Power Co., supra*, 208 F.3d at 1024) (invalidating EPA guidance document that improperly broadened existing rule absent compliance with APA).

¹⁰⁷ Ashby Dec., ¶ 10.

¹⁰⁸ *Long Beach Unified, supra*, 225 Cal.App.3d at 173.

¹⁰⁹ *Dept. of Finance, supra*, 1 Cal.5th at 765.

and to conduct that monitoring. These requirements are ongoing (*Id.*, Sections D.2 and 4). Neither the SALs nor these requirements were contained in the 2002 Permit.

While the Water Boards argue that the SAL requirements are “necessary to achieve the decade-old federal standard applicable to municipal stormwater discharges” and are consistent with federal application requirements,¹¹⁰ they do not dispute that these requirements are new requirements that had never been previously imposed on Claimants. Indeed, like the NALs, even if these requirements were not viewed as new program, they certainly constitute a “higher level of service” in that they reflect an increase in the actual level or quality of governmental services being provided. These requirements are a new program or higher level of service within the meaning of article XIII B, section 6.

2. The Permit Requirements Associated with SALs Are Not Federally Mandated

No federal statute or regulation requires the programs set forth in Section D, and the Water Boards identify none. Instead, the Water Boards contend that the permit requirements triggered by the SALs “are required to comply with water quality standards and to control pollutants in stormwater discharges to the MEP.”¹¹¹

As set forth above, however, the CWA does not require municipal stormwater permits to achieve compliance with water quality standards. *See* Section III.B.2.a, above; *Defenders of Wildlife, supra*, 191 F.3d at 1164-65. As for the MEP standard, although the Water Boards contend that these requirements are necessary to comply with that standard,¹¹² the Water Boards cite no evidence in the record to support this contention, do not demonstrate that these SAL-related requirements are the only means of doing so, or that Claimants could not have implemented other, less costly means of compliance. The Water Boards’ bald assertion that the SAL requirements were necessary to meet MEP thus is not entitled to deference and does not meet the state’s burden of proving that this is a federal mandate.¹¹³ Moreover, to the extent that the SALs act as numeric effluent limits, these limits are also not federally mandated. *See* Claimant’s Narrative Statement at Section IV.D.2 and discussion in Section III.B.2.a above.

The Water Boards also argue that Finding E.6 and EPA’s support for the inclusion of SALs show that SALs are federally mandated.¹¹⁴ As discussed above, however, Finding E.6. is entitled to no weight and, like other Permit requirements, does not even mention SALs.

EPA’s comments also do not support the contention that SALs are federally required. EPA simply stated that it supports their inclusion, not that they are required by federal law. In fact, no

¹¹⁰ WB Comments at 32.

¹¹¹ *Id.* at 30.

¹¹² *Id.* at 30-31.

¹¹³ *Dept. of Finance*, 1 Cal.5th at 768-69.

¹¹⁴ WB Comments at 31.

EPA issued permit contains SALs or their related requirements.¹¹⁵ The absence of SALs and SAL-related requirements in EPA-issued permits evidences the fact that these requirements are not federally mandated.

As with the NALs, the Water Boards have not shown that the SALs and the SAL-related programs are the only ways to effectively reduce pollutants and discharges to the maximum extent practicable. The Regional Board, by imposing this requirement as opposed to allowing Claimants to design their own programs, usurped Claimants' discretion to design their own program and imposed requirements that exceed federal law.¹¹⁶

SALs were not included in the 2002 Permit, are not required by any federal statute or regulation, and are not present in EPA-issued permits. The SALs and the SAL-related programs are state mandates, not compelled by federal law.

E. THE 2009 PERMIT'S LOW IMPACT DEVELOPMENT AND HYDROMODIFICATION REQUIREMENTS ARE STATE MANDATES (2009 PERMIT, SECTIONS F.1.d(4) AND (7) AND F.1.h)

1. The Permit's Low Impact Development and Hydromodification Requirements are New Programs or Higher Levels of Service.

As set forth in Claimants' Narrative Statement,¹¹⁷ the 2009 Permit requires Claimants to develop and implement a program to ensure that new developments and significant redevelopments comply with low impact development ("LID") and hydromodification requirements. Specifically, the 2009 Permit requires Claimants to update Standard Storm Water Mitigation Plans ("SSMPs"), require LID requirements for priority development projects, create a formalized review process for all priority development projects, assess potential on and off-site collection and reuse of stormwater, amend local ordinances, maintain or restore natural storage reservoirs and drainage corridors, address impervious areas, construct low-traffic areas with permeable surfaces, and collaboratively develop and implement a hydromodification plan ("HMP"). These requirements were not contained in the 2002 Permit.

The Water Boards do not dispute that these are new requirements. Instead, the Water Boards simply contend that these new requirements "build on" prior programs, but are not higher levels of service because these new requirements are focused on achieving compliance with the MEP standard.¹¹⁸

There is no dispute, however, that these are new obligations with which Claimants had not previously been required to comply. Even if these requirements are not viewed as a new program,

¹¹⁵ Ashby Dec., ¶ 11.

¹¹⁶ *Long Beach Unified, supra*, 225 Cal.App.3d at 173.

¹¹⁷ Narrative Statement at Section IV.E.

¹¹⁸ WB Comments at 35-36.

they are a “higher level of service” in that they reflect an increase in the actual level or quality of governmental services being provided.¹¹⁹ These new LID and hydromodification plan requirements thus are a new program or higher level of service within the meaning of article XIII B, section 6.

2. The LID and Hydromodification Requirements are not Federally Mandated

No federal statute or regulation requires the 2009 Permit’s LID or HMP provisions and the Water Boards do not identify any such statute or regulation. Instead, the Water Boards again argue that these requirements are consistent with the MEP standard and EPA supported their inclusion.¹²⁰

The Commission has already considered and rejected the Water Board’s position that LID and HMP permit requirements such as the ones at issue here are federal mandates. In the San Diego County Stormwater Test Claim, the Commission considered permit provisions that required the update of Standard Urban Stormwater Mitigation Plans (“SUSMPs”) to include LID requirements similar to the SSMP update requirements at issue here, and HMP requirements almost identical to those at issue here, imposed by the same San Diego Regional Board.¹²¹ The Water Boards made the same arguments in that case that they make here.¹²²

After considering those arguments, the Commission found that:

nothing in the federal regulation (40 C.F.R. §122.26) . . . requires local agencies to collectively review and update the BMP requirements listed in their SUSMPs, or to develop, submit and implement ‘an updated Model SUSMP’ that defines minimum LID and other BMP requirements for incorporation into the SUSMPs. Thus, the LID requirements in the permit ‘exceed the mandate in that federal law or regulation.’ As in *Long Beach Unified School Dist. v. State of California*, the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen to impose these requirements. Thus, the Commission finds that [the LID provisions] of the permit is not a federal mandate.¹²³

The Commission reached the same conclusion with respect to HMPs. The Commission found:

there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus,

¹¹⁹ *San Diego Unified School District, supra*, 33 Cal.4th at 877.

¹²⁰ *Id.* at 32-34.

¹²¹ See San Diego County Statement of Decision at 11-16 (HMP) and 16-18 (LID).

¹²² *Id.* at 42-44 (HMP) and 50 (LID).

¹²³ *Id.* at 51 (citations omitted).

the HMP requirement in the permit ‘exceeds[s] the mandate in that federal law or regulation.’ As in *Long Beach Unified School Dist. v. State of California*, the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen to impose these requirements.¹²⁴

Indeed, it is the Water Boards which have the principal legal obligation to regulate discharges from private development projects, not Claimants.¹²⁵ Thus, to the extent the LID or HMP programs are directed towards the regulation of discharge of pollutants or the volume of water from private property, the Regional Board is shifting its obligations under California’s Porter-Cologne Act to regulate such discharges onto Claimants. The shifting of these obligations creates a state mandate whether the LID and HMP permit provisions would otherwise be federal or not.¹²⁶

Further, the LID and HMP requirements are not federally mandated because the NPDES program regulates the “discharge of pollutants,” not the flow or volume of water.¹²⁷ “Discharge of pollutants” is defined to be “the addition of any pollutant to navigable waters from any point source . . .”¹²⁸ “Pollutant” is defined to mean “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”¹²⁹ Volume of water is not included in this definition. Moreover, EPA may not regulate flow as a surrogate for CWA regulated pollutants.¹³⁰ Because

¹²⁴ *Id.* at 44-45 (citations omitted).

¹²⁵ Under California’s Porter-Cologne Water Quality Control Act, any person who discharges or proposes to discharge “waste” to waters of the state is required to obtain “waste discharge requirements” from a regional water quality control board or the State Board. Water Code §§ 13260 and 13263. The Regional Board has an obligation to regulate these discharges under these state laws.

¹²⁶ See *Hayes, supra*, 11 Cal.App.4th at 1593-94 (state mandate created when state freely chooses to shift obligation to perform a federal mandate to a local agency), cited with approval in *Dept. of Finance*, 1 Cal.5th at 765.

¹²⁷ See 33 U.S.C. § 1342(p)(3)(B)(iii) (municipal stormwater permits shall require controls “to reduce the discharge of pollutants to the maximum extent practicable”). See also 33 U.S.C. § 1342(a)(1) (“The Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants”).

¹²⁸ 33 U.S.C. § 1362(12) (attached as Tab 10 to Rebuttal Documentation).

¹²⁹ 33 U.S.C. § 1362(6).

¹³⁰ See *Virginia Dept. of Transp. v. EPA* (2013 E.D. Va.) 43 CLR 20002 (invalidating EPA TMDL which sought to regulate flow of water as a surrogate for pollutants such as sediment), attached as Tab 9 to the Rebuttal Documentation.

volume of water is not subject to NPDES regulation, the Permit's LID and HMP programs that addresses such volume are not derived from federal law.¹³¹

The Water Boards nevertheless argue that permitting agencies have the authority to regulate flow under the Clean Water Act, citing *PUD 1 v. Washington Department of Ecology*.¹³² That case did not, however, address the NPDES program or NPDES permits. That case involved an entirely separate regulatory program under the Clean Water Act, Section 401 certifications under 33 U.S.C. § 1341,¹³³ and the court relied on the interpretation of language contained in that statute, not section 1342, the NPDES program.¹³⁴ *PUD 1*, which pertains to an entirely separate federal regulatory scheme, therefore, does not support the Water Boards' argument that LIDs and HMPs are federally required.

In the San Diego County Stormwater Test Claim, the Commission did distinguish LID and HMP requirements as applied to municipal projects. Whereas the Commission found the permit's provisions requiring LID and HMP on private developments to be a state mandate, the Commission found that the permit's provisions requiring LID and HMP for municipal projects would not. The Commission reasoned that compliance with LID and HMP for municipal projects was voluntary because it arose only when the permittees built a project and there was no legal requirement to do so, citing *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727.¹³⁵

As set forth in Claimant's Narrative Statement, this portion of the Commission's San Diego County Stormwater Test Claim is not applicable to the 2009 Permit.¹³⁶ The Permit requires the preparation of an updated SSMP, without regard to whether Claimants are going to construct a municipal priority development project.¹³⁷ Moreover, as set forth in Claimants' Narrative Statement, the rationale of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, relied upon by the court in *Kern High School Dist.*, is not applicable and has been limited to its facts by

¹³¹ The purpose of LID requirements is, in part, to reduce the impact of development on stormwater flows. See LID definition in the 2009 Permit, page C-6. Hydromodification refers to changes in natural hydrologic process and runoff caused by urbanization or other land use changes. See "Hydromodification" definition in 2009 Permit, *id.* Both concepts focus on the impacts on flows of water.

¹³² 511 U.S. 700 (Vol. I, tab 5 of Documentation Documents in Support of 2011 Narrative Statement).

¹³³ Section 401 certifications are triggered where a federal agency (typically the U.S. Army Corps of Engineers) is the CWA permitting authority, not where the Regional Board, a state agency, is itself the permitting authority.

¹³⁴ (1994) 511 U.S. at 711-12, 713-14 (Vol. I, Tab 5 of Documentation in Support of 2011 Narrative Statement).

¹³⁵ San Diego County Statement of Decision at 45, 51.

¹³⁶ See Narrative Statement at Section IV.E.

¹³⁷ 2009 Permit, Part F.1.(d).

the Supreme Court in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.¹³⁸

Finally, like the NALs and SALs, the fact that EPA staff supported these requirements does not establish that they are federally required. In fact, the EPA comments cited by the Water Boards do not so state.¹³⁹ Indeed, no EPA-issued permit contains these detailed requirements, which they would be if they were mandated by federal law.¹⁴⁰

F. THE 2009 PERMIT'S NEW REPORTING REQUIREMENTS INCLUDING AN ANNUAL EFFECTIVENESS ASSESSMENT AND A WORK PLAN TO ADDRESS WATER QUALITY ISSUES ARE STATE MANDATES (2009 PERMIT, SECTION J)

1. The Permit's New Assessment and Reporting Requirements are New Programs or Higher Levels of Service

Sections J.1 through J.4 of the 2009 Permit require Claimants to develop a new program for assessing the effectiveness of its stormwater management program and to prepare a work plan to address high priority water quality problems in an iterative manner over the life of the permit. Although the 2002 Permit required Claimants to annually analyze the effectiveness of their program, the 2002 Permit requirements were neither as extensive nor prescriptive as those set forth in the 2009 Permit. Nevertheless, the Water Boards contend that Section J is not a new program or higher level of service because the 2002 Permit required an annual assessment. A comparison of the two permits, however, demonstrates that Section J is a new program or higher level of service.

Claimants' Narrative Statement at Sections IV.F.3 and 4 contains an extensive comparison of the requirements under the two permits. As set forth therein, under the 2002 Permit, Claimants were authorized to develop their own strategy for assessing the effectiveness of their programs and to report that method to the Regional Board.¹⁴¹ As further discussed in the Narrative Statement, the 2009 Permit is much more extensive and prescriptive. In it, the Regional Board mandated the manner and elements of the assessment.

Thus, whereas under the 2002 Permit the Claimants could develop their own annual assessment procedure, under the 2009 Permit Claimants are now required to assess (1) discharges to "303(d)" waterbodies; discharges to "Environmentally Sensitive Areas ("ESAs")," (3) the effectiveness of each general program component of the permit, and (4) measures employed to protect receiving water limitations. The assessment must further describe (1) the use of dry-weather and wet weather monitoring data for these purposes of making these assessments, (2)

¹³⁸ Narrative Statement at Section IV.E.

¹³⁹ WB Comments at 33-34.

¹⁴⁰ See Ashby Dec., ¶12.

¹⁴¹ See 2002 Permit, Section F.8 and H.9.1.a (9).

activities conducted in response to investigations of illicit discharges and illicit connections, (3) modifications of permit programs made in response to these assessments; (4) steps to be taken to improve Claimants' ability to assess program effectiveness; and (5) steps to be taken to identify changes to Claimant's jurisdictional runoff management program in light of the assessments.¹⁴² In addition, pursuant to Section J.4, Claimants are required to develop a work plan to address their high priority water quality issues in an iterative manner over the life of the permit.

This section of the permit is therefore more than just a continuation of prior effectiveness assessments. These highly prescriptive terms and the new work plan represent a significant increase in the level and type of activities required of Claimants, and thus an increase in the actual level or quality of the governmental services being provided. As such, these requirements are a new program or higher level of service within the meaning of article XIII B, section 6.¹⁴³

2. Section J's Reporting and Effective Assessments and Work Plan are not Federally Mandated

No statute or federal regulation requires the specific assessments and work plans set forth in Section J and the Water Boards do not identify any such statute or regulation. Instead, the Water Boards make the same argument that they make with respect to the other mandates at issue, that these prescriptive permit requirements are required by the MEP standard and cite Finding D.1.(a) and the fact sheet in support thereof.¹⁴⁴

Permit Finding D.1(a), however, is only a general finding that the 2009 Permit includes requirements to reduce the discharge of pollutants to MEP and that MEP is a dynamic performance standard that evolves over time based upon permittee's assessment of their programs. Finding D.1(a) does not address the specific requirements forth in Section J and does not address whether this detailed, prescriptive assessment and work plan is the only way to meet MEP, as opposed to having the Claimants design their own assessment program. Absent such evidence, this finding is entitled to no deference and the Water Boards have not met their burden of demonstrating that these requirements are federally mandated.¹⁴⁵ Although EPA-issued permits require annual assessments, they do not require the detailed assessments mandated by the 2009 permit.¹⁴⁶

Because the Regional in Section J has usurped permittees ability to propose their own program, as they had in the 2002 Permit and are allowed to do under the 40 C.F.R. 122.26(d)(2)(iv)

¹⁴² 2009 Permit, Section J.3.a.

¹⁴³ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at 877.

¹⁴⁴ WB comments at 36-37.

¹⁴⁵ *Dept. of Finance*, 1 Cal.5th at 768-69. The Water Boards also contend, in passing, that the costs are de minimis. As set forth in Claimant's Declarations, however, the costs of these new, highly prescriptive programs are not de minimis.

¹⁴⁶ Ashby Dec., ¶ 13.

and (v), and because the requirements are not compelled by federal statute or regulation, the mandate in Section J exceeds federal requirements.¹⁴⁷

G. THE 2009 PERMIT'S PUBLIC MEETING REQUIREMENT FOR WATERSHED WORKPLANS IS A STATE MANDATE (2009 PERMIT, SECTIONS G.6 AND K.1.B(4)(n))

1. The Public Meeting Requirement is a New Program or Higher Level of Service

Sections G.6. and Section K.1.b.4 of the 2009 Permit require annual public meetings in conjunction with the development of Claimant's watershed water quality work plan. This requirement was not present in the 2002 Permit, which required only thirty day public review and comments period before the work plan was implemented.¹⁴⁸ This requirement represents an increase in the level and quality of the governmental services being provided, and is thus a "higher level of service."¹⁴⁹

2. The Annual Public Meeting Requirement is not Federally Mandated

As set forth in Claimant's Narrative Statement,¹⁵⁰ there is no federal statute or regulation that requires annual public meetings. The Water Boards contend that annual public meetings are "consistent" with applicable federal regulations but do not cite any regulation that compels them. No EPA-issued permit requires a public meeting.¹⁵¹ Because federal law does not compel this mandate, the Water Boards have not met their burden of proving that it is a federal mandate.¹⁵²

H. THE 2009 PERMIT'S NEW REPORTING REQUIREMENTS ARE STATE MANDATES (2009 PERMIT, SECTIONS F.1.d(7)(i), F.3.a(4)(c), K.3.a(3) AND ATTACHMENT D)

1. The Permit's New Reporting Requirements are New Programs or Higher Levels of Service

The 2009 Permit contains new reporting requirements not previously contained in the 2002 Permit. These reporting requirements, as more fully discussed in Claimant's Narrative Statement,¹⁵³ include (a) a report of priority development projects choosing to participate in the LID waiver program; (b) an evaluation of Claimant's existing flood control devices; and (c) a

¹⁴⁷ *Long Beach Unified, supra*, 225 Cal.App.3d at 173.

¹⁴⁸ 2002 Permit Section L and M.

¹⁴⁹ *San Diego Unified School Dist., supra*, 33 Cal.4th at 877.

¹⁵⁰ Section 5 Narrative Statement at Section IV.G.

¹⁵¹ Ashby Dec., ¶ 14

¹⁵² *Dept. of Finance*, 1 Cal.5th at 765.

¹⁵³ Narrative Statement at Section IV.H.

reporting checklist providing extensive data on programs implemented under the permit.¹⁵⁴ None of these subjects was required to be addressed in the annual reports under the 2002 Permit.

The Water Boards do not contend otherwise. The Water Boards do not identify any provision of the 2002 Permit which called for this information. Although the Water Boards contend that the 2002 Permit required discussion of flood management projects and flood control devices, such information was limited to high priority areas and did not call for identification of measures to reduce the effect on pollution.¹⁵⁵ The Water Boards do not dispute that the reporting checklist is new.

Accordingly, these new reporting requirements imposed on Claimants an increase in the level and quality of governmental services. As such, they constitute both new programs and a higher level of service.¹⁵⁶

2. The New Reporting Requirements are not Federally Mandated

The Water Boards do not argue that the requirement to provide a report of priority development projects choosing to participate in the LID waiver program is required by federal statute or regulation. (Because the LID requirements themselves go beyond federal law, as addressed in Claimants' Narrative Statement,¹⁵⁷ reporting about those requirements also goes beyond federal law.)

Instead, the Water Boards limit their comments to the requirement to evaluate flood control devices and the checklist, arguing that 40 C.F.R. § 122.26(d)(2)(iv)(A)(4) requires permit applications to include a description of procedures to assure that flood management projects assess their impacts on water quality and existing flood control devices have been evaluated to determine if retrofitting is feasible.¹⁵⁸ The Water Boards also cite 40 C.F.R. § 122.42(c) (1) and (4),¹⁵⁹ which generally requires annual reporting on the status of implementing controls and a summary of data accumulated throughout the year.¹⁶⁰

Again, the 2009 Permit's requirements go beyond the requirements set forth in the federal regulations and, rather than allowing Claimants to design their programs, the permit mandates what has to be evaluated and reported. For example, the federal regulations require a program to evaluate existing flood control devices to determine if retrofitting is feasible, but do not require all

¹⁵⁴ 2009 Permit, Sections F.1.d(7)(i), F.3.a.(4)(c) K.3.a.(3) and Attachment D.

¹⁵⁵ 2002 Permit, Section F.3.a(3)(b).

¹⁵⁶ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at 877.

¹⁵⁷ *See* Section 5 Narrative Statement at Section IV.E.

¹⁵⁸ WB Comments at 39.

¹⁵⁹ The Water Boards erroneously cite to 40 C.F.R. 122.26(a)(1)(v).

¹⁶⁰ WB Comments at 39-40.

that the permit requires under Section F.3.a(4). Although EPA-issued permits require annual assessments, they do not include the detailed reporting required here.¹⁶¹

In adopting these new reporting requirements, the Regional Board has usurped the Claimants' discretion to design their assessment and reporting the program, and has imposed requirements that exceed federal law.¹⁶²

I. THE 2009 PERMIT'S MANDATE TO USE GEOGRAPHICAL INFORMATION SYSTEM (GIS) IS A STATE MANDATE (2009 PERMIT, SECTION F.4.b)

1. The Requirement to Use GIS in Mapping is a New Program or Higher Level of Service

Section F.4.b requires Claimants to maintain an updated map of their entire municipal storm sewer system in GIS format. The Water Boards concede that this requirement is new, but contend that Claimants anticipated the use of this technology.¹⁶³ "Anticipation," however, does not negate the newness of the mandate. As set forth in Government Code § 17565, "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

Nor did Claimants propose use of GIS. The Water Boards cite Section 3.2.2 of Claimant's Report of Waste Discharge. That section references the fact that certain GIS-mapping activity had been undertaken and during 2003-4 and 2004-5, an evaluation was performed using a GIS based model. Nowhere in this section do Claimants propose that an entire GIS MS4 map be required.

2. The Requirement to Use GIS is Not Federally Mandated

No statute or federal regulation requires the use of the GIS format. Although the Water Boards contend that such use is "consistent" with the regulations, they cite no statute or regulation that compels it. Instead the Water Boards argue that GIS is necessary to assure compliance with the requirements to identify field screening points for analyzing illicit connections and discharges (WB Comments at 41). The Water Boards, however, do not address why GIS is required. The requirement for field screening has been in the federal regulations since 1990 and screening successfully occurred without the use of GIS maps since that time. The Water Boards may prefer GIS, but they cite no statute or regulation that compels its use.

¹⁶¹ Ashby Dec., ¶ 15.

¹⁶² *Long Beach Unified*, 225 Cal.App.3d at 173. The Water Boards also claim in passing that the costs of the mandate are "de minimis." As set forth in Claimants' Declarations and in Section IV.E of the Narrative Statement, that assertion is not correct.

¹⁶³ WB Comments at 41-42.

J. THE 2009 PERMIT'S REQUIREMENT FOR DEVELOPING AND IMPLEMENTING A RETROFITTING PROGRAM IS A STATE MANDATE (2009 PERMIT, SECTION F.3.d)

1. The Retrofitting Requirement is a New Program or Higher Level of Service

Section F.3.d of the 2009 Permit requires Claimants to develop and implement a program to retrofit existing developments to reduce the impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, and reduce pollutants in stormwater. The program requires Claimants to identify existing municipal, industrial, commercial, and residential developments as candidates for retrofitting, evaluate and rank the candidates according to certain criteria, create work plans and prioritize them based on certain criteria, cooperate with private landowners to encourage retrofitting projects and track and inspect those projects.

This retrofitting program was not present in the 2002 Permit. The Water Boards do not argue that this program is not a new program or higher level of service.

2. The Retrofitting Program is not Mandated by Federal Law

No federal statute or regulation requires this retrofitting program. The only regulation that bears on this issue is 40 C.F.R. § 122.26(d)(2)(iv)(A)(1), which provides that an application for a municipal storm sewer permit shall contain a description of procedures to assure that flood management projects assess the impacts of water quality “and that *existing structural flood control devices* have been evaluated to determine if retrofitting the device to provide additional pollutant removal from stormwater is feasible.”¹⁶⁴

On its face, this regulation applies only to structural flood control devices. In contrast, the permit's retrofitting program requires Claimants to consider all municipal, industrial, commercial and residential existing developments, to work with private property owners, to prioritize projects and prepare work plans. These requirements clearly exceed the scope of this federal regulation.

The Water Boards' nevertheless argue that retrofitting is consistent with MEP standard and that EPA endorsed these provisions.¹⁶⁵ This is the same argument that the Water Boards have made with respect to other mandates as issue, and as previously discussed in Section V.E.2 above, is inconsistent with the premise that EPA has the authority to regulate flow as a surrogate for other pollutants.

As with those other mandates, the Water Boards have not shown that federal law compels this program, with all its elements. The Regional Board did not make a finding that this program was the only way to comply with the MEP standard. As such, the Water Boards have not shown

¹⁶⁴ 40 C.F.R. § 122.26(d)(2)(iv)(A)(1) (emphasis added).

¹⁶⁵ WB Comments at 43-44.

that this program is compelled by federal law.¹⁶⁶ Instead, the retrofitting program usurps Claimant's ability to design their own program and imposes requirements that exceed federal law.¹⁶⁷

K. THE PERMIT'S BMP MAINTENANCE TRACKING REQUIREMENT IS A STATE MANDATE (2009 PERMIT, SECTION F.1.f)

1. The BMP Maintenance Tracking Requirement is a New Program or Higher Level of Service

The 2009 Permit requires Claimants to develop and maintain a watershed-based database to track all approved post-construction BMPs and BMP maintenance within its jurisdiction. Claimants must establish a mechanism not only to inventory post-construction BMPs, but also to ensure that appropriate easements or ownerships are properly recorded in public records, and that approved BMPs are operating effectively and have been adequately maintained. This includes inspection and enforcement of these BMPs. Section F.1.f(c)(3).

This permit requirement was not present in the 2002 Permit. The Water Boards do not contend otherwise.

Instead, the Water Boards contend that the permittees, in their 2007 Drainage Area Management Program under the 2002 Permit, proposed to verify 90% of water quality management programs, including structural and non-structural BMPs.¹⁶⁸ This verification, however, is not nearly as comprehensive as the 2009 Permit's program, which requires the creation of a watershed-wide database and annual inspections and verification that the BMPs are operating effectively and have been adequately maintained. Indeed, even if Claimants had been voluntarily implementing a similar program prior to the 2009 Permit, Claimants are still entitled to reimbursement for those costs incurred after the imposition of the mandate.¹⁶⁹

The Permit's BMP maintenance tracking requirements is a new program or higher level of service.

¹⁶⁶ *Dept. of Finance*, 1 Cal.5th at 765, 768-69. The Water Boards argue that EPA has imposed retrofitting requirements in the 2011 Washington D.C. MS4 permit. That permit, however, does not contain the breadth of requirements mandated here. Other EPA-issued permits do not apply the retrofitting requirement to industrial, commercial and residential sites and do not impose the detailed requirements at issue here. *See Ashby Dec*, ¶ 17.

¹⁶⁷ *See Long Beach Unified School Dist.*, *supra*, 225 Cal.App.3d at 173.

¹⁶⁸ WB Comments at 45.

¹⁶⁹ Govt. Code § 17565.

2. The BMP Maintenance Tracking Requirements are not Federally Mandated

No federal statute or regulation requires this BMP Maintenance Tracking Program. The Water Boards cite the federal regulations that require Claimants to develop a program to reduce pollutants from new development and redevelopment construction and certain industrial or land use sites.¹⁷⁰ None of these regulations, however, requires the extensive BMP maintenance tracking program at issue here, and the Water Boards cite to no such portion of the regulations that require it.¹⁷¹

Instead, the Water Boards again argue that this program is necessary to meet the MEP standard, the same argument the Water Boards have made with respect to the other mandates at issue in this test claim. The Water Boards cite to the Permit's general findings regarding the nature of MEP,¹⁷² but those findings do not discuss this program or why it is necessary. The findings, moreover, do not assert that this program is the only way to meet the MEP standard and thus is not entitled to any deference.¹⁷³ EPA-issued permits do not include these requirements.¹⁷⁴

Indeed, this program's requirements to annually inspect BMPs and private developments is similar to the requirement to inspect commercial, industrial, and construction sites that was at issue in *Dept. of Finance*. In that case, the Supreme Court noted that "neither the CWA's 'maximum extent practicable' provision nor the EPA regulations on which the State relies expressly required the Operators to inspect these particular facilities or construction sites."¹⁷⁵ The Court also rejected the argument that the inspection requirements were federally mandated because the CWA required the Los Angeles Regional Board to impose permit controls to the MEP and EPA regulations contemplated that some kind of operator inspections would be required. The Supreme Court held "that the EPA regulations contemplated some form of inspections, however, does not mean that federal law required the scope and detail of inspections required by the Permit conditions."¹⁷⁶

The same rule applies here. Nothing in the MEP standard or the federal regulations that the Water Boards cite require the BMP maintenance and tracking program set forth in the permit. This program imposes requirements that exceed federal law.¹⁷⁷

The BMP Maintenance Tracking Program is a state mandate for another reason. As discussed above, the Porter-Cologne Water Quality Act regulates discharges of waste to waters of the state. Under Porter-Cologne, the Water Boards have the obligation to control such discharges

¹⁷⁰ 40 C.F.R. §122.26(d)(2)(iv)(A)-(D).

¹⁷¹ See WB Comments at 44.

¹⁷² *Id.* at 44-45.

¹⁷³ *Dept. of Finance*, 1 Cal.5th at 768.

¹⁷⁴ *Ashby Dec.*, ¶ 18.

¹⁷⁵ *Id.* at 770.

¹⁷⁶ *Id.* at 771.

¹⁷⁷ See *Long Beach Unified School Dist.*, 25 Cal.App.3d at 173.

from all dischargers, including any private property developments subject to the BMP Maintenance Tracking Program¹⁷⁸ Under Porter-Cologne, it is the Water Board's duty to track and verify these private discharges and private BMPs. The Regional Board could have performed this task itself. When the Board freely chose to shift this obligation to the Claimants, it created a state mandate.¹⁷⁹

VI. THE TEST CLAIMANTS DO NOT HAVE AUTHORITY TO LEVY SERVICE CHARGES, FEES OR ASSESSMENTS TO FUND THE MANDATED PROGRAMS

Claimants are not entitled to reimbursement if they have the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service. Govt. Code § 17556(d). Like the exception for federal mandates set forth in subdivision (c), the State bears the burden of proving that Claimants have this authority. As the Supreme Court said with respect to the federal mandate exception, "the State must explain why" the Claimants can assess service charges, fees or assessments to pay for mandates set forth above.¹⁸⁰

The Water Boards and the DOF have not met this burden. To a large extent, the Water Boards and DOF limit their comments to the mandates relating to the hydromodification, low impact development and retrofitting program obligations of the 2009 Permit, contending that Claimants can impose the cost of complying with these requirements on developers.¹⁸¹ The Water Boards and DOF also contend generally that the fact that Claimants have to seek voter approval pursuant to Proposition 218, articles XIII C and D of the California Constitution, to assess a fee or tax does not mean that they do not have authority to do so within the meaning of Government Code section 17556(d).¹⁸² The Water Boards also contend that the costs imposed by the state mandates are *de minimis*.¹⁸³

None of these contentions meets the State's burden of explaining why the Claimants can assess charges, fees or assessments. Indeed, the Commission has already considered and rejected the Water Boards and DOF's position with respect to articles XIII C and D. In the San Diego County Stormwater Test Claim, the Water Boards and DOF made the same contention that they make here, that municipalities have authority to levy service charges, fees or assessments within the meaning of Government Code § 17556(d), even though they lack such authority under articles

¹⁷⁸ Water Code §§ 13260 and 13263.

¹⁷⁹ *Hayes, supra*, 11 Cal.App.4th at 1594.

¹⁸⁰ *Dept. of Finance*, 1 Cal.5th at 769.

¹⁸¹ WB Comments at 20; DOF Comments at 2.

¹⁸² WB Comments at 21; DOF Comments at 1. As set forth in Claimants' Narrative Statement, the eleven mandated activities at issue here are programs that apply throughout Claimants' jurisdictions and are not directed towards individual businesses or property owners. As such any charge to pay for these programs would be a "special tax" within the meaning article XIII C, section 1(d) of the California Constitution. No local government may impose, extend, or increase any special tax unless it is approved by a two-thirds vote of the electorate. See generally Claimants' Narrative Statement at 69-71.

¹⁸³ WB Comments at 21; DOF Comments at 1.

XIII C and D unless the charges, fees or assessments are submitted to the electorate and approved by a two-thirds vote. The Commission held:

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

Additionally, it is possible that the local agency’s voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of taxing and spending limitations that articles XIII A and XIII B impose.”¹⁸⁴

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

The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. *Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d)*. The voting requirement of Proposition does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the “authority,” i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program.¹⁸⁵

As a result, the Commission found the following state mandates in the San Diego County stormwater permit to be reimbursable: (1) street sweeping; (2) street sweeping reporting; (3) conveyance system cleaning; (4) conveyance system cleaning reporting; (5) educational programs; (6) watershed activities and collaboration in the Watershed Urban Runoff Management Program;

¹⁸⁴ San Diego County Statement of Decision at 106 (emphasis in original; citation omitted).

¹⁸⁵ *Id.* at 107 (emphasis added).

(7) the Regional Urban Runoff Management Program; (8) program effectiveness assessment; (9) long-term effectiveness assessment; and (10) permittee collaboration requirements.¹⁸⁶

The Commission reached the same conclusion in the San Diego County Stormwater Test Claim with respect to property-related fees under article XIII D of the Constitution. To the extent that any fees imposed for the programs at issue here would be considered property-related fees, rather than a special tax, the fee would still be subject to voter approval or a majority of property owners under article XIII D, section 6(c).¹⁸⁷ As the Commission found in the San Diego County Test Claim, this requirement also means that Claimants lack authority to impose fees for property-related services.¹⁸⁸

The DOF nevertheless contends that Claimants have the ability to submit fees to the voters for approval, and that under *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, this ability by itself meets the requirements of Government Code § 17556(d).

Clovis is not applicable. In *Clovis* the school district was authorized to collect health fees but voluntarily chose not to do so.¹⁸⁹ In those circumstances, the Court of Appeal held that the Controller's office properly offset the authorized fees, whether the school district collected them or not, because the district had the authority to assess those fees. *Id.* at 812. Here, Claimants have not been authorized to collect fees or taxes; they currently have no such power as such authority resides directly with the electorate, pursuant to Prop 218, for any stormwater related pollution control charge. Therefore this is not a circumstance in which Claimants can assess fees but have voluntarily chosen not to do so. Indeed, if one accepted DOF's argument, article XIII B, section 6, would be written out of the Constitution because the argument could always be made that a city or county could submit a tax or fee to the electorate. If that ability was all that was required to meet Government Code § 17556(d), a city or county could never obtain a subvention of funds.

¹⁸⁶ *Id.* at 1-2.

¹⁸⁷ See *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal. App. 4th 1351 (Vol. I, Tab 16 of Documentation in Support of 2011 Narrative Statement).

¹⁸⁸ San Diego County Statement of Decision at 106-07. The Commission reiterated this principle in *In Re Test Claim on Water Code Division 6, Part 2.5* [Sections 10608 through 10608.41] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4, Test Claim Nos. 10-TC-12 and 12-TC-01 (December 5, 2014) (attached as Tab 32 of Rebuttal Documentation). In these test claims, certain water suppliers sought reimbursement for new activities imposed on urban and agricultural water suppliers. With respect to the application of article XIII D, the Commission found that the water suppliers had fee authority, in that their fees were for water services within the meaning of article XIII D, section 6(e), and therefore the fee was subject only to a majority protest, not a vote of the electorate or property owners. *Id.* at 78. In doing so, the Commission noted that the San Diego County Stormwater Test Claim was distinguishable and that, with respect to in the mandates in that test claim, "absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d)." Test Claim Nos. 10-TC-12 and 12-TC-01, Decision at 77.

¹⁸⁹ 188 Cal. App. 4th at 810.

Such a result would be contrary to the people of California's intent in adopting article XIII B, section 6.

With respect to the hydromodification and low impact programs, as well as the program to identify, track and encourage retrofitting, the Water Boards and DOF contend that Claimants can impose fees on developers to pay for these programs.¹⁹⁰ Both the Water Boards and DOF, however, fail to recognize that Claimants seek reimbursement for the low impact plan mandates as they apply to *Claimants' own municipal projects*, not projects by private developers. There is, therefore, no developer on whom a fee can be assessed. With respect to the hydromodification plan requirement in Section F.1.h of the 2009 Permit, while such plans would apply to both public and private development projects, Claimants are seeking the cost of devising the plan itself, not the costs of imposing the requirements on private projects.

Likewise, the retrofitting program involves a government program to identify, track and encourage retrofitting opportunities, not a program directed towards an individual development, and to the extent that it is directed at governmental facilities, there is again no developer on whom a fee can be assessed.

Claimants cannot pay for these mandates, therefore, through charges or development fees assessed on private developers. There is no private development involved and no benefit being conferred or service provided to a developer that is not also being provided to those who would not be charged.¹⁹¹

Finally, the Water Boards contend that the costs of the mandated programs are "*de minimis*."¹⁹² As the Commission found in the San Diego County Test Claim with respect to similar requirements, and as demonstrated by the costs incurred and future cost estimates set forth in Claimants' declarations in support of this test claim, the costs of these state-mandated programs are more than *de minimis*.¹⁹³

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

VII. CONCLUSION

For the foregoing reasons, each of the 11 mandates at issue in this Test Claim are state mandates for which Claimants are entitled to reimbursement. The Commission should find that

¹⁹⁰ WB Comments at 20; DOF Comments at 2.

¹⁹¹ See article XIII C, sections 1(e)(1) and (6) and article XIII D, section 1(b) (charges and fees are excepted from article XIII C when the charge is for a specific benefit that is not provided to those not charged or is a condition of property development).

¹⁹² WB Comments at 21.

¹⁹³ See San Diego County Statement of Decision at 120-21.

Claimants are entitled to a subvention of funds for each mandate in accordance with article XIII B, section 6, of the California Constitution.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my personal knowledge.

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

David W. Burhenn

BURHENN & GEST LLP
HOWARD GEST
DAVID W. BURHENN
624 S. Grand Avenue, Suite 2200
Los Angeles, CA 90017
Phone: (213) 629-8788
Email: dburhenn@burhenngest.com

Counsel for Joint Test Claimant County of Orange and on behalf of Joint Test Claimants Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo and San Juan Capistrano.

ATTACHMENTS IN SUPPORT OF NARRATIVE STATEMENT IN REBUTTAL TO
COMMENTS OF STATE WATER RESOURCES CONTROL BOARD AND CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, AND
DEPARTMENT OF FINANCE CONCERNING TEST CLAIM 10-TC-11, CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO.
R9-2009-0002

ATTACHMENT 1: DECLARATION OF DAVID W. BURHENN AND EXHIBITS A-D
THERE TO

ATTACHMENT 2: DECLARATION OF KAREN ASHBY AND EXHIBITS 1-5 THERE TO

ATTACHMENT 1

**DECLARATION OF DAVID W. BURHENN ON BEHALF OF JOINT TEST
CLAIMANTS IN SUPPORT OF NARRATIVE STATEMENT IN REBUTTAL**

I, David W. Burhenn, declare and state as follows:

1. I am a partner in the firm of Burhenn & Gest LLP, which represents the County of Orange in Test Claim 10-TC-11, California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002. As such, I have personal knowledge of the matters set forth in this Declaration and could, if called upon, testify competently thereto.

2. Exhibit A to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit issued by the California Regional Water Quality Control Board, Los Angeles Region ("LARWQCB"), to the County of Ventura and other permittees on or about May 7, 2009. On January 3, 2017, I downloaded that excerpt from the website of the LARWQCB at the following address:

http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057-01-13-2010.pdf.

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

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

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

October 14, 2009. On January 3, 2017, I downloaded that excerpt from the website of the SFRWQCB at the following address:

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

5. Exhibit D to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit issued by the California Regional Water Quality Control Board, Santa Ana Region ("SARWQCB"), to permittees in Riverside County on or about January 29, 2010. On January 3, 2017, I downloaded that excerpt from the website of the SARWQCB at the following address:

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

6. I have reviewed the permit issued by the LARWQCB to Ventura County permittees and determined that corrections to the permit dated January 13, 2010 did not include revisions to Finding E.7, which discussed unfunded state mandates.

7. I have reviewed the permit issued by the SFBRWQCB to San Francisco Bay permittees and determined that revisions to the permit dated November 28, 2011 did not include revisions to those provisions in the Fact Sheet discussing unfunded state mandates.

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

Executed January 5, 2017 at Los Angeles, California.



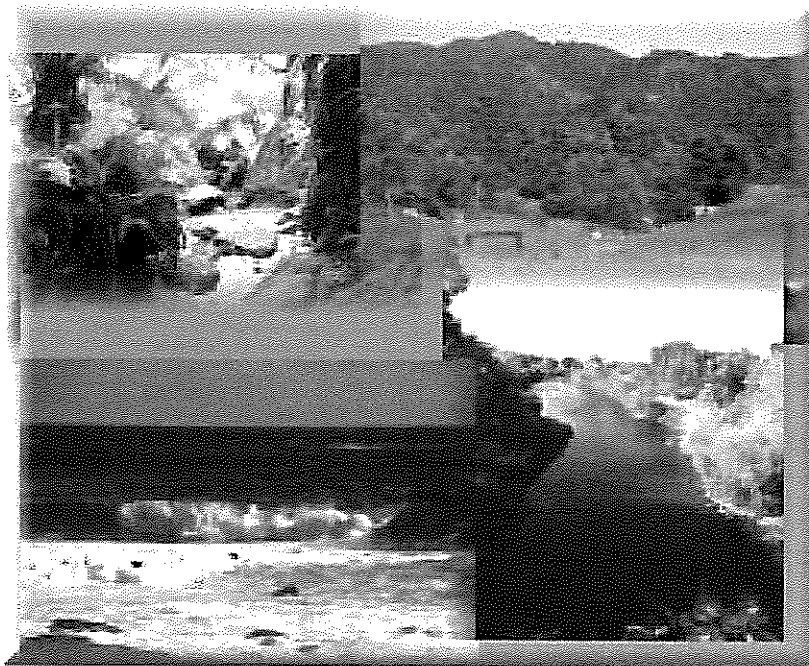
David W. Burhenn

EXHIBIT A

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

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

May 7, 2009



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

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

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

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

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

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

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

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

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

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

EXHIBIT B

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ORDER NO. R5-2008-0092

NPDES NO. CAS083526

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

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

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

¹ U.S. Census Bureau, 2000.

² Modesto Irrigation District, Water Years 2002-2007.

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

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

STATUTORY AND REGULATORY CONSIDERATIONS

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

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

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

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

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

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

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

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

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

EXHIBIT C

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

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



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

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

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

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

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

State Mandates

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT D

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

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

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

AREA-WIDE URBAN RUNOFF MANAGEMENT PROGRAM

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

Table 1. Municipal Permittees (Dischargers)

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

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

Table 2. - Administrative Information

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

~~there is only one individual storm water NPDES permit that has been issued by the Regional Board for an Industrial Facility (March Air Reserve Base) located within the Permit Area. Additionally, the Regional Board has issued NPDES permits for a number of facilities that discharge process wastewater and storm water; storm water discharge requirements are included in such a facility's NPDES permit.~~

~~9. Section 402(p) of the CWA establishes two different performance standards for storm water discharges. NPDES MS4 permits require controls to reduce the discharge of Pollutants to the MEP. NPDES permits issued for industrial storm water discharges (including construction activities) must meet Best Available Technology (BAT) and Best Conventional Pollutant Control Technology (BCT) standards. The CWA and the USEPA regulations allow each state the flexibility to decide what constitutes the MEP.~~

10. This Order does not constitute an unfunded mandate subject to subvention under Article XIII.B, Section (6) of the California Constitution for several reasons, including the following:

- a. This Order implements federally mandated requirements under CWA Section 402(p)(3)(B). (33 USC § 1342(p)(3)(B)).
- b. The Permittees' obligation 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.
- c. The Permittees have the authority to levy service charges, fees, or assessments to pay for compliance with this Order⁷.
- d. The Permittees 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 USC § 1311(a)).

~~11. Section 13225 of the CWA identifies the Regional Board as being the enforcement authority for NPDES permits, including the Industrial General Permit, and the Construction General Permit which are collectively referred to as the "General Stormwater Permits." However, in many areas, the Industrial Facilities and Construction Sites discharge directly into MS4 facilities owned and operated by the Permittees. These Industrial Facilities and Construction Sites are also regulated under local ordinances and regulations. The Permittees and Regional Board staff work together to avoid duplicative efforts in regulating these facilities. As part of~~

⁷ Voter approval may be required for new tax levies.

ATTACHMENT 2

DECLARATION OF KAREN ASHBY

I, Karen Ashby, hereby declare:

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

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

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

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

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

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

6. EPA issued the currently effective Albuquerque permit in 2014 and the currently effective Boise permit in 2012. EPA issued the currently effective Washington, D.C. permit in 2011 and modified this permit in 2012. The Boston permit is older, EPA having issued it in 1999.

7. I reviewed these four EPA-issued permits to determine if they included any of the provisions that are the subject of the test claim filed by Orange County and certain cities concerning provisions in San Diego Regional Board Order No. R9-2009-0002 (“2009 Permit”). Attached as Exhibit 1 is a chart that summarizes my review. The Albuquerque, Boise, Washington D.C., and Boston permits are attached hereto as Exhibits 2, 3, 4, and 5, respectively

8. **Prohibition Against Landscape Irrigation, Irrigation Water and Lawn Watering from Entering into the Municipal Storm Sewer System (“MS4”), 2009 Permit, Section B.2.** Section B.2 of the 2009 Permit prohibits landscape irrigation, irrigation water, and lawn watering from entering into the MS4. These three types of discharges were excluded from the list of non-storm water discharges that are not prohibited unless they are identified by the municipality as a source of pollutants to waters of the United States. None of the EPA-issued permits include this prohibition.

9. **Total Maximum Daily Load (“TMDL”) Requirements, Permit Section I.** Section I of the 2009 Permit requires the permittees to achieve numeric interim and final waste load allocations and meet numeric targets for the Baby Beach Bacteria TMDL. The permittees must further conduct monitoring and annual reporting in support of these efforts. No similar TMDL requirements are present in the EPA-issued Boise or Boston permits. The Albuquerque permit requires permittees to propose Best Management Practices to control discharges subject to TMDLs but does not contain numeric effluent limits with respect thereto. The Washington D.C. permit requires permittees to develop a plan to comply with applicable TMDLs, but does not require compliance with numeric allocations/targets.

10. **Non-Stormwater Dry Weather Action Levels (“NALs”), 2009 Permit Sections C.1 and F.4.** Sections C.1 and F.4 of the 2009 Permit require permittees to develop monitoring, investigation and compliance programs triggered by non-stormwater dry weather action levels. None of the EPA-issued permits have this requirement.

11. **Stormwater Action Levels (“SALs”), 2009 Permit Section D.** Section D of the 2009 Permit require permittees to adopt additional control measures when a running average of twenty percent or greater discharges exceed designated stormwater action levels, and to monitor discharges from major outfalls at which the stormwater action levels have been exceeded. None of the EPA-issued permits have this requirement.

12. **Low Impact Development (“LID”) and Hydromodification Plans, 2009 Permit Sections F.1.d.(4) and (7) and F.1.h.** Sections F.1.d.(4) and (7) and F.1 of the 2009 Permit require permittees to develop and implement a program to ensure that new developments and significant redevelopments comply with low impact development and hydromodification requirements. Although the Washington D.C permit references use of LID principles, and the Albuquerque permit contains requirements to control discharges from a 90th percentile storm event from new and an 80 percentile storm event from redevelopment sites and to assure that the hydrology from new and redevelopment sites mimic to the extent practicable predevelopment hydrology, none of the EPA-issued permits impose on permittees the extensive requirements contained in the 2009 Permit.

13. **New Reporting Requirements Including an Annual Effectiveness Assessment and Work Plan, 2009 Permit Section J.** Sections J.1 through J.4 of the 2009 Permit require permittees to develop a new system for assessing the effectiveness of its stormwater management program and to prepare a work plan to address high priority water quality problems in an iterative manner over the life of the permit. Although the EPA-issued permits require annual assessments of the effectiveness of the permittees’ programs, they do not contain the detailed requirements set forth in Sections J.1 through J.4, such as assessing impact on section 303(d)

impaired water bodies or environmentally sensitive areas or to create and implement a work plan in response.

14. **The Public Meeting Requirement, 2009 Permit Sections G.6 and K.1.b.(4).(n).** Sections G.6 and Section K.1.b.4 of the 2009 Permit require annual public meetings in conjunction with the development of the permittees' watershed water quality work plan. The EPA-issued permits contain opportunities for public comment on draft annual reports or proposed programs, but do not require that a public meeting be held.

15. **The New Reporting Requirements, 2009 Permit Sections F.1.d.(7).(i), F.3.a.(4).(c), K.3.a(3) and Attachment D.** Sections F.1.d.(7).(i), F.3.a.(4).(c), K.3.a(3) and Attachment D of the 2009 Permit contain new reporting requirements, including the obligation to prepare (a) a report of priority development projects choosing to participate in the LID waiver program; (b) an evaluation of Claimant's existing flood control devices; and (c) a reporting checklist providing extensive data on programs implemented under the permit. Although the EPA-issued permits include provisions for annual assessments of the permittee's stormwater programs and reporting of those assessments, they do not include the detailed reporting requirements contained in these sections.

16. **Use of GIS in Mapping, Permit, 2009 Permit Section F.4.b.** Section F.4.b of the 2009 Permit requires the permittees to maintain an updated map of their entire municipal storm sewer system in GIS format. EPA's Washington D.C. permit requires the permittee to provide updates to the stormwater model and Geographical System and report on their progress on an annual basis, and to use GIS to develop certain strategies or reporting, but does not contain a requirement to create an updated map of the entire system in GIS format. Similarly, the Boise permit provides for use of GIS in preparing and maintaining a database of management controls in areas of new development and redevelopment, but does not require an updated, GIS map of the entire MS4 system. The Albuquerque and Boston permits do not contain GIS requirements.

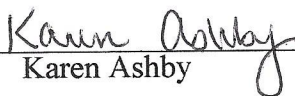
17. **Development of a Retrofitting Program, 2009 Permit Section F.3.d.** Section F.3.d of the 2009 Permit requires the permittees to develop and implement a program to retrofit

existing developments to reduce the impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, and reduce pollutants in stormwater. The 2009 Permit requires permittees to encourage retrofitting of industrial, commercial, and residential developments. The Washington D. C., Boise, and Albuquerque permits require the permittees to analyze certain of their own properties for possibility of retrofitting (within the Washington D.C. permit, there is a reference to redevelopment projects within the retrofitting program, thus it could extend to industrial, commercial, and residential developments.). The Boston permit does not include this requirement.

18. The BMP Maintenance Tracking Requirement, 2009 Permit Section F.1.f. Section F.1.f of the 2009 Permit requires permittees to develop and maintain a watershed-based database to track all approved post-construction Best Management Practices (BMPs) and BMP maintenance within its jurisdiction. Although the Boise permit contains a requirement to inspect and enforce post-construction BMPs, it is not as extensive as that required by the 2009 Permit. This requirement is not present in the Boston, Washington, D.C or Albuquerque permits.

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

Executed this 5th day of January, 2017 at Davis,
California.



Karen Ashby

This page intentionally left blank

Exhibit 1

Summary of USEPA Phase I Permit Requirements

This page intentionally left blank

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

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

Item # in Joint Test Claim	State Mandated Activity	Is the requirement consistent with San Diego permit?	Page Number	Description
IV. A	New Requirements Involving Non-Stormwater Discharges [Landscape irrigation, irrigation water and lawn watering not exempted anymore]	No	Page 6 of 20 - Part I.B.2.g	Landscape irrigation, irrigation waters, and lawn watering discharges are authorized to enter MS4 facility [discharges not prohibited].
IV. B	Total Maximum Daily Loads Section - [Implementing BMPs as a metric in achieving interim and final WLAs-monitoring and reporting requirements] - WLAs and Numeric Targets are included in the MS4 permit to ensure that the BMPs achieve appropriate bacteria concentration.	No	Page 13 of 20, Fact Sheet pages 2, 5, 7	Permit states that there are no numeric effluent limits that have been established for the permit.
IV. C	Meeting Non-Stormwater Dry Weather Action Levels (NALS) under Sections C and D of the 2009 Permit Provisions [Identifying source of exceedance]	No	-	-
IV. D	Compliance with Programs Associated with "Stormwater Action Levels" or "SALs" under Section D	No	-	-
IV. E	New "Low Impact Development" or "LID" and Hydromodification Requirements under Sections F.1.D and F.1.H	No	-	-
IV. F	New Reporting Requirements Including an Annual Assessment of The Effectiveness of the Jurisdictional Runoff Management Program and a Workplan Demonstrating a Responsive and Adaptive Approach ... under section J	Includes annual assessment requirement	Part I.B.7.a & b - Page 11 of 20, Part I.B.7.c - Page 12 of 20, PartI.E - Page 18 of 20	Requirements include a review of the status of program, an assessment of the effectiveness of controls established by the SWMP, and a review of monitoring data and finding trends in pollutant loadings, but the permit provides flexibility to permittees to determine how to do the assessment. Same for Program Modifications. The requirements are generally described under Part I.E. A demonstration project to assess the effectiveness of the program is required. Monitoring data to be used to assess effectiveness.
IV. G	New Public Meeting Requirements as set forth in section K.1.B	No	-	No discussion of public meetings or review of the SWMP.
IV. H	New reporting requirements, including describing all activities a copermitee will undertake pursuant to the 2009 permit and an individual jurisdictional runoff management report under sections K.1.a and K.3	Includes annual assessment requirement	PartI.E - Page 18 of 20, Table A Page 6 of fact sheet	Outfall information, IDDE, effectiveness of structural controls, standard provisions.
IV. I	New Requirements Mandating the Use of Geographical Information System (GIS) MS4 Maps in Section F.4	No	-	-
IV. J	New Requirements for Developing and Implementing a Retrofitting Program for Existing Deveelopment in Section F.3.D	No	-	-
IV. K	New BMP Maintanance Tracking Requirements in Section F.1.f	No	-	-

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

Item # in Joint Test Claim	State Mandated Activity	Is the requirement consistent with San Diego permit?	Page Number	Description
IV. A	New Requirements Involving Non-Stormwater Discharges [Landscape irrigation, irrigation water and lawn watering not exempted anymore]	No	Page 7 of Part I - Part I-A.4	Authorized to discharge lawn, landscape, and other irrigation waters given all pesticides, herbicides, and fertilizers have been used according to approved manufacturing labeling and also any applicable permits for discharges associated with pesticide, herbicide, and fertilizer applicaiton. [discharges not prohibited]
IV. B	Total Maximum Daily Loads Section - [Implementing BMPs as a metric in achieving interim and final WLAs-monitoring and reporting requirements] - WLAs and Numeric Targets are included in the MS4 permit to ensure that the BMPs achieve appropriate bacteria concentration.	Includes BMP requirements but does not discuss numerical targets or WLAs	Page 16 of Part I- PartI.C.2.b.(i).(e)	If the pollutant of concern is bacteria, the permittee shall include focused BMPs addressing five areas, as applicable, in the SWMP and implement as appropriate.
IV. C	Meeting Non-Stormwater Dry Weather Action Levels (NALS) under Sections C and D of the 2009 Permit Provisions [Identifying source of exceedance]	No	-	-
IV. D	Compliance with Programs Associated with "Stormwater Action Levels" or "SALs" under Section D	No	-	-
IV. E	New "Low Impact Development" or "LID" and Hydromodification Requirements under Sections F.1.D and F.1.H	No	Page 31 of Part I- PartI-D.5.b.(viii).(f)	Under Control Measures section of Stormwater Management Program, hydromodification prevention is introduced as a watershed protection element. There are no discussions of developing plans.
IV. F	New Reporting Requirements Including an Annual Assessment of The Effectiveness of the Jurisdictional Runoff Management Program and a Workplan Demonstrating a Responsive and Adaptive Approach ... under section J	Includes annual assessment requirement	Page 49 of Part I - PartI.D.6	Includes performance assessment with measurable goals. There are also general update requirements by EPA such as addressing water quality impact of receiving water streams from MS4.
IV. G	New Public Meeting Requirements as set forth in section K.1.B	Requires public comments not holding a public meeting	Page 47 of Part I - PartI.D.5.h.(ii)	Permittees are required to develop, revise, implement and maintain a plan to encourage public involvement and provide opportunities for participation in the review, modification and implementation of the SWMP. Also, to develop a process by which public comments to the plan are received and reviewed.
IV. H	New reporting requirements, including describing all activities a copermitee will undertake pursuant to the 2009 permit and an individual jurisdictional runoff management report under sections K.1.a and K.3	Includes annual assessment requirement	Page 7 of Part III - Part III.B	TMDL updates, new development information (EIA, IA), and standard provisions.
IV. I	New Requirements Mandating the Use of Geographical Information System (GIS) MS4 Maps in Section F.4	No	-	-
IV. J	New Requirements for Developing and Implementing a Retrofitting Program for Existing Deveelopment in Section F.3.D	Includes requirements applicable to municipal properties only (does not include private properties)	Page 31 of Part I - Part I.D.5.b.(vii)	Recognizes that retrofit projects may be undertaken; determine potential for retrofitting, report on those projects that have been retrofitted.
IV. K	New BMP Maintanance Tracking Requirements in Section F.1.f	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
District of Columbia	MS4-Phase I	DC0000221, Modification #1	2011 (modified in 2011)	DC MS4 Old

Item # in Joint Test Claim	State Mandated Activity	Is the requirement consistent with San Diego permit?	Page Number	Description
IV. A	New Requirements Involving Non-Stormwater Discharges [Landscape irrigation, irrigation water and lawn watering not exempted anymore]	No	Part 1.2 - Page 4	Permit authorizes landscape irrigation, irrigation waters, and lawn watering discharge to the MS4 as long as it is regulated with an NPDES permit [discharges not prohibited].
IV. B	Total Maximum Daily Loads Section - [Implementing BMPs as a metric in achieving interim and final WLAs-monitoring and reporting requirements] - WLAs and Numeric Targets are included in the MS4 permit to ensure that the BMPs achieve appropriate bacteria concentration.	Requires developing a plan but no mention of WLAs or numeric targets	Part 1.4.2 - Page 5; Pages 28 -31	Attain applicable WLAs, annual reporting, TMDL requirements, TMDL implementation plan development, milestones, benchmarks, modeling.
IV. C	Meeting Non-Stormwater Dry Weather Action Levels (NALS) under Sections C and D of the 2009 Permit Provisions [Identifying source of exceedance]	No	-	-
IV. D	Compliance with Programs Associated with "Stormwater Action Levels" or "SALs" under Section D	No	-	-
IV. E	New "Low Impact Development" or "LID" and Hydromodification Requirements under Sections F.1.D and F.1.H	No	Part 4 - Pages 10-15	References LID-based principles.
IV. F	New Reporting Requirements Including an Annual Assessment of The Effectiveness of the Jurisdictional Runoff Management Program and a Workplan Demonstrating a Responsive and Adaptive Approach ... under section J	Includes annual assessment requirement	Part 6.2.1 - Page 38, Part 2.3.2.3; Part 7 - Page 41	Requirements include: a review of the status of program, an assessment of the effectiveness of controls established by the SWMP, and a review of monitoring data and finding trends in pollutant loadings. Also, the District Department of the Environment is responsible for evaluating, assessing, and synthesizing results of the monitoring and assessment programs and the effectiveness of the implementation if management practices and coordinating necessary adjustments to the SWMP. Report on pollutant load reductions with stormwater model.
IV. G	New Public Meeting Requirements as set forth in section K.1.B	Requires public comments not holding a public meeting	Part 2.3.2.6 - Page 7, Part 4.9.4 - Page 27-28, Part 6.2.2 - Page 40	Stormwater program needs to be made available to the public (publicly notice). Public needs to have ability to participate in decision making process involving the implementation and update of the Permittee's program.
IV. H	New reporting requirements, including describing all activities a copermitee will undertake pursuant to the 2009 permit and an individual jurisdictional runoff management report under sections K.1.a and K.3	Includes annual assessment requirement	Part 6.2.1 - Page 38-39	Flood projects, retrofit project information, TMDL, and standard provisions.
IV. I	New Requirements Mandating the Use of Geographical Information System (GIS) MS4 Maps in Section F.4	Does not require GIS mapping for the entire watershed	Part 7 - Page 41, Part 4.3.4.5 - Page 17	Permittees shall continue compliance with 2004 requirement and provide updates to the stormwater model and GIS. In addition, GIS layers of public landuse and sewersheds shall be used in conjunction with background data to identify priority areas for a targeted strategy to reduce pesticides, herbicides, and fertilizers per Part 4.3.4 (landscape and recreational facilities management).
IV. J	New Requirements for Developing and Implementing a Retrofitting Program for Existing Development in Section F.3.D	Includes requirements applicable to municipal properties only (does not include private properties)	Part 4.1.5 - Page 12, Part 4.8.2 - Page 26	Retrofit program for existing discharges within 2 years of adopted permit. Establish performance metrics for retrofit projects. Estimate potential pollutant load and volume reductions.
IV. K	New BMP Maintenance Tracking Requirements in Section F.1.f	No	-	-

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

<u>Item # in Joint Test Claim</u>	<u>State Mandated Activity</u>	<u>Is the requirement consistent with San Diego permit?</u>	<u>Page Number</u>	<u>Description</u>
IV. A	New Requirements Involving Non-Stormwater Discharges [Landscape irrigation, irrigation water and lawn watering not exempted anymore]	No	Page 4 of 66 - Part I-D.1.c.(i)	Authorized to discharge following: landscape waters given all pesticides, herbicides, and fertilizers have been used according to approved manufacturing labeling; lawn watering and irrigation water [discharges not prohibited].
IV. B	Total Maximum Daily Loads Section - [Implementing BMPs as a metric in achieving interim and final WLAs-monitoring and reporting requirements] - WLAs and Numeric Targets are included in the MS4 permit to ensure that the BMPs achieve appropriate bacteria concentration.	No	-	-
IV. C	Meeting Non-Stormwater Dry Weather Action Levels (NALS) under Sections C and D of the 2009 Permit Provisions [Identifying source of exceedance]	No	-	-
IV. D	Compliance with Programs Associated with "Stormwater Action Levels" or "SALs" under Section D	No	-	-
IV. E	New "Low Impact Development" or "LID" and Hydromodification Requirements under Sections F.1.D and F.1.H	Requires a strategy to use LID	Page 16 of 66 - Part II.B.2.c, Page 44 of 66 - Part IV.A.10, Page 8 of 66 - Part II.A.4.d.(iv)	As set forth in "Storm Water Management for Areas of New Development and Redevelopment" section, Permittees are required to "Develop and Implement Green Infrastructure/Low Impact Development (LID) Incentive Strategy" and also complete an effectiveness evaluation. A progress report on overall strategy implementation is to be prepared by Permittees. Hydromodification prevention must be addressed in subwatershed plans per subwatershed planning section of the permit.
IV. F	New Reporting Requirements Including an Annual Assessment of The Effectiveness of the Jurisdictional Runoff Management Program and a Workplan Demonstrating a Responsive and Adaptive Approach ... under section J	No	Page 10 of 66, Page 35 of 66 - Part II.D	Permittees are required to perform annual review of the SWMP. EPA may review reports and require changes to address discharges from MS4 that cause water quality impacts.
IV. G	New Public Meeting Requirements as set forth in section K.1.B	Requires public comments not holding a public meeting	Page 6-7 of 66, Page 30 of 66 - Part II.B.6	Permit requires public involvement during the development of the SWMP. Public input for watershed planning.
IV. H	New reporting requirements, including describing all activities a copermitee will undertake pursuant to the 2009 permit and an individual jurisdictional runoff management report under sections K.1.a and K.3	Includes annual assessment requirement	Page 46 of 66 - Part IV.C.3	Permit requires a host of items to be included in the annual report and standard provisions.
IV. I	New Requirements Mandating the Use of Geographical Information System (GIS) MS4 Maps in Section F.4	Does not require GIS mapping for the entire watershed	Page 18 of 66 - Part II.2.e).(i)	GIS must be used in operation and maintenance of stormwater management controls in areas of new development or redevelopment (in inventory and tracking the facilities).
IV. J	New Requirements for Developing and Implementing a Retrofitting Program for Existing Development in Section F.3.D	Includes requirements applicable to municipal properties only (does not include private properties)	Page 25 of 66 - Part II.B.4.g	Retrofitting existing control devices is mandated under this permit. No specific directions is given.
IV. K	New BMP Maintenance Tracking Requirements in Section F.1.f	Includes requirements to track post construction only	Page 18 of 66 - Part II.2.e).(i)	Inventory, tracking, inspection, and enforcement of permanent storm water management controls.

Exhibit 2

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

This page intentionally left blank



Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

NPDES General Permit No. NMR04A000

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

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

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


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

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


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

Signed by

Prepared by



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



Nelly Smith
Environmental Engineer
NPDES Permits and TMDLs Branch

MIDDLE RIO GRANDE WATERSHED BASED MUNICIPAL SEPARATE STORM SEWER
SYSTEM PERMIT

Table of Contents

Cover Page	Page
Part I INDIVIDUAL PERMIT CONDITIONS	
A. Discharges Authorized Under This General Permit.....	6 of Part I
1. Permit Area.....	6 of Part I
2. Potentially Eligible MS4s.....	6 of Part I
3. Eligibility.....	6 of Part I
4. Authorized Non-Stormwater Discharges.....	7 of Part I
5. Limitations on Coverage.....	7 of Part I
6. Authorization under This General Permit.....	8 of Part I
a. Obtaining Permit Coverage.....	8 of Part I
b. Terminating Coverage.....	9 of Part I
B. Notice of Intent Requirements.....	9 of Part I
1. Deadlines for Notification.....	9 of Part I
a. Designations.....	9 of Part I
b. New Operators.....	10 of Part I
c. Submitting a Late NOI.....	10 of Part I
d. End of Administrative Continued Coverage under Previous Permit.....	10 of Part I
2. Contents of Notice of Intent.....	11 of Part I
3. Where to Submit.....	12 of Part I
4. Permittees with Cooperative Elements in their SWMP.....	12 of Part I
C. Special Conditions.....	12 of Part I
1. Compliance with Water Quality Standards.....	12 of Part I
2. Discharges to Impaired Waters with and without Approved TMDLs.....	15 of Part I
3. Endangered Species Act (ESA) Requirements.....	20 of Part I
a. Dissolved Oxygen Strategy in the Receiving Waters of the Rio Grande.....	20 of Part I
b. Sediment Pollutant Load Reduction Strategy (Applicable to all permittees).....	22 of Part I
D. Stormwater Management Program (SWMP).....	23 of Part I
1. General Requirements.....	23 of Part I
2. Legal Authority.....	23 of Part I
3. Shared Responsibility and Cooperative Programs.....	24 of Part I
4. Measurable Goals.....	24 of Part I
5. Control Measures.....	25 of Part I
a. Construction Site Stormwater Runoff Control.....	25 of Part I
b. Post-Construction Stormwater Management in New Development and	

Redevelopment.....	28 of Part I
c. Pollution Prevention/Good Housekeeping for Municipal/Permittee Operations..	35 of Part I
d. Industrial and High Risk Runoff.....	37 of Part I
e. Illicit Discharges and Improper Disposal.....	39 of Part I
f. Control of Floatables Discharges.....	43 of Part I
g. Public Education and Outreach on Stormwater Impacts.....	44 of Part I
h. Public Involvement and Participation.....	47 of Part I
6. Stormwater Management Review and Modification.....	49 of Part I
a. Program Review.....	49 of Part I
b. Program Modification.....	50 of Part I
c. Program Modifications Required by EPA.....	50 of Part I
d. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation.....	50 of Part I
7. Retention of Program Records.....	51 of Part I
8. Qualifying State, Tribal or Local Program.....	51 of Part I
PART II NUMERIC DISCHARGE LIMITATIONS.....	1 of Part II
Reserved	
PART III MONITORING, ASSESSMENT, AND REPORTING REQUIREMENTS.....	1 of Part III
A. Monitoring and Assessment.....	1 of Part III
1. Wet Weather Monitoring.....	1 of Part III
2. Dry Weather Monitoring.....	3 of Part III
3. Floatable Monitoring.....	4 of Part III
4. Industrial and High Risk Runoff Monitoring.....	4 of Part III
5. Additional Sample Type, Collection and Analysis.....	6 of Part III
B. Annual Report.....	7 of Part III
1. SWMP(s) Status of Implementation.....	7 of Part III
2. SWMP Revisions.....	7 of Part III
3. Performance Assessment.....	7 of Part III
4. Annual Expenditures.....	7 of Part III
5. Annual Report Responsibilities for Cooperative Programs.....	7 of Part III
6. Public Review and Comment.....	8 of Part III
7. Signature on Certification of Annual Reports.....	8 of Part III
C. Certification and Signature of Reports.....	8 of Part III
D. Reporting: Where and When to Submit.....	8 of Part III

PART IV	STANDARD PERMIT CONDITIONS.....	1 of Part IV
A.	Duty to Comply.....	1 of Part IV
B.	Penalties for Violations of Permit Conditions.....	1 of Part IV
1.	Criminal Penalties.....	1 of Part IV
2.	Civil Penalties.....	1 of Part IV
3.	Administrative Penalties.....	1 of Part IV
C.	Duty to Reapply.....	2 of Part IV
D.	Need to Halt or Reduce Activity not a Defense.....	2 of Part IV
E.	Duty to Mitigate.....	2 of Part IV
F.	Duty to Provide Information.....	2 of Part IV
G.	Other Information.....	2 of Part IV
H.	Signatory Requirements.....	2 of Part IV
I.	Penalties for Falsification of Monitoring Systems.....	3 of Part IV
J.	Oil and Hazardous Substance Liability.....	3 of Part IV
K.	Property Rights.....	3 of Part IV
L.	Severability.....	3 of Part IV
M.	Requiring a Separate Permit.....	3 of Part IV
N.	State/Environmental Laws.....	3 of Part IV
O.	Proper Operation and Maintenance.....	4 of Part IV
P.	Monitoring and Records.....	4 of Part IV
Q.	Monitoring Methods.....	4 of Part IV
R.	Inspection and Entry.....	4 of Part IV
S.	Permit Actions.....	5 of Part IV
T.	Additional Monitoring by the Permittee(s).....	5 of Part IV
U.	Archaeological and Historic Sites.....	5 of Part IV
V.	Continuation of the Expired General Permit.....	6 of Part IV
W.	Permit Transfers.....	7 of Part IV
X.	Anticipated Noncompliance.....	7 of Part IV
Y.	Procedures for Modification or Revocation.....	7 of Part IV
PART V	PERMIT MODIFICATION.....	1 of Part V
A.	Modification of the Permit.....	1 of Part V
B.	Modification of the SWMP(s).....	1 of Part V
C.	Changes in Representative Monitoring Sites.....	1 of Part V
PART VI	SCHEDULES FOR IMPLEMENTATION AND COMPLIANCE.....	1 of Part VI
A.	Implementation and Augmentation of the SWMP(s).....	1 of Part VI

B. Compliance with Effluent Limitations..... 1 of Part VI
C. Reporting Compliance with Schedules..... 1 of Part VI
D. Modification of the SWMP(s)..... 1 of Part VI

PART VII DEFINITIONS..... 1 of Part VII

PART VIII PERMIT CONDITIONS APPLICABLE TO SPECIFIC AREAS OR INDIAN COUNTY LANDS

Reserved..... 1 of Part VIII

APPENDICES

Appendix A: Middle Rio Grande Watershed Jurisdictions and Potential Permittees

Appendix B: Total Maximum Daily Loads (TMDLs)

Appendix C: Historic Properties Eligibility Procedures

Appendix D: Suggested Initial Phase Sampling Location Concepts – Wet Weather Monitoring

Appendix E: Providing Comments or Requesting a Public Hearing on an MS4 Operator’s NOI

Appendix F: Minimum Quantifications Levels (MQL’s)

Appendix G: Oxygen Saturation and Dissolved Oxygen Concentrations North Diversion Channel Area

PART I. INDIVIDUAL PERMIT CONDITIONS

A. DISCHARGES AUTHORIZED UNDER THIS PERMIT

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

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

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

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

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

4. **Authorized Non-Stormwater Discharges.** The following non-stormwater discharges need not be prohibited unless determined by the permittees, U.S. Environmental Protection Agency (EPA), or New Mexico Environment Department (NMED) to be significant contributors of pollutants to the municipal separate storm sewer system (MS4). Any such discharge that is identified as significant contributor pollutants to the MS4, or as causing or contributing to a water quality standards violation, must be addressed as an illicit discharge under the illicit discharge and improper disposal practices established pursuant to Part I.D.5.e of this permit. For all of the discharges listed below, not treated as illicit discharges, the permittee must document the reason these discharges are not expected to be significant contributors of pollutants to the MS4. This documentation may be based on either the nature of the discharge or any pollution prevention/treatment requirements placed on such discharges by the permittee.

- potable water sources, including routine water line flushing;
- lawn, landscape, and other irrigation waters provided all pesticides, herbicides and fertilizers have been applied in accordance with approved manufacturing labeling and any applicable permits for discharges associated with pesticide, herbicide and fertilizer application;
- diverted stream flows;
- rising ground waters;
- uncontaminated groundwater infiltration (as defined at 40 CFR §35.2005 (20));
- uncontaminated pumped groundwater;
- foundation and footing drains;
- air conditioning or compressor condensate;
- springs;
- water from crawl space pumps;
- individual residential car washing;
- flows from riparian habitats and wetlands;
- dechlorinated swimming pool discharges;
- street wash waters that do not contain detergents and where no un-remediated spills or leaks of toxic or hazardous materials have occurred;
- discharges or flows from fire fighting activities (does not include discharges from fire fighting training activities); and,
- other similar occasional incidental non-stormwater discharges (e.g. non-commercial or charity car washes, etc.)

5. **Limitations of Coverage.** This permit does not authorize:

- a. **Non-Storm Water:** Discharges that are mixed with sources of non-storm water unless such non-storm water discharges are:
 - (i) In compliance with a separate NPDES permit; or
 - (ii) Exempt from permitting under the NPDES program; or

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

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

6. Authorization Under This General Permit

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

- (iv) If EPA notifies the MS4 operator of deficiencies or inadequacies in any portion of the NOI (including the SWMP), the MS4 operator must correct the deficient or inadequate portions and submit a written statement to EPA certifying that appropriate changes have been made. The certification must be submitted within the time-frame specified by EPA and must specify how the NOI has been amended to address the identified concerns.
- (v) The NOI must be signed and certified in accordance with Parts IV.H.1 and 4. Signature for the NOI, which effectively takes the place of an individual permit application, may not be delegated to a lower level under Part IV.H.2

b. Terminating Coverage.

- (i) A permittee may terminate coverage under this general permit by submitting a notice of termination (NOT). Authorization to discharge terminates at midnight on the day the NOT is post-marked for delivery to EPA.
- (ii) A permittee must submit an NOT to EPA within 30 days after the permittee:
 - (a) Ceases discharging storm water from the MS4,
 - (b) Ceases operations at the MS4, or
 - (c) Transfers ownership of or responsibility for the facility to another operator.
- (iii) The NOT will consist of a letter to EPA and must include the following information:
 - (a) Name, mailing address, and location of the MS4 for which the notification is submitted;
 - (b) The name, address and telephone number of the operator addressed by the NOT;
 - (c) The NPDES permit number for the MS4;
 - (d) An indication of whether another operator has assumed responsibility for the MS4, the discharger has ceased operations at the MS4, or the storm water discharges have been eliminated; and
 - (e) The following certification:

I certify under penalty of law that all storm water discharges from the identified MS4 that are authorized by an NPDES general permit have been eliminated, or that I am no longer the operator of the MS4, or that I have ceased operations at the MS4. I understand that by submitting this Notice of Termination I am no longer authorized to discharge storm water under this general permit, and that discharging pollutants in storm water to waters of the United States is unlawful under the Clean Water Act where the discharge is not authorized by an NPDES permit. I also understand that the submission of this Notice of Termination does not release an operator from liability for any violations of this permit or the Clean Water Act.

- (f) NOTs, signed in accordance with Part IV.H.1 of this permit, must be sent to the e-mail address in Part I.B.3. Electronic submittal of the NOT required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

B. NOTICE OF INTENT REQUIREMENTS

1. Deadlines for Notification.

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

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

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

Table 1 Deadlines to Submit NOI

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

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

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

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

2. **Contents of Notice of Intent.** An MS4 operator eligible for coverage under this general permit must submit an NOI to discharge under this general permit. The NOI will consist of a letter to EPA containing the following information (see suggested EPA R6 MS4 NOI Format located in EPA website at <http://www.epa.gov/region6/water/npdes/sw/ms4/index.htm>) and must be signed in accordance with Part IV.H of this permit:

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

Note: If an individual permittee or a group of permittees seeks an alternative sub-measurable goal for TMDL controls under Part I.C.2.b.(i).(c).B, the permittee or a group of permittees must submit a preliminary proposal with the NOI. This proposal shall include, but is not limited to, the elements included in Appendix B under Section B.2.

- l. Signature and certification by an appropriate official (see Part IV.H). The NOI must include the certification statement from Part IV.H.4.

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

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

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

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

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

C. SPECIAL CONDITIONS

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

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

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

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

(v) Account of stakeholder involvement in the process.

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

COA and AMAFCA Channel Drainage Areas:

- San Jose Drain
- North Diversion Channel

Bernalillo County Channel Drainage Areas:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(**) or MS4s designated by the Director

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

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

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

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

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

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

(**) or MS4s designated by the Director

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

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

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

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

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

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

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

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

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

Notes:

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

(a) The revised strategy shall include:

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

(b) Reporting: The COA and AMAFCA shall provide

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

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

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

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

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

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

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

D. STORMWATER MANAGEMENT PROGRAM (SWMP)

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

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

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

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

3. **Shared Responsibility and Cooperative Programs.**

- a. The SWMP, in addition to any interagency or inter-jurisdictional agreement(s) among permittees, (e.g., the Joint Powers Agreement to be entered into by the permittees), shall clearly identify the roles and responsibilities of each permittee.
- b. Implementation of the SWMP may be achieved through participation with other permittees, public agencies, or private entities in cooperative efforts to satisfy the requirements of Part I.D in lieu of creating duplicate program elements for each individual permittee.
 - (i) Implementation of one or more of the control measures may be shared with another entity, or the entity may fully take over the measure. A permittee may rely on another entity only if:
 - (a) the other entity, in fact, implements the control measure;
 - (b) the control measure, or component of that measure, is at least as stringent as the corresponding permit requirement; or,
 - (c) the other entity agrees to implement the control measure on the permittee's behalf. Written acceptance of this obligation is expected. The permittee must maintain this obligation as part of the SWMP description. If the other entity agrees to report on the minimum measure, the permittee must supply the other entity with the reporting requirements in Part III.D of this permit. The permittee remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure component.
- c. Each permittee shall provide adequate finance, staff, equipment, and support capabilities to fully implement its SWMP and all requirements of this permit.

4. **Measurable Goals.** The permittees shall control the discharge of pollutants from its MS4. The permittee shall implement the provisions set forth in Part I.D.5 below, and shall at a minimum incorporate into the SWMP the control measures listed in Part I.D.5 below. The SWMP shall include measurable goals, including interim milestones, for each control measure, and as appropriate, the months and years in which the MS4 will undertake the required actions and the frequency of the action.

5. **Control Measures.**

a. **Construction Site Stormwater Runoff Control.**

- (i) The permittee shall develop, revise, implement, and enforce a program to reduce pollutants in any stormwater runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of stormwater discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. **Permittees previously covered under permit NMS000101 or NMR040000 must continue existing programs, updating as necessary, to comply with the requirements of this permit.** (Note: Highway Departments and Flood Control Authorities may only apply the construction site stormwater management program to the permittees's own construction projects)
- (ii) The program must include the development, implementation, and enforcement of, at a minimum:
 - (a) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal or local law;
 - (b) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices (both structural and non-structural);
 - (c) Requirements for construction site operators to control waste such as, but not limited to, discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality (see EPA guidance at <http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=117>);
 - (d) Procedures for site plan review which incorporate consideration of potential water quality impacts. The site plan review must be conducted prior to commencement of construction activities, and include a review of the site design, the planned operations at the construction site, the planned control measures during the construction phase (including the technical criteria for selection of the control measures), and the planned controls to be used to manage runoff created after the development;
 - (e) Procedures for receipt and consideration of information submitted by the public;
 - (f) Procedures for site inspection (during construction) and enforcement of control measures, including provisions to ensure proper construction, operation, maintenance, and repair. The procedures must clearly define who is responsible for site inspections; who has the authority to implement enforcement procedures; and the steps utilized to identify priority sites for inspection and enforcement based on the nature of the construction activity, topography, and the characteristics of soils and the quality of the receiving water. If a construction site operator fails to comply with procedures or policies established by the permittee, the permittee may request EPA enforcement assistance. The site inspection and enforcement procedures must describe sanctions and enforcement mechanism(s) for violations of permit requirements and penalties with detail regarding corrective action follow-up procedures, including enforcement escalation procedures for recalcitrant or repeat offenders. Possible sanctions include non-monetary penalties (such as stop work orders and/or permit denials for non-compliance), as well as monetary penalties such as fines and bonding requirements;
 - (g) Procedures to educate and train permittee personnel involved in the planning, review, permitting, and/or approval of construction site plans, inspections and enforcement. Education and training shall also be provided for developers, construction site operators, contractors and supporting personnel, including requiring a stormwater pollution prevention plan for construction sites within the permittee's jurisdiction;
 - (h) Procedures for keeping records of and tracking all regulated construction activities within the MS4, i.e. site reviews, inspections, inspection reports, warning letters and other enforcement documents. A

summary of the number and frequency of site reviews, inspections (including inspector's checklist for oversight of sediment and erosion controls and proper disposal of construction wastes) and enforcement activities that are conducted annually and cumulatively during the permit term shall be included in each annual report; and

- (iii) Annually conduct site inspections of 100 percent of all construction projects cumulatively disturbing one (1) or more acres within the MS4 jurisdiction. Site inspections are to be followed by any necessary compliance or enforcement action. Follow-up inspections are to be conducted to ensure corrective maintenance has occurred; and, all projects must be inspected at completion for confirmation of final stabilization.
- (iv) The permittee must coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area to ensure that the construction stormwater runoff controls eliminate erosion and maintain sediment on site. Planning documents include, but are not limited to: comprehensive or master plans, subdivision ordinances, general land use plan, zoning code, transportation master plan, specific area plans, such as sector plan, site area plans, corridor plans, or unified development ordinances.
- (v) The site plan review required in Part I.D.5.a.(ii)(d) must include an evaluation of opportunities for use of GI/LID/Sustainable practices and when the opportunity exists, encourage project proponents to incorporate such practices into the site design to mimic the pre-development hydrology of the previously undeveloped site. For purposes of this permit, pre-development hydrology shall be met according to Part I.D.5.b of this permit. (consistent with any limitations on that capture). Include a reporting requirement of the number of plans that had opportunities to implement these practices and how many incorporated these practices.
- (vi) The permittee must include in the SWMP a description of the mechanism(s) that will be utilized to comply with each of the elements required in Part I.D.5.a.(i) throughout Part I.D.5.a.(v), including description of each individual BMP (both structural or non-structural) or source control measures and its corresponding measurable goal.
- (vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report. The permittee must include in each annual report:
 - (a) A summary of the frequency of site reviews, inspections and enforcement activities that are conducted annually and cumulatively during the permit term.
 - (b) The number of plans that had the opportunity to implement GI/LID/Sustainable practices and how many incorporated the practices.

Program Flexibility Elements

- (viii) The permittee may use storm water educational materials locally developed or provided by the EPA (refer to <http://water.epa.gov/polwaste/npdes/swbmp/index.cfm>, <http://www.epa.gov/smartgrowth/parking.htm>, <http://www.epa.gov/smartgrowth/stormwater.htm>), the NMED, environmental, public interest or trade organizations, and/or other MS4s.
- (ix) The permittee may develop or update existing construction handbooks (e.g., the COA NPDES Stormwater Management Guidelines for Construction and Industrial Activities Handbook) to be consistent with promulgated construction and development effluent limitation guidelines.
- (x) The construction site inspections required in Part I.D.5.a.(iii) may be carried out in conjunction with the permittee's building code inspections using a screening prioritization process.

Table 2. Construction Site Stormwater Runoff Control - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Development of an ordinance or other regulatory mechanism as required in Part I.D.5.a.(ii)(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of the permit
Develop requirements and procedures as required in Part I.D.5.a.(ii)(b) through in Part I.D.5.a.(ii)(h)	Ten (10) months from effective date of permit	Thirteen (13) months from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Annually conduct site inspections of 100 percent of all construction projects cumulatively disturbing one (1) or more acres as required in Part I.D.5.a.(iii)	Ten (10) months from effective date of permit	Start Thirteen (13) months from effective date of permit and annually thereafter	Start Sixteen (16) months from effective date of permit and annually thereafter	Start eighteen (18) months from effective date of permit and thereafter	Start two (2) years from effective date of permit and thereafter
Coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area as required in Part I.D.5.a.(iv)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Evaluation of GI/LID/Sustainable practices in site plan reviews as required in Part I.D.5.a.(v)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.a.(vi) and in Part I.D.5.a.(vii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include program elements in Part I.D.5.a.(viii) through Part I.D.5.a.(x)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs. (**) or MS4s designated by the Director

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

b. Post-Construction Stormwater Management in New Development and Redevelopment

(i) The permittee must develop, revise, implement, and enforce a program to address stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the MS4. The program must ensure that controls are in place that would prevent or minimize water quality impacts. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs, updating as necessary, to comply with the requirements of this permit.** (Note: Highway Departments and Flood Control Authorities may only apply the post-construction stormwater management program to the permittee's own construction projects)

(ii) The program must include the development, implementation, and enforcement of, at a minimum:

(a) Strategies which include a combination of structural and/or non-structural best management practices (BMPs) to control pollutants in stormwater runoff.

(b) An ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law. The ordinance or policy must:

Incorporate a stormwater quality design standard that manages on-site the 90th percentile storm event discharge volume associated with new development sites and 80th percentile storm event discharge volume associated with redevelopment sites, through stormwater controls that infiltrate, evapotranspire the discharge volume, except in instances where full compliance cannot be achieved, as provided in Part I.D.5.b.(v). The stormwater from rooftop discharge may be harvested and used on-site for non-commercial use. Any controls utilizing impoundments that are also used for flood control that are located in areas where the New Mexico Office of the State Engineer requirements at NMAC 19.26.2.15 (see also Section 72-5-32 NMSA) apply must drain within 96 hours unless the state engineer has issued a waiver to the owner of the impoundment.

Options to implement the site design standard include, but not limited to: management of the discharge volume achieved by canopy interception, soil amendments, rainfall harvesting, rain tanks and cisterns, engineered infiltration, extended filtration, dry swales, bioretention, roof top disconnections, permeable pavement, porous concrete, permeable pavers, reforestation, grass channels, green roofs and other appropriate techniques, and any combination of these practices, including implementation of other stormwater controls used to reduce pollutants in stormwater (e.g., a water quality facility).

Estimation of the 90th or 80th percentile storm event discharge volume is included in EPA Technical Report entitled "*Estimating Predevelopment Hydrology in the Middle Rio Grande Watershed, New Mexico, EPA Publication Number 832-R-14-007*". Permittees can also estimate:

Option A: a site specific 90th or 80th percentile storm event discharge volume using methodology specified in the referenced EPA Technical Report.

Option B: a site specific pre-development hydrology and associated storm event discharge volume using methodology specified in the referenced EPA technical Report.

(c) The permittee must ensure the appropriate implementation of the structural BMPs by considering some or all of the following: pre-construction review of BMP designs; inspections during construction to verify BMPs are built as designed; post-construction inspection and maintenance of BMPs; and penalty provisions for the noncompliance with preconstruction BMP design; failure to construct BMPs

in accordance with the agreed upon pre-construction design; and ineffective post-construction operation and maintenance of BMPs;

- (d) The permittee must ensure that the post-construction program requirements are constantly reviewed and revised as appropriate to incorporate improvements in control techniques;
 - (e) Procedure to develop and implement an educational program for project developers regarding designs to control water quality effects from stormwater, and a training program for plan review staff regarding stormwater standards, site design techniques and controls, including training regarding GI/LID/Sustainability practices. Training may be developed independently or obtained from outside resources, i.e. federal, state, or local experts;
 - (f) Procedures for site inspection and enforcement to ensure proper long-term operation, maintenance, and repair of stormwater management practices that are put into place as part of construction projects/activities. Procedure(s) shall include the requirement that as-built plans be submitted within ninety (90) days of completion of construction projects/activities that include controls designed to manage the stormwater associated with the completed site (post-construction stormwater management). Procedure(s) may include the use of dedicated funds or escrow accounts for development projects or the adoption by the permittee of all privately owned control measures. This may also include the development of maintenance contracts between the owner of the control measure and the permittee. The maintenance contract shall include verification of maintenance practices by the owner, allows the MS4 owner/operator to inspect the maintenance practices, and perform maintenance if inspections indicate neglect by the owner;
 - (g) Procedures to control the discharge of pollutants related to commercial application and distribution of pesticides, herbicides, and fertilizers where permittee(s) hold jurisdiction over lands not directly owned by that entity (e.g., incorporated city). The procedures must ensure that herbicides and pesticides applicators doing business within the permittee's jurisdiction have been properly trained and certified, are encouraged to use the least toxic products, and control use and application rates according to the applicable requirements; and
 - (h) Procedure or system to review and update, as necessary, the existing program to ensure that stormwater controls or management practices for new development and redevelopment projects/activities continue to meet the requirements and objectives of the permit.
- (iii) The permittee must coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private new development and redevelopment projects/activities within the permit area to ensure the hydrology associated with new development and redevelopment sites mimic to the extent practicable the pre-development hydrology of the previously undeveloped site, except in instances where the pre-development hydrology requirement conflicts with applicable water rights appropriation requirements. For purposes of this permit, pre-development hydrology shall be met by capturing the 90th percentile storm event runoff (consistent with any limitations on that capture) which under undeveloped natural conditions would be expected to infiltrate or evapotranspire on-site and result in little, if any, off-site runoff. (Note: This permit does not prevent permittees from requiring additional controls for flood control purposes.) Planning documents include, but are not limited to: comprehensive or master plans, subdivision ordinances, general land use plan, zoning code, transportation master plan, specific area plans, such as sector plan, site area plans, corridor plans, or unified development ordinances.
- (iv) The permittee must assess all existing codes, ordinances, planning documents and other applicable regulations, for impediments to the use of GI/LID/Sustainable practices. The assessment shall include a list of the identified impediments, necessary regulation changes, and recommendations and proposed schedules to incorporate policies and standards to relevant documents and procedures to maximize infiltration, recharge, water harvesting, habitat improvement, and hydrological management of stormwater runoff as allowed under the applicable water rights appropriation requirements. The permittee must develop a report of the assessment findings, which is to be used to provide information to the permittee, of the regulation changes necessary to remove impediments and allow implementation of these practices.

- (v) Alternative Compliance for Infeasibility due to Site Constrains:
- (a) Infeasibility to manage the design standard volume specified in Part I(D)(5)(b)(ii)(b), or a portion of the design standard volume, onsite may result from site constraints including the following:
 - A. too small a lot outside of the building footprint to create the necessary infiltrative capacity even with amended soils;
 - B. soil instability as documented by a thorough geotechnical analysis;
 - C. a site use that is inconsistent with capture and reuse of storm water;
 - D. other physical conditions; or,
 - E. to comply with applicable requirements for on-site flood control structures leaves insufficient area to meet the standard.
 - (b) A determination that it is infeasible to manage the design standard volume specified in Part I.D.5.b.(ii)(b), or a portion of the design standard volume, on site may not be based solely on the difficulty or cost of implementing onsite control measures, but must include multiple criteria that rule out an adequate combination of the practices set forth in Part I.D,5.b.(v).
 - (c) This permit does not prevent imposition of more stringent requirements related to flood control. Where both the permittee's site design standard ordinance or policy and local flood control requirements on site cannot be met due to site conditions, the standard may be met through a combination of on-site and off-site controls.
 - (d) Where applicable New Mexico water law limits the ability to fully manage the design standard volume on site, measures to minimize increased discharge consistent with requirements under New Mexico water law must still be implemented.
 - (e) In instances where an alternative to compliance with the standard on site is chosen, technical justification as to the infeasibility of on-site management of the entire design standard volume, or a portion of the design standard volume, is required to be documented by submitting to the permittee a site-specific hydrologic and/or design analysis conducted and endorsed by a registered professional engineer, geologist, architect, and/or landscape architect.
 - (f) When a Permittee determines a project applicant has demonstrated infeasibility due to site constraints specified in Part I.D.5.b.(v) to manage the design standard volume specified in Part I.D.5.b.(ii).(b) or a portion of the design standard volume on-site, the Permittee shall require one of the following mitigation options:
 - A. *Off-site mitigation.* The off-site mitigation option only applies to redevelopment sites and cannot be applied to new development. Management of the standard volume, or a portion of the volume, may be implemented at another location within the MS4 area, approved by the permittee. The permittee shall identify priority areas within the MS4 in which mitigation projects can be completed. The permittee shall determine who will be responsible for long-term maintenance on off-site mitigation projects.
 - B. *Ground Water Replenishment Project:* Implementation of a project that has been determined to provide an opportunity to replenish regional ground water supplies at an offsite location.
 - C. *Payment in lieu.* Payment in lieu may be made to the permittee, who will apply the funds to a public stormwater project. MS4s shall maintain a publicly accessible database of approved projects for which these payments may be used.

D. Other. In a situation where alternative options A through C above are not feasible and the permittee wants to establish another alternative option for projects, the permittee may submit to the EPA for approval, the alternative option that meets the standard.

- (vi) The permittee must estimate the number of acres of impervious area (IA) and directly connected impervious area (DCIA). For the purpose of this part, IA includes conventional pavements, sidewalks, driveways, roadways, parking lots, and rooftops. DCIA is the portion of IA with a direct hydraulic connection to the permittee's MS4 or a waterbody via continuous paved surfaces, gutters, pipes, and other impervious features. DCIA typically does not include isolated impervious areas with an indirect hydraulic connection to the MS4 (e.g., swale or detention basin) or that otherwise drain to a pervious area.
- (vii) The permittee must develop an inventory and priority ranking of MS4-owned property and infrastructure (including public right-of-way) that may have the potential to be retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges to and from its MS4. In determining the potential for retrofitting, the permittee shall consider factors such as the complexity and cost of implementation, public safety, access for maintenance purposes, subsurface geology, depth to water table, proximity to aquifers and subsurface infrastructure including sanitary sewers and septic systems, and opportunities for public use and education under the applicable water right requirements and restrictions. In determining its priority ranking, the permittee shall consider factors such as schedules for planned capital improvements to storm and sanitary sewer infrastructure and paving projects; current storm sewer level of service and control of discharges to impaired waters, streams, and critical receiving water (drinking water supply sources);
- (viii) The permittee must incorporate watershed protection elements into relevant policy and/or planning documents as they come up for regular review. If a relevant planning document is not scheduled for review during the term of this permit, the permittee must identify the elements that cannot be implemented until that document is revised, and provide to EPA and NMED a schedule for incorporation and implementation not to exceed five years from the effective date of this permit. As applicable to each permittee's MS4 jurisdiction, policy and/or planning documents must include the following:
 - (a) A description of master planning and project planning procedures to control the discharge of pollutants to and from the MS4.
 - (b) Minimize the amount of impervious surfaces (roads, parking lots, roofs, etc.) within each watershed, by controlling the unnecessary creation, extension and widening of impervious parking lots, roads and associated development. The permittee may evaluate the need to add impervious surface on a case-by-case basis and seek to identify alternatives that will meet the need without creating the impervious surface.
 - (c) Identify environmentally and ecologically sensitive areas that provide water quality benefits and serve critical watershed functions within the MS4 and ensure requirements to preserve, protect, create and/or restore these areas are developed and implemented during the plan and design phases of projects in these identified areas. These areas may include, but are not limited to critical watersheds, floodplains, and areas with endangered species concerns and historic properties. Stakeholders shall be consulted as appropriate.
 - (d) Implement stormwater management practices that minimize water quality impacts to streams, including disconnecting direct discharges to surface waters from impervious surfaces such as parking lots.
 - (e) Implement stormwater management practices that protect and enhance groundwater recharge as allowed under the applicable water rights laws.
 - (f) Seek to avoid or prevent hydromodification of streams and other water bodies caused by development, including roads, highways, and bridges.

- (g) Develop and implement policies to protect native soils, prevent topsoil stripping, and prevent compaction of soils.
- (h) The program must be specifically tailored to address local community needs (e.g. protection to drinking water sources, reduction of water quality impacts) and must be designed to attempt to maintain pre-development runoff conditions.
- (ix) The permittee must update the SWMP as necessary to include a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.b.(i) throughout Part I.D.5.b.(viii) as well as the citations and descriptions of design standards for structural and non-structural controls to control pollutants in stormwater runoff, including discussion of the methodology used during design for estimating impacts to water quality and selecting structural and non-structural controls. Description of measurable goals for each BMP (structural or non-structural) or each stormwater control must be included in the SWMP.
- (x) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report. The following information must be included in each annual report:
 - (a) Include a summary and analysis of all maintenance, inspections and enforcement, and the number and frequency of inspections performed annually.
 - (b) A cumulative listing of the annual modifications made to the Post-Construction Stormwater Management Program during the permit term, and a cumulative listing of annual revisions to administrative procedures made or ordinances enacted during the permit term.
 - (c) According to the schedule presented in the Program Development and Implementation Schedule in Table 3, the permittee must
 - A. Report the number of MS4-owned properties and infrastructure that have been retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges. The permittee may also include in its annual report non-MS4 owned property that has been retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges.
 - B. As required in Part I.D.5.b.(vi), report the tabulated results for IA and DCIA and its estimation methodology. In each subsequent annual report, the permittee shall estimate the number of acres of IA and DCIA that have been added or removed during the prior year. The permittee shall include in its estimates the additions and reductions resulting from development, redevelopment, or retrofit projects undertaken directly by the permittee; or by private developers and other parties in a voluntary manner on in compliance with the permittee's regulations.

Program Flexibility Elements:

- (xi) The permittee may use storm water educational materials locally developed or provided by EPA (refer to <http://water.epa.gov/polwaste/npdes/swbmp/index.cfm>, <http://www.epa.gov/smartgrowth/parking.htm>, and <http://www.epa.gov/smartgrowth/stormwater.htm>); the NMED; environmental, public interest or trade organizations; and/or other MS4s.
- (xii) When choosing appropriate BMPs, the permittee may participate in locally-based watershed planning efforts, which attempt to involve a diverse group of stakeholders including interested citizens. When developing a program that is consistent with this measure's intent, the permittee may adopt a planning process that identifies the municipality's program goals (e.g., minimize water quality impacts resulting from post-construction runoff from new development and redevelopment), implementation strategies (e.g., adopt a combination of structural and/or non-structural BMPs), operation and maintenance policies and procedures, and enforcement procedures.

- (xiii) The permittee may incorporate the following elements in the Post-Construction Stormwater Management in New Development and Redevelopment program required in Part I.D.5.b.(ii)(b):
- (a) Provide requirements and standards to direct growth to identified areas to protect environmentally and ecologically sensitive areas such as floodplains and/or other areas with endangered species and historic properties concerns;
 - (b) Include requirements to maintain and/or increase open space/buffers along sensitive water bodies, minimize impervious surfaces, and minimize disturbance of soils and vegetation; and
 - (c) Encourage infill development in higher density urban areas, and areas with existing storm sewer infrastructure.

Table 3. Post-Construction Stormwater Management in New Development and Redevelopment - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Development of strategies as required in Part I.D.5.b.(ii).(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Development of an ordinance or other regulatory mechanism as required in Part I.D.5.b.(ii).(b)	Twenty (24) months from effective date of permit	Thirty (30) months from effective date of permit	Thirty six (36) months from effective date of permit	Thirty six (36) months from effective date of permit	Thirty six (36) months from effective date of permit
Implementation and enforcement, via the ordinance or other regulatory mechanism, of site design standards as required in Part I.D.5.b.(ii).(b)	Within thirty six (36) months from effective date of the permit	Within forty two (42) months from the effective date of the permit	Within forty eight (48) months from effective date of the permit	Within forty eight (48) months from effective date of the permit	Within forty eight (48) months from effective date of the permit
Ensure appropriate implementation of structural controls as required in Part I.D.5.b.(ii).(c) and Part I.D.5.b.(ii).(d)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop procedures as required in Part I.D.5.b.(ii).(e), Part I.D.5.b.(ii).(f), Part I.D.5.b.(ii).(g), and Part I.D.5.b.(ii).(h)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit

Coordinate internally with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area as required in Part I.D.5.b.(iii)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	One (1) year from effective date of permit
As required in Part I.D.5.b.(iv), the permittee must assess all existing codes, ordinances, planning documents and other applicable regulations, for impediments to the use of GI/LID/Sustainable practices	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit
As required in Part I.D.5.b.(iv), develop and submit a report of the assessment findings on GI/LID/Sustainable practices.	Eleven (11) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Twenty seven (27) months from effective date of permit
Estimation of the number of acres of IA and DCIA as required in Part I.D.5.b.(vi)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Inventory and priority ranking as required in section in Part I.D.5.b.(vii)	Within fifteen (15) months from effective date of the permit	Within twenty four (24) months from effective date of the permit	Within thirty six (36) months from effective date of the permit	Within thirty six (36) months from effective date of the permit	Within forty two (42) months from effective date of the permit
Incorporate watershed protection elements as required in Part I.D.5.b.(viii)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.b.(ix) and Part I.D.5.b.(x).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include program elements in Part I.D.5.b.(xi) and Part I.D.5.b.(xii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

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

(**) or MS4s designated by the Director

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

c. Pollution Prevention/Good Housekeeping for Municipal/Co-permittee Operations.

- (i) The permittee must develop, revise and implement an operation and maintenance program that includes a training component and the ultimate goal of preventing or reducing pollutant runoff from municipal operations. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The program must include:
- (a) Development and implementation of an employee training program to incorporate pollution prevention and good housekeeping techniques into everyday operations and maintenance activities. The employee training program must be designed to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance. The permittee must also develop a tracking procedure and ensure that employee turnover is considered when determining frequency of training;
 - (b) Maintenance activities, maintenance schedules, and long term inspections procedures for structural and non-structural storm water controls to reduce floatable, trash, and other pollutants discharged from the MS4.
 - (c) Controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations, snow disposal areas operated by the permittee, and waste transfer stations;
 - (d) Procedures for properly disposing of waste removed from the separate storm sewers and areas listed in Part I.D.5.c.(i).(c) (such as dredge spoil, accumulated sediments, floatables, and other debris); and
 - (e) Procedures to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection devices or practices.

Note: The permittee may use training materials that are available from EPA, NMED, Tribe, or other organizations.

- (ii) The Pollution Prevention/Good Housekeeping program must include the following elements:
- (a) Develop or update the existing list of all stormwater quality facilities by drainage basin, including location and description;
 - (b) Develop or modify existing operational manual for de-icing activities addressing alternate materials and methods to control impacts to stormwater quality;
 - (c) Develop or modify existing program to control pollution in stormwater runoff from equipment and vehicle maintenance yards and maintenance center operations located within the MS4;
 - (d) Develop or modify existing street sweeping program. Assess possible benefits from changing frequency or timing of sweeping activities or utilizing different equipment for sweeping activities;
 - (e) A description of procedures used by permittees to target roadway areas most likely to contribute pollutants to and from the MS4 (i.e., runoff discharges directly to sensitive receiving water, roadway receives majority of de-icing material, roadway receives excess litter, roadway receives greater loads of oil and grease);
 - (f) Develop or revise existing standard operating procedures for collection of used motor vehicle fluids (at a minimum oil and antifreeze) and toxics (including paint, solvents, fertilizers, pesticides, herbicides,

and other hazardous materials) used in permittee operations or discarded in the MS4, for recycle, reuse, or proper disposal;

- (g) Develop or revised existing standard operating procedures for the disposal of accumulated sediments, floatables, and other debris collected from the MS4 and during permittee operations to ensure proper disposal;
 - (h) Develop or revised existing litter source control programs to include public awareness campaigns targeting the permittee audience; and
 - (i) Develop or review and revise, as necessary, the criteria, procedures and schedule to evaluate existing flood control devices, structures and drainage ways to assess the potential of retrofitting to provide additional pollutant removal from stormwater. Implement routine review to ensure new and/or innovative practices are implemented where applicable.
 - (j) Enhance inspection and maintenance programs by coordinating with maintenance personnel to ensure that a target number of structures per basin are inspected and maintained per quarter;
 - (k) Enhance the existing program to control the discharge of floatables and trash from the MS4 by implementing source control of floatables in industrial and commercial areas;
 - (l) Include in each annual report, a cumulative summary of retrofit evaluations conducted during the permit term on existing flood control devices, structures and drainage ways to benefit water quality. Update the SWMP to include a schedule (with priorities) for identified retrofit projects;
 - (m) Flood management projects: review and revise, as necessary, technical criteria guidance documents and program for the assessment of water quality impacts and incorporation of water quality controls into future flood control projects. The criteria guidance document must include the following elements:
 - A. Describe how new flood control projects are assessed for water quality impacts.
 - B. Provide citations and descriptions of design standards that ensure water quality controls are incorporated in future flood control projects.
 - C. Include method for permittees to update standards with new and/or innovative practices.
 - D. Describe master planning and project planning procedures and design review procedures.
 - (n) Develop procedures to control the discharge of pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied, by the permittee's employees or contractors, to public right-of-ways, parks, and other municipal property. The permittee must provide an updated description of the data monitoring system for all permittee departments utilizing pesticides, herbicides and fertilizers.
- (iii) Comply with the requirements included in the EPA Multi Sector General Permit (MSGP) to control runoff from industrial facilities (as defined in 40 CFR 122.26(b)(14)(i)-(ix) and (xi)) owned or operated by the permittees and ultimately discharge to the MS4. The permittees must develop or update:
- (a) A list of municipal/permittee operations impacted by this program,
 - (b) A map showing the industrial facilities owned and operated by the MS4,
 - (c) A list of the industrial facilities (other than large construction activities defined as industrial activity) that will be included in the industrial runoff control program by category and by basin. The list must include the permit authorization number or a MSGP NOI ID for each facility as applicable.

- (iv) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.c.(i) throughout Part I.D.5.c.(iii) and its corresponding measurable goal.
- (v) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Table 4. Pollution Prevention/Good Housekeeping for Municipal/Co-permittee Operations - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
-Develop or update the Pollution Prevention/Good House Keeping program to include the elements in Part I.D.5.c.(i)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit	Fourteen (14) months from effective date of the permit	Eighteen (18) months from effective date of the permit
-Enhance the program to include the elements in Part I.D.5.c.(ii)	Ten (10) months from effective date of the permit	One (1) year from effective date of the permit	Two (2) years from effective date of the permit	Two (2) years from effective date of the permit	Thirty (30) months from effective date of the permit
-Develop or update a list and a map of industrial facilities owned or operated by the permittee as required in Part I.D.5.c.(iii)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit	One (1) year from effective date of the permit	Eighteen (18) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.c.(iv) and Part I.D.5.c.(v)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

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

(**) or MS4s designated by the Director

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

d. Industrial and High Risk Runoff (Applicable only to Class A permittees)

- (i) The permittee must control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity as defined in 40 CFR 122.26(b)(14)(i)-(ix) and (xi). If no such industrial activities are in a permittees jurisdiction, that permittee may certify that this program element does not apply.
- (ii) The permittee must continue implementation and enforcement of the Industrial and High Risk Runoff program, assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the annual report. The program shall include:
 - (a) A description of a program to identify, monitor, and control pollutants in stormwater discharges to the MS4 from municipal landfills; other treatment, storage, or disposal facilities for municipal waste (e.g. transfer stations, incinerators, etc.); hazardous waste treatment, storage, disposal and recovery facilities; facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee(s) determines are contributing a substantial pollutant loading to the

MS4. (Note: If no such facilities are in a permittees jurisdiction, that permittee may certify that this program element does not apply.); and

- (b) Priorities and procedures for inspections and establishing and implementing control measures for such discharges.
- (iii) Permittees must comply with the monitoring requirements specified in Part III.A.4;
- (iv) The permittee must modify the following as necessary:
 - (a) The list of the facilities included in the program, by category and basin;
 - (b) Schedules and frequency of inspection for listed facilities. Facility inspections may be carried out in conjunction with other municipal programs (e.g. pretreatment inspections of industrial users, health inspections, fire inspections, etc.), but must include random inspections for facilities not normally visited by the municipality;
 - (c) The priorities for inspections and procedures used during inspections (e.g. inspection checklist, review for NPDES permit coverage; review of stormwater pollution prevention plan; etc.); and
 - (d) Monitoring frequency, parameters and entity performing monitoring and analyses (MS4 permittees or subject facility). The monitoring program may include a waiver of monitoring for parameters at individual facilities based on a “no-exposure” certification;
- (v) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.d.(i) throughout Part I.D.5.d.(iv) and its corresponding measurable goal.
- (vi) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Program Flexibility Elements:

- (vii) The permittee may:
 - (a) Use analytical monitoring data, on a parameter-by-parameter basis, that a facility has collected to comply with or apply for a State or NPDES discharge permit (other than this permit), so as to avoid unnecessary cost and duplication of effort;
 - (b) Allow the facility to test only one (1) outfall and to report that the quantitative data also apply to the substantially identical outfalls if:
 - A. A Type 1 or Type 2 industrial facility has two (2) or more outfalls with substantially identical effluents, and
 - B. Demonstration by the facility that the stormwater outfalls are substantially identical, using one (1) or all of the following methods for such demonstration. The NPDES Stormwater Sampling Guidance Document (EPA 833-B-92-001), available on EPA’s website at [provides](#) detailed guidance on each of the three options: (1) submission of a narrative description and a site map; (2) submission of matrices; or (3) submission of model matrices.
 - (c) Accept a copy of a “no exposure” certification from a facility made to EPA under 40 CFR §122.26(g), in lieu of analytic monitoring.

Table 5: Industrial and High Risk Runoff - Program Development and Implementation Schedules:

Activity	Permittee Class	
	A Phase I MS4s	Cooperative (*) Any Permittee with cooperative programs
Ordinance (or other control method) as required in Part I.D.5.d.(i)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Continue implementation and enforcement of the Industrial and High Risk Runoff program, assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the annual report as required in Part I.D.5.d.(ii)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Meet the monitoring requirements in Part I.D.5.d.(iii)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Include requirements in Part I.D.5.d.(iv)	Ten (10) months from permit effective date of the permit	Twelve (12) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.d.(v) and Part I.D.5.d.(vi)	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.d.(vii)	Update as necessary	Update as necessary

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

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

e. Illicit Discharges and Improper Disposal

- (i) The permittee shall develop, revise, implement, and enforce a program to detect and eliminate illicit discharges (as defined at 40 CFR 122.26(b)(2)) entering the MS4. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The permittee must:
 - (a) Develop, if not already completed, a storm sewer system map, showing the names and locations of all outfalls as well as the names and locations of all waters of the United States that receive discharges from those outfalls. Identify all discharges points into major drainage channels draining more than twenty (20) percent of the MS4 area;
 - (b) To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance or other regulatory mechanism, non-stormwater discharges into the MS4, and implement appropriate enforcement procedures and actions;
 - (c) Develop and implement a plan to detect and address non-stormwater discharges, including illegal dumping, to the MS4. The permittee must include the following elements in the plan:
 - A. Procedures for locating priority areas likely to have illicit discharges including field test for selected pollutant indicators (ammonia, boron, chlorine, color, conductivity, detergents, *E. coli*, enterococci, total coliform, fluoride, hardness, pH, potassium, conductivity, surfactants), and visually screening outfalls during dry weather;

- B. Procedures for enforcement, including enforcement escalation procedures for recalcitrant or repeat offenders;
 - C. Procedures for removing the source of the discharge;
 - D. Procedures for program evaluation and assessment; and
 - E. Procedures for coordination with adjacent municipalities and/or state, tribal, or federal regulatory agencies to address situations where investigations indicate the illicit discharge originates outside the MS4 jurisdiction.
- (d) Develop an education program to promote, publicize, and facilitate public reporting of illicit connections or discharges, and distribution of outreach materials. The permittee shall inform public employees, businesses and the general public of hazards associated with illegal discharges and improper disposal of waste.
- (e) Establish a hotline to address complaints from the public.
- (f) Investigate suspected significant/severe illicit discharges within forty-eight (48) hours of detection and all other discharges as soon as practicable; elimination of such discharges as expeditiously as possible; and, requirement of immediate cessation of illicit discharges upon confirmation of responsible parties.
- (g) Review complaint records for the last permit term and develop a targeted source reduction program for those illicit discharge/improper disposal incidents that have occurred more than twice in two (2) or more years from different locations. (Applicable only to class A and B permittees)
- (h) If applicable, implement the program using the priority ranking develop during last permit term
- (ii) The permittee shall address the following categories of non-stormwater discharges or flows (e.g., illicit discharges) only if they are identified as significant contributors of pollutants to the MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(90)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water.
- Note:* Discharges or flows from fire fighting activities are excluded from the effective prohibitions against non-stormwater and need only be addressed where they are identified a significant sources of pollutants to water of the United States).
- (iii) The permittee must screen the entire jurisdiction at least once every five (5) years and high priority areas at least once every year. High priority areas include any area where there is ongoing evidence of illicit discharges or dumping, or where there are citizen complaints on more than five (5) separate events within twelve (12) months. The permittee must:
- (a) Include in its SWMP document a description of the means, methods, quality assurance and controls protocols, and schedule for successfully implementing the required screening, field monitoring, laboratory analysis, investigations, and analysis evaluation of data collected.
 - (b) Comply with the dry weather screening program established in Table 6 and the monitoring requirements specified in Part III.A.2.
 - (c) If applicable, implement the priority ranking system develop in previous permit term.

- (iv) Waste Collection Programs: The permittee must develop, update, and implement programs to collect used motor vehicle fluids (at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal, and to collect household hazardous waste materials (including paint, solvents, fertilizers, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. Where available, collection programs operated by third parties may be a component of the programs. Permittees shall enhance these programs by establishing the following elements as a goal in the SWMP:
 - A. Increasing the frequency of the collection days hosted;
 - B. Expanding the program to include commercial fats, oils and greases; and
 - C. Coordinating program efforts between applicable permittee departments.
- (v) Spill Prevention and Response. The permittee must develop, update and implement a program to prevent, contain, and respond to spills that may discharge into the MS4. The permittees must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit. The Spill Prevention and Response program shall include:
 - (a) Where discharge of material resulting from a spill is necessary to prevent loss of life, personal injury, or severe property damage, the permittee(s) shall take, or insure the party responsible for the spill takes, all reasonable steps to control or prevent any adverse effects to human health or the environment: and
 - (b) The spill response program may include a combination of spill response actions by the permittee (and/or another public or private entity), and legal requirements for private entities within the permittee's municipal jurisdiction.
- (vi) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.e.(i) throughout Part I.D.5.e.(v) and its corresponding measurable goal. A description of the means, methods, quality assurance and controls protocols, and schedule for successfully implementing the required screening, field monitoring, laboratory analysis, investigations, and analysis evaluation of data collected
- (vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.
- (viii) The permittee must expeditiously revise as necessary, within nine (9) months from the effective date of the permit, the existing permitting/certification program to ensure that any entity applying for the use of Right of Way implements controls in their construction and maintenance procedures to control pollutants entering the MS4. (Only applicable to NMDOT)

Program Flexibility Elements

- (ix) The permittee may:
 - (a) Divide the jurisdiction into assessment areas where monitoring at fewer locations would still provide sufficient information to determine the presence or absence of illicit discharges within the larger area;
 - (b) Downgrade high priority areas after the area has been screened at least once and there are citizen complaints on no more than five (5) separate events within a twelve (12) month period;
 - (c) Rely on a cooperative program with other MS4s for detection and elimination of illicit discharges and illegal dumping;

- (d) If participating in a cooperative program with other MS4s, required detection program frequencies may be based on the combined jurisdictional area rather than individual jurisdictional areas and may use assessment areas crossing jurisdictional boundaries to reduce total number of screening locations (e.g., a shared single screening location that would provide information on more than one jurisdiction); and
- (e) After screening a non-high priority area once, adopt an “in response to complaints only” IDDE for that area provided there are citizen complaints on no more than two (2) separate events within a twelve (12) month period.
- (f) Enhance the program to utilize procedures and methodologies consistent with those described in “Illicit Discharge Detection and Elimination, A Guidance Manual for Program Development and Technical Assessments.”

Table 6. Illicit Discharges and Improper Disposal - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census ***)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Mapping as required in Part I.D.5.e.(i)(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Fourteen (14) months from effective date of permit
Ordinance (or other control method) as required in Part I.D.5.e.(i)(b)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop and implement a IDDE plan as required in Part I.D.5.e.(i)(c)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop an education program as required in Part I.D.5.e.(i)(d)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Establish a hotline as required in Part I.D.5.e.(i)(e)	Update as necessary	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Investigate suspected significant/severe illicit discharges as required in Part I.D.5.e.(i)(f)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Review complaint records and develop a targeted source reduction program as required in Part I.D.5.e.(i)(g)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	N/A	N/A	One (1) year from effective date of permit

Screening of system as required in Part I.D.5.e.(iii) as follows: a.) High priority areas**	1 / year	1 / year	1 / year	1 / year	1 / year
b.) Whole system	-Screen 20% of the MS4 per year	- Screen 20% of the MS4 per year	-Years 1 – 2: develop procedures as required in Part I.D.5.e.(i)(c) -Year 3: screen 30% of the MS4 -Year 4: screen 20% of the MS4 -Year 5: screen 50% of the MS4	-Years 1 – 2: develop procedures as required Part I.D.5.e.(i)(c) -Year 3: screen 30% of the MS4 -Year 4: screen 20% of the MS4 -Year 5: screen 50% of the MS4	-Years 1 – 3: develop procedures as require in Part I.D.5.e.(i)(c) -Year 4: screen 30% of the MS4 -Year 5: screen 70% of the MS4
Develop, update, and implement a Waste Collection Program as required in Part I.D.5.e.(iv)	Ten (10) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop, update and implement a Spill Prevention and Response program to prevent, contain, and respond to spills that may discharge into the MS4 as required in Part I.D.5.e.(v)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.e.(iii), Part I.D.5.e.(vi), and Part I.D.5.e.(vii).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.e.(ix)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

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

(**) High priority areas include any area where there is ongoing evidence of illicit discharges or dumping, or where there are citizen complaints on more than five (5) separate events within twelve (12) months (***) or MS4s designated by the Director

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

f. Control of Floatables Discharges

- (i) The permittee must develop, update, and implement a program to address and control floatables in discharges into the MS4. The floatables control program shall include source controls and, where necessary, structural controls. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The following elements must be included in the program:

- (a) Develop a schedule for implementation of the program to control floatables in discharges into the MS4 (Note: AMAFCA and the City of Albuquerque should update the schedule according to the findings of the 2005 AMAFCA/COA Floatable and Gross Pollutant Study and other studies); and
- (b) Estimate the annual volume of floatables and trash removed from each control facility and characterize the floatable type.
- (ii) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.f.(i).
- (iii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Table 7. Control of Floatables Discharges - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
- Develop a schedule to implement the program as required in Part I.D.5.f.(i)(a)	Ten (10) months from the effective date of the permit	Ten (10) months from the effective date of the permit	One (1) year from the effective date of the permit	One (1) year from the effective date of the permit	Eighteen (18) months from the effective date of the permit
-Estimate the annual volume of floatables and trash removed from each control facility and characterize the floatable type as required in Part I.D.5.f.(i)(b)	Ten (10) months from the effective date of the permit	One (1) year from the effective date of the permit	Two (2) years from the effective date of the permit	Two (2) years from the effective date of the permit	Thirty (30) months from the effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.f.(ii) and Part I.D.5.f.(iii).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

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

(**) or MS4s designated by the Director

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

g. Public Education and Outreach on Stormwater Impacts

- (i) The permittee shall, individually or cooperatively, develop, revise, implement, and maintain a comprehensive stormwater program to educate the community, employees, businesses, and the general public of hazards associated with the illegal discharges and improper disposal of waste and about the impact that stormwater discharges on local waterways, as well as the steps that the public can take to reduce pollutants in stormwater. **Permittees previously covered under NMS000101 and NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.**
- (ii) The permittee must implement a public education program to distribute educational knowledge to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff. The permittee must:

- (a) Define the goals and objectives of the program based on high priority community-wide issues;
 - (b) Develop or utilize appropriate educational materials, such as printed materials, billboard and mass transit advertisements, signage at select locations, radio advertisements, television advertisements, and websites;
 - (c) Inform individuals and households about ensuring proper septic system maintenance, ensuring the proper use and disposal of landscape and garden chemicals including fertilizers and pesticides, protecting and restoring riparian vegetation, and properly disposing of used motor oil or household hazardous wastes;
 - (d) Inform individuals and groups how to become involved in local stream and beach restoration activities as well as activities that are coordinated by youth service and conservation corps or other citizen groups;
 - (e) Use tailored public education program, using a mix of locally appropriate strategies, to target specific audiences and communities. Examples of strategies include distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age children, and conducting community-based projects such as storm drain stenciling, and watershed cleanups; and
 - (f) Use materials or outreach programs directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant stormwater impacts. For example, providing information to restaurants on the impact of grease clogging storm drains and to garages on the impact of oil discharges. The permittee may tailor the outreach program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as any special concerns relating to children. The permittee must make information available for non-English speaking residents, where appropriate.
- (iii) The permittee must include the following information in the Stormwater Management Program (SWMP) document:
- (a) A description of a program to promote, publicize, facilitate public reporting of the presence of illicit discharges or water quality associated with discharges from municipal separate storm sewers;
 - (b) A description of the education activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and
 - (c) A description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.g.(i) and Part I.D.5.g.(ii) and its corresponding measurable goal.
- (iv) The permittee must assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the Annual Report.

Program Flexibility Elements

- (v) Where necessary to comply with the Minimum Control Measures established in Part I.D.5.g.(i) and Part I.D.5.g.(ii), the permittee should develop a program or modify/revise an existing education and outreach program to:
 - (a) Promote, publicize, and facilitate the use of Green Infrastructure (GI)/Low Impact Development (LID)/Sustainability practices; and
 - (b) Include an integrated public education program (including all permittee departments and programs within the MS4) regarding litter reduction, reduction in pesticide/herbicide use, recycling and proper

disposal (including yard waste, hazardous waste materials, and used motor vehicle fluids), and GI/LID/Sustainable practices (including xeriscaping, reduced water consumption, water harvesting practices allowed by the New Mexico State Engineer Office).

- (vi) The permittee may collaborate or partner with other MS4 operators to maximize the program and cost effectiveness of the required outreach.
- (vii) The education and outreach program may use citizen hotlines as a low-cost strategy to engage the public in illicit discharge surveillance.
- (viii) The permittee may use stormwater educational materials provided by the State, Tribe, EPA, environmental, public interest or trade organizations, or other MS4s. The permittee may also integrate the education and outreach program with existing education and outreach programs in the Middle Rio Grande area. Example of existing programs include:
 - (a) Classroom education on stormwater;
 - A. Develop watershed map to help students visualize area impacted.
 - B. Develop pet-specific education
 - (b) Establish a water committee/advisor group;
 - (c) Contribute and participate in Stormwater Quality Team;
 - (d) Education/outreach for commercial activities;
 - (e) Hold regular employee trainings with industry groups
 - (f) Education of lawn and garden activities;
 - (g) Education on sustainable practices;
 - (h) Education/outreach of pet waste management;
 - (i) Education on the proper disposal of household hazardous waste;
 - (j) Education/outreach programs aimed at minority and disadvantaged communities and children;
 - (k) Education/outreach of trash management;
 - (l) Education/outreach in public events;
 - A. Participate in local events—brochures, posters, etc.
 - B. Participate in regional events (i.e., State Fair, Balloon Fiesta).
 - (m) Education/outreach using the media (e.g. publish local newsletters);
 - (n) Education/outreach on water conservation practices designed to reduce pollutants in storm water for home residences.

Table 8. Public Education and Outreach on Stormwater Impacts - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Develop, revise, implement, and maintain an education and outreach program as required in Part I.D.5.g.(i) and Part I.D.5.g.(ii)	Ten (10) months from the effective date of the permit	Eleven (11) months from the effective date of the permit	Twelve (12) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.g.(iii) and Part I.D.5.g.(iv)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.g.(v) through Part I.D.5.g.(viii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

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

(**) or MS4s designated by the Director

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

h. Public Involvement and Participation

- (i) The permittee must provide local public notice of and make available for public review a copy of the complete NOI and attachments (see Part I.B.2). Local public notice may be made by newspaper notice, notice at a council meeting, posting on the internet, or other method consistent with state/tribal/local public notice requirements.

The permittee must consider all public comments received during the public notice period and modify the NOI, or include a schedule to modify the SWMP, as necessary, or as required by the Director modify the NOI or/and SWMP in response to such comments. The Permittees must include in the NOI any unresolved public comments and the MS4's response to these comments. Responses provided by the MS4 will be considered as part of EPA's decision-making process. See also Appendix E Providing Comments or Requesting a Public Hearing on an Operator's NOI.

- (ii) **The permittee shall develop, revise, implement and maintain a plan to encourage public involvement and provide opportunities for participation in the review, modification and implementation of the SWMP; develop and implement a process by which public comments to the plan are received and reviewed by the person(s) responsible for the SWMP; and, make the SWMP available to the public and to the operator of any MS4 or Tribal authority receiving discharges from the MS4. Permittee previously covered under NMS000101 or NMR040000 must continue existing public involvement and participation programs while updating those programs, as necessary, to comply with the requirements of this permit.**

- (iii) The plan required in Part I.D.5.h.(ii) shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The permittee must include the following elements in the plan:
 - (a) A detailed description of the general plan for informing the public of involvement and participation opportunities, including types of activities; target audiences; how interested parties may access the SWMP; and how the public was involved in development of the SWMP;
 - (b) The development and implementation of at least one (1) assessment of public behavioral change following a public education and/or participation event;
 - (c) A process to solicit involvement by environmental groups, environmental justice communities, civic organizations or other neighborhoods/organizations interested in water quality-related issues, including but not limited to the Middle Rio Grande Water Quality Work Group, the Middle Rio Grande Bosque Initiative, the Middle Rio Grande Endangered Species Act Collaborative Program, the Middle Rio Grande-Albuquerque Reach Watershed Group, the Pueblos of Santa Ana, Sandia and Isleta, Albuquerque Bernalillo County Water Utility Authority, UNM Colleges and Schools, and Chartered Student Organizations; and
 - (d) An evaluation of opportunities to utilize volunteers for stormwater pollution prevention activities and awareness throughout the area.
- (iv) The permittee shall comply with State, Tribal and local public notice requirements when implementing a public involvement/ participation program.
- (v) The public participation process must reach out to all economic and ethnic groups. Opportunities for members of the public to participate in program development and implementation include serving as citizen representatives on a local stormwater management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other pre-existing programs, or participating in volunteer monitoring efforts.
- (vi) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Parts I.D.5.h.(i) throughout Part I.D.5.h.(iv) and its corresponding measurable goal.
- (vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.
- (viii) The permittee must provide public accessibility of the Storm Water Management Program (SWMP) document and Annual Reports online via the Internet and during normal business hours at the MS4 operator's main office, a local library, posting on the internet and/or other readily accessible location for public inspection and copying consistent with any applicable federal, state, tribal, or local open records requirements. Upon a showing of significant public interest, the MS4 operator is encouraged to hold a public meeting (or include in the agenda of in a regularly scheduled city council meeting, etc.) on the NOI, SWMP, and Annual Reports. (See Part III B)

Program Flexibility Elements

- (ix) The permittee may integrate the public Involvement and participation program with existing education and outreach programs in the Middle Rio Grande area. Example of existing programs include: Adopt-A-Stream Programs; Attitude Surveys; Community Hotlines (e.g. establishment of a "311"-type number and system established to handle storm-water-related concerns, setting up a public tracking/reporting

system, using phones and social media); Revegetation Programs; Storm Drain Stenciling Programs; Stream cleanup and Monitoring program/events.

Table 9. Public Involvement and Participation - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Develop (or update), implement, and maintain a public involvement and participation plan as required in Part I.D.5.h.(ii) and Part I.D.5.h.(iii)	Ten (10) months from effective date of the permit	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit
Comply with State, Tribal, and local notice requirements when implementing a Public Involvement and Participation Program as required in Part I.D.5.h.(iv)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	Twelve (12) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit
Include elements as required in Part I.D.5.h.(v)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit	One (1) year from effective date of the permit	Eighteen (18) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.h.(vi), Part I.D.5.h.(vii), and Part I.D.5.h.(viii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.h.(ix)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

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

(**) or MS4s designated by the Director

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

6. Stormwater Management Program Review and Modification.

- a. **Program Review.** Permittee shall participate in an annual review of its SWMP in conjunction with preparation of the annual report required in Part III.B. Results of the review shall be discussed in the annual report and shall include an assessment of:
 - (i) SWMP implementation, progress in achieving measurable goals, and compliance with program elements and other permit conditions;
 - (ii) the effectiveness of its SWMP, and any necessary modifications, in complying with the permit, including requirements to control the discharge of pollutants, and comply with water quality standards and any applicable approved TMDLs; and the adequacy of staff, funding levels, equipment, and support capabilities to fully implement the SWMP and comply with permit conditions.

- (a) Project staffing requirements, in man hours, for the implementation of the MS4 program during the upcoming year.
 - (b) Staff man hours used during the previous year for implementing the MS4 program. Man hours may be estimated based on staff assigned, assuming a forty (40) hour work week.
- b. Program Modification. The permittee(s) may modify its SWMP with prior notification or request to the EPA and NMED in accordance with this section.
 - (i) Modifications adding, but not eliminating, replacing, or jeopardizing fulfillment of any components, controls, or requirements of its SWMP may be made by the permittee(s) at any time upon written notification to the EPA.
 - (ii) Modifications replacing or eliminating an ineffective or unfeasible component, control or requirement of its SWMP, including monitoring and analysis requirements described in Parts III.A and V, may be requested in writing at any time. If request is denied, the EPA will send a written explanation of the decision. Modification requests shall include the following:
 - (a) a description of why the SWMP component is ineffective, unfeasible (including cost prohibitions), or unnecessary to support compliance with the permit;
 - (b) expectations on the effectiveness of the proposed replacement component; and
 - (c) an analysis of how the proposed replacement component is expected to achieve the goals of the component to be replaced.
 - (iii) Modifications resulting from schedules contained in Part VI may be requested following completion of an interim task or final deadline.
 - (iv) Modification requests or notifications shall be made in writing, signed in accordance with Part IV.H.
- c. Program Modifications Required by EPA. Modifications requested by EPA shall be made in writing, set forth the time schedule for the permittee(s) to develop the modifications, and offer the permittee(s) the opportunity to propose alternative program modifications to meet the objective of the requested modification. The EPA may require changes to the SWMP as needed to:
 - (i) Address impacts on receiving water quality caused, or contributed to, by discharges from the MS4;
 - (ii) Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements;
 - (iii) Include such other conditions deemed necessary by the EPA to comply with the goals and requirements of the Clean Water Act; or
 - (iv) If, at any time, EPA determines that the SWMP does not meet permit requirements.
- d. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation: The permittee(s) shall implement the SWMP:
 - (i) On all new areas added to their portion of the MS4 (or for which they become responsible for implementation of stormwater quality controls) as expeditiously as possible, but not later than one (1) year from addition of the new areas. Implementation may be accomplished in a phased manner to allow additional time for controls that cannot be implemented immediately;

- (ii) Within ninety (90) days of a transfer of ownership, operational authority, or responsibility for SWMP implementation, the permittee(s) shall have a plan for implementing the SWMP on all affected areas. The plan may include schedules for implementation; and information on all new annexed areas and any resulting updates required to the SWMP shall be submitted in the annual report.
7. **Retention of Program Records.** The permittee shall retain SWMP records developed in accordance with Part I.D, Part IV.P, and Part VI for at least five (5) years after coverage under this permit terminates.
 8. **Qualifying State, Tribal or Local Program.** The permittee may substitute the BMPs and measurable goals of an existing storm water pollution control program to qualify for compliance with one or more of the minimum control measures if the existing measure meets the requirements of the minimum control measure as established in Part I.D.5

PART II. NUMERIC DISCHARGE LIMITATIONS

A. DISCHARGE LIMITATIONS. Reserved

PART III. MONITORING, ASSESSMENT, AND REPORTING REQUIREMENTS:

A. MONITORING AND ASSESSMENT

The permittee must develop, in consultation with NMED and EPA (and affected Tribes if monitoring locations would be located on Tribal lands), and implement a comprehensive monitoring and assessment program designed to meet the following objectives:

- Assess compliance with this permit;
- Assess the effectiveness of the permittee's stormwater management program;
- Assess the impacts to receiving waters resulting from stormwater discharges;
- Characterize stormwater discharges;
- Identify sources of elevated pollutant loads and specific pollutants;
- Detect and eliminate illicit discharges and illegal connections to the MS4; and
- Assess the overall health and evaluate long-term trends in receiving water quality.

The permittee shall select specific monitoring locations sufficient to assess effects of storm water discharges on receiving waters. The monitoring program may take advantage of monitoring stations/efforts utilized by the permittees or others in previous stormwater monitoring programs or other water quality monitoring efforts. Data collected by others at such stations may be used to satisfy part, or all, of the permit monitoring requirements provided the data collection by that party meets the requirements established in Part III.A.1 throughout Part III.A.5. The comprehensive monitoring and assessment program shall be described in the SWMP document and the results must be provided in each annual report.

Implementation of the comprehensive monitoring and assessment program may be achieved through participation with other permittees to satisfy the requirements of Part III.A.1 throughout Part III.A.5 below in lieu of creating duplicate program elements for each individual permittee.

1. **Wet Weather Monitoring:** The permittees shall conduct wet weather monitoring to gather information on the response of receiving waters to wet weather discharges from the MS4 during both wet season (July 1 through October 31) and dry season (November 1 through June 30). Wet Weather Monitoring shall be conducted at outfalls, internal sampling stations, and/or in-stream monitoring locations at each water of the US that runs in each entity or entities' jurisdiction(s). Permittees may choose either Option A or Option B below:
 - a. *Option A:* Individual monitoring
 - (i) Class A: Perform wet weather monitoring at a location coming into the MS4 jurisdictional area (upstream) and leaving the MS4 jurisdictional area (downstream), see Appendix D. Monitor for TSS, TDS, COD, BOD₅, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and gross alpha. Monitoring of temperature shall be also conducted at outfalls and/or Rio Grande monitoring locations. Phase I permittees must include additional parameters from monitoring conducted under permit NMS000101 (from last 10 years) whose mean values are at or above a WQS. Permittee must sample these pollutants a minimum of 10 events during the permit term with at least 5 events in wet season and 4 events in dry season.
 - (ii) Class B, C, and D: Perform wet weather monitoring at a location coming into the MS4 jurisdictional area (upstream) and leaving the MS4 jurisdictional area (downstream), see Appendix D. Monitor for TSS, TDS, COD, BOD₅, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and gross alpha. Monitoring of temperature shall be also

conducted at outfalls and/or Rio Grande monitoring locations. If applicable, include additional parameters from monitoring conducted under permits NMR040000 or/and NMR04000I whose mean values are at or above a WQS; sample these pollutants a minimum of 8 events per location during the permit term with at least 4 events in wet season and 2 events in dry season.

b. *Option B: Cooperative Monitoring Program*

Develop a cooperative wet weather monitoring program with other permittees in the Middle Rio Grande watershed (see map in Appendix A). The program will monitor waters coming into the watershed (upstream) and leaving the watershed (downstream), see suggested sampling locations in Appendix D. The program must include sampling for TSS, TDS, COD, BOD5, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and Gross alpha. Monitoring of temperature shall be also conducted at outfalls and/or Rio Grande monitoring locations. Permittees must include additional parameters from monitoring conducted under permits NMS000101, NMR040000 or/and NMR04000I whose mean values are at or above a WQS. The monitoring program must sample the pollutants for a minimum of 7 storm events per location during the permit term with at least 3 events wet season and 2 events in dry season.

Note: Seasonal monitoring periods are: Wet Season: July 1 through October 31; Dry Season: November 1 through June 30.

- c. Wet weather monitoring shall be performed only when the predicted (or actual) rainfall magnitude of a storm event is greater than 0.25 inches and an antecedent dry period of at least forty-eight (48) hours after a rain event greater than 0.1 inch in magnitude is satisfied. Monitoring methodology will consist of collecting a minimum of four (4) grab samples spaced at a minimum interval of fifteen (15) minutes each (or a flow weighted automatic composite, see Part III.A.5.a.(i)). Individual grab samples shall be preserved and delivered to the laboratory where samples will be combined into a single composite sample from each monitoring location.
- d. Monitoring methodology at each MS4 monitoring location shall be collected during any portion of the monitoring location's discharge hydrograph (i.e. first flush, rising limb, peak, and falling limb) after a discernible increase in flow at the tributary inlet.
- e. The permittee must comply with the schedules contained in Table 10. The results of the Wet Weather Monitoring must be provided in each annual report.
- f. DO, pH, conductivity, and temperature shall be analyzed in the field within fifteen (15) minutes of sample collection.
- g. Alternate wet weather monitoring locations established in Part III.A.1.a or Part III.A.1.b may be substituted for just cause during the term of the permit. Requests for approval of alternate monitoring locations shall be made to the EPA and NMED in writing and include the rationale for the requested monitoring station relocation. Unless disapproved by the EPA, use of an alternate monitoring location (except for those with numeric effluent limitations) may commence thirty (30) days from the date of the request. For monitoring locations where numeric effluent limitations have been established, the permit must be modified prior to substitution of alternate monitoring locations. At least six (6) samples shall be collected during the first year of monitoring at substitute monitoring locations. If there are less than six sampleable events, this should be document for reporting purposes.

- h. Response to monitoring results: The monitoring program must include a contingency plan for collecting additional monitoring data within the MS4 or at additional appropriate instream locations should monitoring results indicate that MS4 discharges may be contributing to instream exceedances of WQS. The purpose of this additional monitoring effort would be to identify sources of elevated pollutant loadings so they could be addressed by the SWMP.

Table 10. Wet Weather Monitoring Program Implementation Schedules:

Activity	Permittee Class				
	A Phase I MS4s	B Phase II MS4s (2000 Census)	C New Phase II MS4s (2010 Census **)	D MS4s within Indian Lands	Cooperative (*) Any Permittee with cooperative programs
Submit wet weather monitoring preference to EPA (i.e., individual monitoring program vs. cooperative monitoring program) with NOI submittals	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)
Submit a detailed description of the monitoring scheme to EPA and NMED for approval. The monitoring scheme should include: a list of pollutants; a description of monitoring sites with an explanation of why those sites were selected; and a detailed map of all proposed monitoring sites	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Twelve (12) months from effective date of permit
Submit certification that all wet weather monitoring sites are operational and begin sampling	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Thirteen (13) months from effective date of permit	Thirteen (13) months from effective date of permit	Fourteen (14) months from effective date of permit
Update SWMP document and submit annual reports	Annually	Annually	Annually	Annually	Annually

() or MS4s designated by the Director**

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

2. **Dry Weather Discharge Screening of MS4:** Each permittee shall identify, investigate, and address areas within its jurisdiction that may be contributing excessive levels of pollutants to the Municipal Separate Storm Sewer System as a result of dry weather discharges (i.e., discharges from separate storm sewers that occur without the direct influence of runoff from storm events, e.g. illicit discharges, allowable non-stormwater, groundwater infiltration, etc.). Due to the arid and semi-arid conditions of the area, the dry weather discharges screening program may be carried out during both wet season (July 1 through October 31) and dry Season (November 1 through June 30). Results of the assessment

shall be provided in each annual report. This program may be coordinated with the illicit discharge detection and elimination program required in Part I.D.5.e. The dry weather screening program shall be described in the SWMP and comply with the schedules contained in Part I.D.5.e.(iii). The permittee shall

- a. Include sufficient screening points to adequately assess pollutant levels from all areas of the MS4.
- b. Screen for, at a minimum, BOD₅, sediment or a parameter addressing sediment (e.g., TSS or turbidity), E. coli, Oil and Grease, nutrients, any pollutant that has been identified as cause of impairment of a waterbody receiving discharges from that portion of the MS4, including temperature.
- c. Specify the sampling and non-sampling techniques to be issued for initial screening and follow-up purposes. Sample collection and analysis need not conform to the requirements of 40 CFR Part 136; and
- d. Perform monitoring only when an antecedent dry period of at least seventy-two (72) hours after a rain event greater than 0.1 inch in magnitude is satisfied. Monitoring methodology shall consist of collecting a minimum of four (4) grab samples spaced at a minimum interval of fifteen (15) minutes each. Grab samples will be combined into a single composite sample from each station, preserved, and delivered to the laboratory for analysis. A flow weighted automatic composite sample may also be used.

3. **Floatable Monitoring:** The permittees shall establish locations for monitoring/assessing floatable material in discharges to and/or from their MS4. Floatable material shall be monitored at least twice per year at priority locations and at minimum of two (2) stations except as provided in Part III.A.3. below. The amount of collected material shall be estimated in cubic yards.

- a. One (1) station should be located in the North Diversion (only applicable to the COA and AMAFCA).
- b. Non-traditional MS4 as defined in Part VII shall sample/assess at one (1) station.
- c. Phase II MS4s shall sample/assess at one (1) station within their jurisdiction or participate in a cooperative floatable monitoring plan addressing impacts on perennial waters of the US on a larger watershed basis.

A cooperative monitoring program may be established in partnership with other MS4s to monitor and assess floatable material in discharges to and/or from a joint jurisdictional area or watershed basis.

4. **Industrial and High Risk Runoff Monitoring** (Applicable only to Class A permittees): The permittees shall monitor stormwater discharges from Type 1 and 2 industrial facilities which discharge to the MS4 provided such facilities are located in their jurisdiction. (Note: if no such facilities are in the permittee's jurisdiction, the permittee must certify that this program element does not apply). The permittee shall:

- a. Conduct analytical monitoring of Type 1 facilities that discharge to the MS4. Type 1 facilities are municipal landfills; hazardous waste treatment, disposal and recovery facilities; facilities that are subject to EPCRA Title III, Section 313; and industrial facilities the permittee(s) determines are contributing a substantial pollutant loading to the MS4.

- (i) The following parameters shall be monitored:
 - any pollutants limited in an existing NPDES permit to a subject facility;

- oil and grease;
 - chemical oxygen demand (COD);
 - pH;
 - biochemical oxygen demand, five-day (BOD₅);
 - total suspended solids (TSS);
 - total phosphorous;
 - total Kjeldahl nitrogen (TKN);
 - nitrate plus nitrite nitrogen;
 - any discharge information required under 40 CFR §122.21(g)(7)(iii) and (iv);
 - total cadmium;
 - total chromium;
 - total copper;
 - total lead;
 - total nickel;
 - total silver;
 - total zinc; and,
 - PCBs.
- (ii) Frequency of monitoring shall be established by the permittee(s), but may not be less than once per year;
- (iii) In lieu of the above parameter list, the permittee(s) may alter the monitoring requirement for any individual Type 1 facility:
- (a) To coincide with the corresponding industrial sector-specific monitoring requirements of the 2008 Multi-Sector General Stormwater Permit or any applicable general permit issued after September 2008. This exception is not contingent on whether a particular facility is actually covered by the general permit; or
 - (b) To coincide with the monitoring requirements of any individual permit for the stormwater discharges from that facility, and
 - (c) Any optional monitoring list must be supplemented by pollutants of concern identified by the permittee(s) for that facility.
- b. Conduct appropriate monitoring (e.g. analytic, visual), as determined by the permittee(s), at Type 2 facilities that discharge to the MS4. Type 2 facilities are other municipal waste treatment, storage, or disposal facilities (e.g. POTWs, transfer stations, incinerators) and industrial or commercial facilities the permittee(s) believed contributing pollutants to the MS4. The permittee shall include in each annual report, a list of parameters of concern and monitoring frequencies required for each type of facility.
- c. May use analytical monitoring data, on a parameter-by-parameter basis, that a facility has collected to comply with or apply for a State or NPDES discharge permit (other than this permit), so as to avoid unnecessary cost and duplication of effort;
- d. May allow the facility to test only one (1) outfall and to report that the quantitative data also apply to the substantially identical outfalls if:
- (i) A Type 1 or Type 2 industrial facility has two (2) or more outfalls with substantially identical effluents, and

- (ii) Demonstration by the facility that the stormwater outfalls are substantially identical, using one (1) or all of the following methods for such demonstration. The NPDES Stormwater Sampling Guidance Document (EPA 833-B-92-001), available on EPA's website at provides detailed guidance on each of the three options: (1) submission of a narrative description and a site map; (2) submission of matrices; or (3) submission of model matrices.
- b. May accept a copy of a "no exposure" certification from a facility made to EPA under 40 CFR §122.26(g), in lieu of analytic monitoring.

5. **Additional Sample Type, Collection and Analysis:**

- a. **Wet Weather (or Storm Event) Discharge Monitoring:** If storm event discharges are collected to meet the objectives of the Comprehensive Monitoring and Assessment Program required in Part III.A (e.g., assess compliance with this permit; assess the effectiveness of the permittee's stormwater management program; assess the impacts to receiving waters resulting from stormwater discharges), the following requirements apply:
 - (i) **Composite Samples:** Flow-weighted composite samples shall be collected as follows:
 - (a) **Composite Method –** Flow-weighted composite samples may be collected manually or automatically. For both methods, equal volume aliquots may be collected at the time of sampling and then flow-proportioned and composited in the laboratory, or the aliquot volume may be collected based on the flow rate at the time of sample collection and composited in the field.
 - (b) **Sampling Duration –** Samples shall be collected for at least the first three (3) hours of discharge. Where the discharge lasts less than three (3) hours, the permittee should report the value. .
 - (c) **Aliquot Collection –** A minimum of three (3) aliquots per hour, separated by at least fifteen (15) minutes, shall be collected. Where more than three (3) aliquots per hour are collected, comparable intervals between aliquots shall be maintained (e.g. six aliquots per hour, at least seven (7) minute intervals).
 - (ii) **Grab Samples:** Grab samples shall be taken during the first two (2) hours of discharge.
- b. **Analytical Methods:** Analysis and collection of samples shall be done in accordance with the methods specified at 40 CFR §136. Where an approved 40 CFR §136 method does not exist, any available method may be used unless a particular method or criteria for method selection (such as sensitivity) has been specified in the permit. The minimum quantification levels (MQLs) in Appendix F are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

Screening level tests may utilize less expensive "field test kits" using test methods not approved by EPA under 40 CFR 136, provided the manufacturers published detection ranges are adequate for the illicit discharge detection purposes.

EPA Method 1668 shall be utilized when PCB water column monitoring is conducted to determine compliance with permit requirements. For purposes of sediment sampling in dry weather as part of a screening program to identify area(s) where PCB control/clean-up efforts may need to be focused, either the Arochlor test (EPA Method 8082) or USGS test method (8093) may be utilized, but must use EPA Method 1668 (latest revision) for confirmation and determination of specific PCB levels at that location.

EPA Method 900.0 shall be utilized when gross alpha water column monitoring is conducted to determine compliance with permit requirements.

B. ANNUAL REPORT

The permittees shall submit an annual report to be submitted by no later than **December 1st**. See suggested form at <http://epa.gov/region6/water/npdes/sw/ms4/index.htm>. The report shall cover the previous year from **July 1st to June 30rd** and include the below separate sections. Additionally, the year one (1) and year four (4) annual report shall include submittal of a complete SWMP revision.

At least forty five (45) days prior to submission of each Annual Report, the permittee must provide public notice of and make available for public review and comment a draft copy of the Annual Report. All public input must be considered in preparation of the final Annual Reports and any changes to the SWMP.

Note: A complete copy of the signed Annual Report should be maintained on site.

1. **SWMP(s) status of implementation:** shall include the status of compliance with all schedules established under this permit and the status of actions required in Parts I, III, and VI.
2. **SWMP revisions:** shall include revisions, if necessary, to the assessments of controls or BMPs reported in the permit application (or NOI for coverage under this permit) under 40 CFR §122.26(d)(2)(v) and §122.34(d)(1)(i) are to be included, as well as a cumulative list of all SWMP revisions during the permit term.

Class A permittees shall include revisions, if necessary, to the fiscal analysis reported in the permit application (or NOI for coverage under this permit) under §122.26(d)(2)(vi).
3. **Performance assessment:** shall include:
 - a. an assessment of performance in terms of measurable goals, including, but not limited to, a description of the number and nature of enforcement actions and inspections, public education and public involvement efforts;
 - b. a summary of the data, including monitoring data, that is accumulated throughout the monitoring year (July 1 to June 30); actual values of representative monitoring results shall be included, if results are above minimum quantification level (MQL); and
 - c. an identification of water quality improvements or degradation.
4. **Annual expenditures:** for the reporting period, with a breakdown for the major elements of the stormwater management program and the budget for the year following each annual report. (Applicable only to Class A permittees)
5. **Annual Report Responsibilities for Cooperative Programs:** preparation of a system-wide report with cooperative programs may be coordinated among cooperating MS4s and then used as part of individual Annual Reports. The report of a cooperative program element shall indicate which, if any, permittee(s) have failed to provide the required information on the portions of the MS4 for which they are responsible to the cooperation permittees.
 - a. Joint responsibility for reports covering cooperative programs elements shall be limited to participation in preparation of the overview for the entire system and inclusion of the identity of any permittee who failed to provide input to the annual report.

- b. Individual permittees shall be individually responsible for content of the report relating to the portions of the MS4 for which they are responsible and for failure to provide information for the system-wide annual report no later than July 31st of each year.
6. **Public Review and Comment:** a brief summary of any issues raised by the public on the draft Annual Report, along with permittee's responses to the public comments.
7. **Signature on Certification of Annual Reports:** The annual report shall be signed and certified, in accordance with Part IV.H and include a statement or resolution that the permittee's governing body or agency (or delegated representative) has reviewed or been apprised of the content of the Annual Report. Annual report shall be due no later than December 1st of each year. A complete copy of the signed Annual Report should be maintained on site.

C. CERTIFICATION AND SIGNATURE OF RECORDS.

All reports required by the permit and other information requested by the EPA shall be signed and certified in accordance with Part IV.H.

D. REPORTING: WHERE AND WHEN TO SUBMIT

1. Monitoring results (Part III.A.1, Part III.A.3, Part III.A.5.a) obtained during the reporting period running from July 1st to June 30th shall be submitted on discharge monitoring report (DMR) forms along with the annual report required by Part III.B. A separate DMR form is required for each monitoring period (season) specified in Part III.A.1. If any individual analytical test result is less than the minimum quantification level (MQL) listed for that parameter, then a value of zero (0) may be used for that test result for the discharge monitoring report (DMR) calculations and reporting requirements. The annual report shall include the actual value obtained, if test result is less than the MQL (See Appendix F).
2. Signed copies of DMRs required under Part III, the Annual Report required by Part III.B, and all other reports required herein, shall be submitted in electronic form to R6_MS4Permits@epa.gov (note: there is an underscore between R6 and MS4).

Copy of a suggested Annual Report Format is located in EPA R6 website:
<http://epa.gov/region6/water/npdes/sw/ms4/index.htm>.

Electronic submittal of the documents required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

3. Requests for SWMP updates, modifications in monitoring locations, or application for an individual permit shall, be submitted to,:

U.S. EPA, Region 6
Water Quality Protection Division
Operations Support Office (6WQ-O)
1445 Ross Avenue
Dallas, Texas 75202-2733

4. Additional Notification. Permittee(s) shall also provide copies of NOIs, DMRs, annual reports, NOTs, requests for SWMP updates, items for compliance with permit requirements for Compliance with Water Quality Standards in Part I.C.1, TMDL's reports established in Part I.C.2, monitoring scheme, reports, and certifications required in Part III.A.1, programs or changes in monitoring locations, and all other reports required herein, to:

New Mexico Environment Department
Attn: Bruce Yurdin, Program Manager
Surface Water Quality Bureau
Point Source Regulation Section
P.O. Box 5469
Santa Fe, New Mexico 87502

Pueblo of Sandia Environment Department
Attn: Scott Bulgrin, Water Quality Manager
481 Sandia Loop
Bernalillo, NM 87004

(Note: Only those MS4s with discharges upstream of or to waters under the jurisdictional of the Pueblo of Sandia: AMAFCA, Sandoval County, Village of Corrales, City of Rio Rancho, Town of Bernalillo, SSCAFCA, and ESCAFCA)

Pueblo of Isleta
Attn: Ramona M. Montoya, Environment Division Manager
P.O. Box 1270
Isleta NM 87022

(Notes: Only the City of Albuquerque, Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA), New Mexico Department of Transportation (NMDOT) District 3, KAFB (Kirtland Air Force Base), Sandia Labs (DOE), and Bernalillo County). All parties submitting an NOI or NOT shall notify the Pueblo of Isleta in writing that a NOI or NOT has been submitted to EPA

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

(Note: Only those MS4s with discharges upstream of or to waters under the jurisdictional of the Pueblo of Santa Ana)

PART IV. STANDARD PERMIT CONDITIONS

A. DUTY TO COMPLY.

The permittee(s) must comply with all conditions of this permit insofar as those conditions are applicable to each permittee, either individually or jointly. Any permit noncompliance constitutes a violation of the Clean Water Act (The Act) and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

B. PENALTIES FOR VIOLATIONS OF PERMIT CONDITIONS.

The EPA will adjust the Civil and administrative penalties listed below in accordance with the Civil Monetary Penalty Inflation Adjustment Rule (Federal Register: Dec. 31, 1996, Volume 61, No. 252, pages 69359-69366, as corrected, March 20, 1997, Volume 62, No. 54, pages 13514-13517) as mandated by the Debt Collection Improvement Act of 1996 for inflation on a periodic basis. This rule allows EPA's penalties to keep pace with inflation. The Agency is required to review its penalties at least once every four years thereafter and to adjust them as necessary for inflation according to a specified formula. The civil and administrative penalties listed below were adjusted for inflation starting in 1996.

1. Criminal Penalties.

- a. **Negligent Violations:** The Act provides that any person who negligently violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one (1) year, or both.
- b. **Knowing Violations:** The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than three (3) years, or both.
- c. **Knowing Endangerment:** The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act and who knows at that time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than \$250,000, or by imprisonment for not more than fifteen (15) years, or both.
- d. **False Statement:** The Act provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than two (2) years, or by both. If a conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than four (4) years, or by both. (See Section 309(c)(4) of the Act).

2. Civil Penalties. The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed \$27,500 per day for each violation.

3. Administrative Penalties. The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to an administrative penalty, as follows:

- a. **Class I penalty:** Not to exceed \$11,000 per violation nor shall the maximum amount exceed \$27,500.

NPDES Permit No. NMR04A000

- b. Class II penalty: Not to exceed \$11,000 per day for each day during which the violation continues nor shall the maximum amount exceed \$137,500.
- C. DUTY TO REAPPLY.** If the permittee wishes to continue an activity regulated by this permit after the permit expiration date, the permittee must apply for and obtain a new permit. The application shall be submitted at least 180 days prior to expiration of this permit. The EPA may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date. Continuation of expiring permits shall be governed by regulations promulgated at 40 CFR §122.6 and any subsequent amendments.
- D. NEED TO HALT OR REDUCE ACTIVITY NOT A DEFENSE.** It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.
- E. DUTY TO MITIGATE.** The permittee(s) shall take all reasonable steps to control or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.
- F. DUTY TO PROVIDE INFORMATION.** The permittee(s) shall furnish to the EPA, within a time specified by the EPA, any information which the EPA may request to determine compliance with this permit. The permittee(s) shall also furnish to the EPA upon request copies of records required to be kept by this permit.
- G. OTHER INFORMATION.** When the permittee becomes aware that he or she failed to submit any relevant facts or submitted incorrect information in any report to the EPA, he or she shall promptly submit such facts or information.
- H. SIGNATORY REQUIREMENTS.** For a municipality, State, or other public agency, all DMRs, SWMPs, reports, certifications or information either submitted to the EPA or that this permit requires be maintained by the permittee(s), shall be signed by either a:
1. Principal executive officer or ranking elected official; or
 2. Duly authorized representative of that person. A person is a duly authorized representative only if:
 - a. The authorization is made in writing by a person described above and submitted to the EPA.
 - b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either a named individual or any individual occupying a named position.
 3. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new written authorization satisfying the requirements of this paragraph must be submitted to the EPA prior to or together with any reports, information, or applications to be signed by an authorized representative.
 4. Certification: Any person signing documents under this section shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

NPDES Permit No. NMR04A000

- I. PENALTIES FOR FALSIFICATION OF MONITORING SYSTEMS.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by fines and imprisonment described in Section 309 of the Act.
- J. OIL AND HAZARDOUS SUBSTANCE LIABILITY.** Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under section 311 of the Act or section 106 of CERCLA.
- K. PROPERTY RIGHTS.** The issuance of this permit does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.
- L. SEVERABILITY.** The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit shall not be affected thereby.
- M. REQUIRING A SEPARATE PERMIT.**
1. The EPA may require any permittee authorized by this permit to obtain a separate NPDES permit. Any interested person may petition the EPA to take action under this paragraph. The Director may require any permittee authorized to discharge under this permit to apply for a separate NPDES permit only if the permittee has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form (as necessary), a statement setting a deadline for the permittee to file the application, and a statement that on the effective date of the separate NPDES permit, coverage under this permit shall automatically terminate. Separate permit applications shall be submitted to the address shown in Part III.D. The EPA may grant additional time to submit the application upon request of the applicant. If an owner or operator fails to submit, prior to the deadline of the time extension, a separate NPDES permit application as required by the EPA, then the applicability of this permit to the permittee is automatically terminated at the end of the day specified for application submittal.
 2. Any permittee authorized by this permit may request to be excluded from the coverage of this permit by applying for a separate permit. The permittee shall submit a separate application as specified by 40 CFR §122.26(d) for Class A permittees and by 40 CFR §122.33(b)(2) for Class B, C, and D permittees, with reasons supporting the request to the Director. Separate permit applications shall be submitted to the address shown in Part III.D.3. The request may be granted by the issuance of a separate permit if the reasons cited by the permittee are adequate to support the request.
 3. When an individual NPDES permit is issued to a discharger otherwise subject to this permit, or the permittee is authorized to discharge under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit or the date of authorization of coverage under the alternative general permit, whichever the case may be. When an individual NPDES permit is denied to an operator otherwise subject to this permit, or the operator is denied for coverage under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the date of such denial, unless otherwise specified by the permitting authority.
- N. STATE / ENVIRONMENTAL LAWS.**
1. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by section 510 of the Act.

2. No condition of this permit shall release the permittee from any responsibility or requirements under other environmental statutes or regulations.

O. PROPER OPERATION AND MAINTENANCE. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit and with the requirements of stormwater management programs. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee only when necessary to achieve compliance with the conditions of the permit.

P. MONITORING AND RECORDS.

1. The permittee must retain records of all monitoring information, including, all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, copies of Discharge Monitoring Reports (DMRs), a copy of the NPDES permit, and records of all data used to complete the NOI for this permit, for a period of at least three years from the date of the sample, measurement, report or application, or for the term of this permit, whichever is longer. This period may be extended by request of the permitting authority at any time.
2. The permittee must submit its records to the permitting authority only when specifically asked to do so. The permittee must retain a description of the SWMP required by this permit (including a copy of the permit language) at a location accessible to the permitting authority. The permittee must make its records, including the NOI and the description of the SWMP, available to the public if requested to do so in writing.
3. Records of monitoring information shall include:
 - a. The date, exact place, and time of sampling or measurements;
 - b. The initials or name(s) of the individual(s) who performed the sampling or measurements;
 - c. The date(s) analyses were performed;
 - d. The time(s) analyses were initiated;
 - e. The initials or name(s) of the individual(s) who performed the analyses;
 - f. References and written procedures, when available, for the analytical techniques or methods used; and
 - g. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.
4. The permittee must maintain, for the term of the permit, copies of all information and determinations used to document permit eligibility under Parts I.A.5.f and Part I.A.3.b.

Q. MONITORING METHODS. Monitoring must be conducted according to test procedures approved under 40 CFR §136, unless other test procedures have been specified in this permit. The minimum quantification levels (MQLs) in Appendix F are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

R. INSPECTION AND ENTRY. The permittee shall allow the EPA or an authorized representative of EPA, or the State, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter the permittee's premises where a regulated facility or activity is located or conducted or where records must be kept under the conditions of this permit;
2. Have access to and copy at reasonable times, any records that must be kept under the conditions of this permit;

NPDES Permit No. NMR04A000

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
4. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substance or parameters at any location.

S. PERMIT ACTIONS. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

T. ADDITIONAL MONITORING BY THE PERMITTEE(S). If the permittee monitors more frequently than required by this permit, using test procedures approved under 40 CFR §136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report (DMR). Such increased monitoring frequency shall also be indicated on the DMR.

U. ARCHEOLOGICAL AND HISTORIC SITES (Applicable to areas within the corporate boundary of the City of Albuquerque and Tribal lands). This permit does not authorize any stormwater discharges nor require any controls to control stormwater runoff which are not in compliance with any historic preservation laws.

1. In accordance with the Albuquerque Archaeological Ordinance (Section 2-12-2, 14-16-5, and 14-14-3-4), an applicant for either:
 - a. A preliminary plan for any subdivision that is five acres or more in size; or
 - b. A site development plan or master development plan for a project that is five acres or more in size on property that is zoned SU-1 Special Use, IP Industrial Park, an SU-2 zone that requires site plan review, PC Planned Community with a site, or meets the Zoning Code definition of a Shopping Center must first obtain either a Certificate of No Effect or a Certificate of Approval from the City Archaeologist. Details of the requirements for a Certificate of No Effect or a Certificate of Approval are described in the ordinance. Failure to obtain a certificate as required by ordinance shall subject the property owner to the penalties of §1-1-99 ROA 1994.
2. If municipal excavation and/or construction projects implementing requirements of this permit will result in the disturbance of previously undisturbed land, and the project is not required to have a separate NPDES permit (e.g. general permit for discharge of stormwater associated with construction activity), then the permittee may seek authorization for stormwater discharges from such sites of disturbance by:
 - a. Submitting, thirty (30) days prior to commencing land disturbance, the following to the State Historic Preservation Officer (SHPO) and to appropriate Tribes and Tribal Historic Preservation Officers for evaluation of possible effects on properties listed or eligible for listing on the National Register of Historic Places:
 - (i) A description of the construction or land disturbing activity and the potential impact that this activity may have upon the ground, and
 - (ii) A copy of a USGS topographic map outlining the location of the project and other ancillary impact areas.
 - (iii) The addresses of the SHPO, Sandia Pueblo, and Isleta Pueblo are:

State Historic Preservation Officer
New Mexico Historic Preservation Division

NPDES Permit No. NMR04A000

Bataan Memorial Building
407 Galisteo Street, Ste. 236
Santa Fe, New Mexico 87501

Pueblo of Sandia Environment Department
Attn: Frank Chaves, Environment Director
481 Sandia Loop
Bernalillo, New Mexico 87004

Pueblo of Isleta
Department of Cultural and Historic Preservation
Attn: Daniel Waseta, Director
P.O. Box 1270
Isleta NM 87022

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

3. If the permittee receives a request for an archeological survey or notice of adverse effects from the SHPO, the permittee shall delay such activity until:
 - a. A cultural resource survey report has been submitted to the SHPO for a review and a determination of no effect or no adverse effect has been made, and
 - b. If an adverse effect is anticipated, measures to minimize harm to historic properties have been agreed upon between the permittee and the SHPO.
 4. If the permittee does not receive notification of adverse effects or a request for an archeological survey from the SHPO within thirty (30) days, the permittee may proceed with the activity.
 5. Alternately, the permittee may obtain authorization for stormwater discharges from such sites of disturbance by applying for a modification of this permit. The permittee may apply for a permit modification by submitting the following information to the Permitting Authority 180 days prior to commencing such discharges:
 - a. A letter requesting a permit modification to include discharges from activities subject to this provision, in accordance with the signatory requirements in Part IV.H.
 - b. A description of the construction or land disturbing activity and the potential impact that this activity may have upon the ground; County in which the facility will be constructed; type of facility to be constructed; size area (in acres) that the facility will encompass; expected date of construction; and whether the facility is located on land owned or controlled by any political subdivision of New Mexico; and
 - c. A copy of a USGS topographic map outlining the location of the project and other ancillary impact areas.
- V. **CONTINUATION OF THE EXPIRED GENERAL PERMIT.** If this permit is not reissued or replaced prior to the expiration date, it will be administratively continued in accordance with the Administrative Procedures Act and remain in force and effect. Any permittee who was granted permit coverage prior to the expiration date will automatically remain covered by the continued permit until the earlier of:

NPDES Permit No. NMR04A000

1. Reissuance or replacement of this permit, at which time the permittee must comply with the Notice of Intent conditions of the new permit to maintain authorization to discharge; or
 2. Issuance of an individual permit for your discharges; or
 3. A formal permit decision by the permitting authority not to reissue this general permit, at which time the permittee must seek coverage under an alternative general permit or an individual permit.
- W. **PERMIT TRANSFERS:** This permit is not transferable to any person except after notice to the permitting authority. The permitting authority may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Act.
- X. **ANTICIPATED NONCOMPLIANCE.** The permittee must give advance notice to the permitting authority of any planned changes in the permitted small MS4 or activity which may result in noncompliance with this permit. (see
- Y. **PROCEDURES FOR MODIFICATION OR REVOCATION:** Permit modification or revocation will be conducted according to 40 CFR 122.62, 122.63, 122.64 and 124.5.

PART V. PERMIT MODIFICATION

- A. MODIFICATION OF THE PERMIT.** The permit may be reopened and modified, in accordance with 40 CFR §122.62, §122.63, and §124.5, during the life of the permit to address:
1. Changes in the State's Water Quality Management Plan, including Water Quality Standards;
 2. Changes in applicable water quality standards, statutes or regulations;
 3. A new permittee who is the owner or operator of a portion of the MS4;
 4. Changes in portions of the SWMP that are considered permit conditions;
 5. Construction activities implementing requirements of this permit that will result in the disturbance of previously undisturbed land and not required to have a separate NPDES permit; or
 6. Other modifications deemed necessary by the EPA to meet the requirements of the Act.
- B. MODIFICATION OF THE SWMP(s).** Only those portions of the SWMPs specifically required as permit conditions shall be subject to the modification requirements of 40 CFR §124.5. Addition of components, controls, or requirements by the permittee(s); replacement of an ineffective or infeasible control implementing a required component of the SWMP with an alternate control expected to achieve the goals of the original control; and changes required as a result of schedules contained in Part VI shall be considered minor changes to the SWMP and not modifications to the permit. (See also Part I.D.6)
- C. CHANGES IN REPRESENTATIVE MONITORING SITES.** Changes in monitoring sites, other than those with specific numeric effluent limitations (as described in Part III.A.1.g), shall be considered minor modifications to the permit and shall be made in accordance with the procedures at 40 CFR §122.63.

PART VI. SCHEDULES FOR IMPLEMENTATION AND COMPLIANCE.

- A. IMPLEMENTATION AND AUGMENTATION OF THE SWMP(s).** The permittee(s) shall comply with all elements identified in Parts I and III for SWMP implementation and augmentation, and permit compliance. The EPA shall have sixty (60) days from receipt of a modification or augmentation made in compliance with Part VI to provide comments or request revisions. During the initial review period, EPA may extend the time period for review and comment. The permittee(s) shall have thirty (30) days from receipt of the EPA's comments or required revisions to submit a response. All changes to the SWMP or monitoring plans made to comply with schedules in Parts I and III must be approved by EPA prior to implementation.
- B. COMPLIANCE WITH EFFLUENT LIMITATIONS.** Reserved.
- C. REPORTING COMPLIANCE WITH SCHEDULES.** No later than fourteen (14) days following a date for a specific action (interim milestone or final deadline) identified in the Part VI schedule(s), the permittee(s) shall submit a written notice of compliance or noncompliance to the EPA in accordance with Part III.D.
- D. MODIFICATION OF THE SWMP(s).** The permittee(s) shall modify its SWMP, as appropriate, in response to modifications required in Part VI.A. Such modifications shall be made in accordance with Part V.B.

PART VII. DEFINITIONS

All definitions contained in Section 502 of the Act shall apply to this permit and are incorporated herein by reference. Unless otherwise specified, additional definitions of words or phrases used in this permit are as follows:

- (1) **Baseline Load** means the load for the pollutant of concern which is present in the waterbody before BMPs or other water quality improvement efforts are implemented.
- (2) **Best Management Practices (BMPs)** means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.
- (3) **Bioretention** means the water quality and water quantity stormwater management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from stormwater runoff.
- (4) **Canopy Interception** means the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.
- (5) **Contaminated Discharges:** The following discharges are considered contaminated:
 - Has had a discharge resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at any time since November 16, 1987; or
 - Has had a discharge resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or
 - Contributes to a violation of an applicable water quality standard.
- (6) **Controls or Control Measures or Measures** means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or control the pollution of waters of the United States. Controls also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.
- (7) **Controllable Sources:** Sources, private or public, which fall under the jurisdiction of the MS4.
- (8) **CWA or The Act** means Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et.seq.
- (9) **Co-permittee** means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.
- (10) **Composite Sample** means a sample composed of two or more discrete samples. The aggregate sample will reflect the average water quality covering the compositing or sample period.
- (11) **Core Municipality** means, for the purpose of this permit, the municipality whose corporate boundary (unincorporated area for counties and parishes) defines the municipal separate storm sewer system. (ex. City of Dallas for the Dallas Municipal Separate Storm Sewer System, Harris County for unincorporated Harris County).
- (12) **Direct Connected Impervious Area (DCIA)** means the portion of impervious area with a direct hydraulic connection to the permittee's municipal separate storm sewer system or a waterbody via continuous paved surfaces, gutters, pipes, and other impervious features. Direct connected impervious area typically does not include isolated impervious areas with an indirect hydraulic connection to the municipal separate storm sewer system (e.g., swale or detention basin) or that otherwise drain to a pervious area.
- (13) **Director** means the Regional Administrator or an authorized representative.
- (14) **Discharge** for the purpose of this permit, unless indicated otherwise, means discharges from the municipal separate storm sewer system.
- (15) **Discharge-related activities** include: activities which cause, contribute to, or result in storm water point source pollutant discharges; and measures to control storm water discharges, including the siting, construction and operation of best management practices (BMPs) to control, reduce or prevent storm water pollution.
- (16) **Engineered Infiltration** means an underground device or system designed to accept stormwater and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the exfiltration rate.
- (17) **Evaporation** means rainfall that is changed or converted into a vapor.
- (18) **Evapotranspiration** means the sum of evaporation and transpiration of water from the earth's surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration of plants.
- (19) **Extended Filtration** means a structural stormwater practice which filters stormwater runoff through vegetation and engineered soil media. A portion of the stormwater runoff drains into an underdrain system which slowly releases it after the storm is over.

- (20) **Facility** means any NPDES "point source" or any other facility (including land or appurtenances thereto) that is subject to regulation under the NPDES program.
- (21) **Flood Control Projects** mean major drainage projects developed to control water quantity rather than quality, including channelization and detention.
- (22) **Flow-weighted composite sample** means a composite sample consisting of a mixture of aliquots collected at a constant time interval, where the volume of each aliquot is proportional to the flow rate of the discharge.
- (23) **Grab Sample** means a sample which is taken from a wastestream on a one-time basis without consideration of the flow rate of the wastestream and without consideration of time.
- (24) **Green Infrastructure** means an array of products, technologies, and practices that use natural systems – or engineered systems that mimic natural processes – to enhance overall environmental quality and provide utility services. As a general principal, Green Infrastructure techniques use soils and vegetation to infiltrate, evapotranspire, and/or recycle stormwater runoff. When used as components of a stormwater management system, Green Infrastructure practices such as green roofs, porous pavement, rain gardens, and vegetated swales can produce a variety of environmental benefits. In addition to effectively retaining and infiltrating rainfall, these technologies can simultaneously help filter air pollutants, reduce energy demands, mitigate urban heat islands, and sequester carbon while also providing communities with aesthetic and natural resource benefits.
- (25) **Hydromodification** means the alteration of the natural flow of water through a landscape, and often takes the form of channel straightening, widening, deepening, or relocating existing, natural stream channels. It also can involve excavation of borrow pits or canals, building of levees, streambank erosion, or other conditions or practices that change the depth, width or location of waterways. Hydromodification usually results in water quality and habitat impacts.
- (26) **Illicit connection** means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.
- (27) **Illicit discharge** means any discharge to a municipal separate storm sewer that is not composed entirely of stormwater except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.
- (28) **Impervious Area (IA)** means conventional pavements, sidewalks, driveways, roadways, parking lots, and rooftops.
- (29) **Indian Country** means:
- All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
 - All dependent Indian communities within the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and
 - All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. This definition includes all land held in trust for an Indian tribe.
- (30) **Individual Residence** means, for the purposes of this permit, single or multi-family residences. (e.g. single family homes and duplexes, town homes, apartments, etc.)
- (31) **Infiltration** means the process by which stormwater penetrates the soil.
- (32) **Land application unit** means an area where wastes are applied onto or incorporated into the soil surface (excluding manure spreading operations) for treatment or disposal.
- (33) **Landfill** means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit, surface impoundment, injection well, or waste pile.
- (34) **Land Use** means the way in which land is used, especially in farming and municipal planning.
- (35) **Large or medium municipal separate storm sewer system** means all municipal separate storm sewers that are either: (i) located in an incorporated place (city) with a population of 100,000 or more as determined by the latest Decennial Census by the Bureau of Census (these cities are listed in Appendix F of 40 CFR §122); or (ii) located in the counties with unincorporated urbanized populations of 100,000 or more, except municipal separate storm sewers are located in the incorporated places, townships, or towns within such counties (these counties are listed in Appendices H and I of 40 CFR §122); or (iii) owned or operated by a municipality other than those described in Paragraph (i) or (ii) and that are designated by the Regional Administrator as part of the large or medium municipal separate storm sewer system.
- (36) **MEP** means maximum extent practicable, the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges. A discussion of MEP as it applies to small MS4s is found at 40 CFR 122.34. CWA section 402(p)(3)(B)(iii) requires that a municipal permit “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system design, and engineering methods, and other provisions such as the Administrator or the State determines appropriate for the control of such pollutants.
- (37) **Measurable Goal** means a quantitative measure of progress in implementing a component of storm water management program.

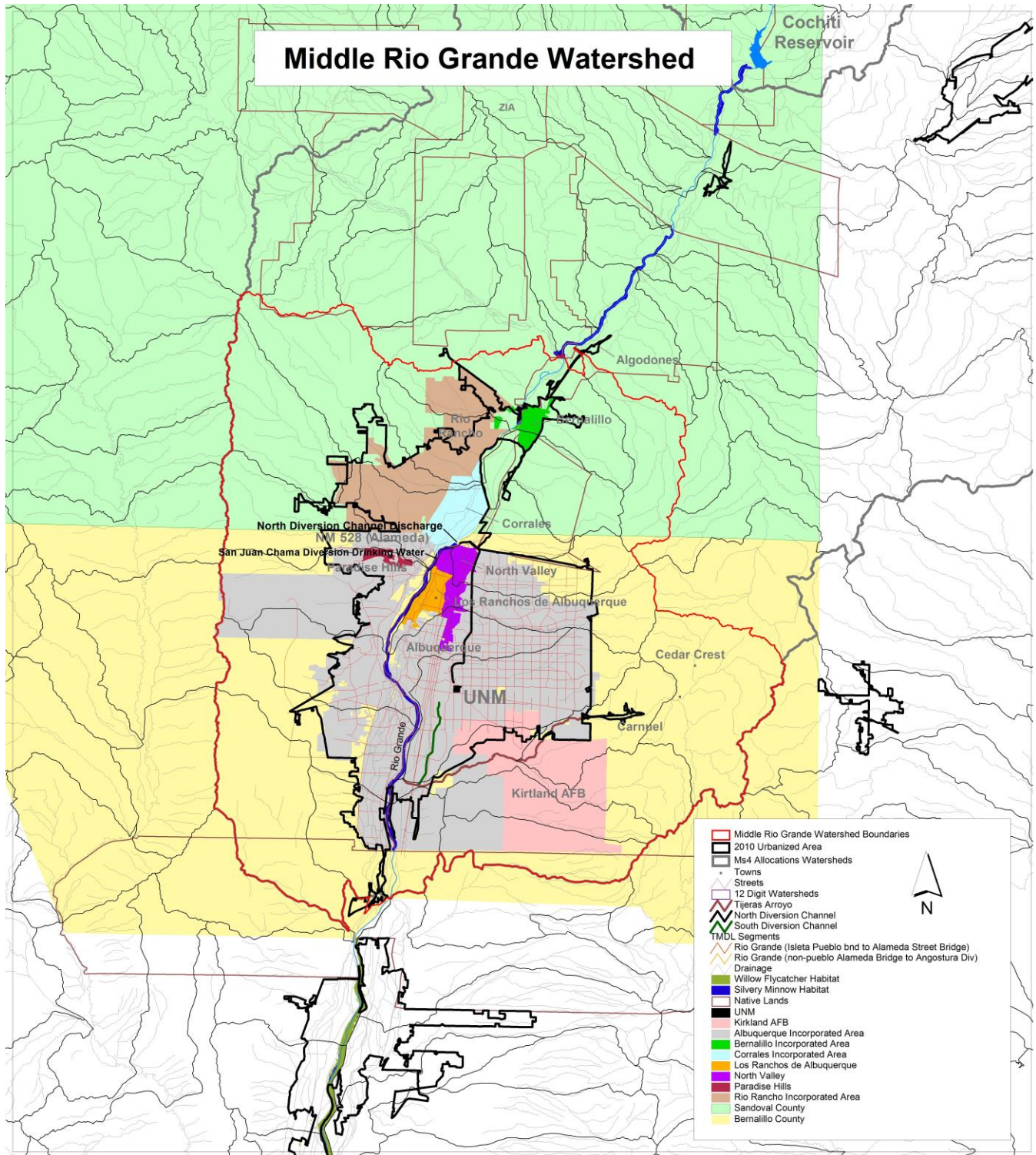
- (38) **Municipal Separate Storm Sewer (MS4)** means all separate storm sewers that are defined as “large” or “medium” or “small” municipal separate storm sewer systems pursuant to paragraphs 40 CFR §122.26(b)(4), (b)(7), and (b)(16), or designated under paragraph 40 CFR §122.26(a)(1)(v).
- (39) **Non-traditional MS4** means systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings. 40 CFR 122.26(a)(16)(iii).
- (40) **NOI** means Notice of Intent to be covered by this permit (see Part I.B of this permit)
- (41) **NOT** means Notice of Termination.
- (42) **Outfall** means a *point source* as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.
- (43) **Percent load reduction** means the difference between the baseline load and the target load divided by the baseline load.
- (44) **Owner or operator** means the owner or operator of any “facility or activity” subject to regulation under the NPDES program.
- (45) **Permittee** refers to any person (defined below) authorized by this NPDES permit to discharge to Waters of the United States.
- (46) **Permitting Authority** means EPA, Region 6.
- (47) **Person** means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.
- (48) **Point Source** means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.
- (49) **Pollutant** is defined at 40 CFR 122.2. Pollutant means dredged spoil, solid waste, incinerator residue, filter back-wash, sewage, garbage, sewage sludge. Munitions, chemical waste, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011), heat, wrecked or discarded equipment, rock sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.
- (50) **Pre-development Hydrology**, Predevelopment hydrology is generally the rain volume at which runoff would be produced when a site or an area is in its natural condition, prior to development disturbances. For the Middle Rio Grande area, EPA considers predevelopment conditions to be a mix of woods and desert shrub.
- (51) **Rainfall and Rainwater Harvesting** means the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.
- (52) **Soil amendment** means adding components to in-situ or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.
- (53) **Storm drainage projects** include stormwater inlets, culverts, minor conveyances and a host of other structures or devices.
- (54) **Storm sewer**, unless otherwise indicated, means a municipal separate storm sewer.
- (55) **Stormwater** means stormwater runoff, snow melt runoff, and surface runoff and drainage.
- (56) **Stormwater Discharge Associated with Industrial Activity** means the discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant (See 40 CFR §122.26(b)(14) for specifics of this definition).
- (57) **Target load** means the load for the pollutant of concern which is necessary to attain water quality goals (e.g. applicable water quality standards).
- (58) **Stormwater Management Program (SWMP)** means a comprehensive program to manage the quality of stormwater discharged from the municipal separate storm sewer system. For the purposes of this permit, the Stormwater Management Program is considered a single document, but may actually consist of separate programs (e.g. "chapters") for each permittee.
- (59) **Targeted controls** means practices implemented to address particular pollutant of concern. For example litter program targets floatables.
- (60) **Time-weighted composite** means a composite sample consisting of a mixture of equal volume aliquots collected at a constant time interval.
- (61) **Total Maximum Daily Load (TMDL)** means a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards. A TMDL is the sum of individual wasteload allocations for point sources (WLA), load allocations for non-point sources and natural background (LA), and must consider seasonal variation and include a margin of safety. The TMDL comes in the form of a technical document or plan.

- (62) **Toxicity** means an LC50 of <100% effluent.
- (63) **Waste load allocation (WLA)** means the portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.
- (64) **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- (65) **Whole Effluent Toxicity (WET)** means the aggregate toxic effect of an effluent measured directly by a toxicity test.

PART VIII PERMIT CONDITIONS APPLICABLE TO SPECIFIC AREAS OR INDIAN COUNTY LANDS

Reserved

Appendix A - Middle Rio Grande Watershed Jurisdictions and Potential Permittees



Middle Rio Grande Watershed Jurisdictions and Potential Permittees

Class A:

City of Albuquerque
AMAFCA (Albuquerque Metropolitan Arroyo Flood Control Authority)
UNM (University of New Mexico)
NMDOT (New Mexico Department of Transportation District 3)

Class B:

Bernalillo County
Sandoval County
Village of Corrales
City of Rio Rancho
Los Ranchos de Albuquerque
KAFB (Kirtland Air Force Base)
Town of Bernalillo
EXPO (State Fairgrounds/Expo NM)
SSCAFCA (Southern Sandoval County Arroyo Flood Control Authority)
NMDOT (New Mexico Department of Transportation District 3)

Class C:

ESCAFCA (Eastern Sandoval County Arroyo Flood Control Authority)
Sandia Labs (DOE)

Class D:

Pueblo of Sandia
Pueblo of Isleta
Pueblo of Santa Ana

Note: There could be additional potential permittees.

NMDOT Dist. 3 falls into the Class A type permittee, if an individual program is developed or/and implemented. The timelines for cooperative programs should be used, if NMDOT Dist. 3 cooperates with other permittees.

Appendix B - Total Maximum Daily Loads (TMDLs)

B.1. Approved Total Maximum Daily Loads (TMDLs) Tables

A bacteria TMDL for the Middle Rio Grande was approved by the New Mexico Water Quality Control Commission on April 13, 2010, and by EPA on June 30, 2010. The new TMDL modifies: 1) the indicator parameter for bacteria from fecal coliform to *E. coli*, and 2) the way the WLAs are assigned

Discharges to Impaired Waters – TMDL Waste Load Allocations (WLAs)² for *E. coli*: Rio Grande¹

Stream Segment	Stream Name	Permittee Class	FLOW CONDITIONS & ASSOCIATED WLA (cfu/day) ³				
			High	Moist	Mid-Range	Dray	Low
2105_50	Isleta Pueblo boundary to Alameda Street Bridge (based on flow at USGS Station NM08330000)	Class A ⁴	3.36x10 ¹⁰	8.41 x10 ¹⁰	5.66 x10 ¹⁰	2.09 x10 ¹⁰	4.67 x10 ⁹
		Class B ⁵ Class C ⁶	3.73 x10 ⁹	9.35 x10 ⁹	6.29 x10 ⁹	2.32 x10 ⁹	5.19 x10 ⁸
2105.1_00	non-Pueblo Alameda Bridge to Angostura Diversion (based on flow at USGS Station NM08329928)	Class A	5.25 x10 ¹⁰	1.52 x10 ¹⁰	–	5.43 x10 ⁹	2.80 x10 ⁹
		Class B Class C	2.62 x10 ¹¹	7.59 x10 ¹⁰	–	2.71 x10 ¹⁰	1.40 x10 ¹⁰

- 1 Total Maximum Daily Load for the Middle Rio Grande Watershed, NMED, 2010.
- 2 The WLAs for the stormwater MS4 permit was based on the percent jurisdiction area approach. Thus, the MS4 WLAs are a percentage of the available allocation for each hydrologic zone, where the available allocation = TMDL – WLA – MOS.
- 3 Flow conditions relate to percent of days the flow in the Rio Grande at a USGS Gauge exceeds a particular level: High 0-10%; Moist 10-40%; Mid-Range 40-60%; Dry 60-90%; and Low 90-100%. (Source: Figures 4.3 and 4.4 in 2010 Middle Rio Grande TMDL)
- 4 Phase I MS4s
- 5 Phase II MS4s (2000 Census)
- 6 New Phase II MS4s (2010 Census or MS4s designated by the Director)

Estimating Target Loadings for Particular Monitoring Location:

The Table in B.2 below provides a mechanism to calculate, based on acreage within a drainage area, a target loading value for a particular monitoring location.

B.2. Calculating Alternative Sub-measurable Goals

Individual permittees or a group of permittees seeking alternative sub-measurable goals under C.2.b.(i).(c).B should consult NMED. Preliminary proposals should be submitted with the Notice of Intent (NOI) under Part I.B.2.k according to the due dates specified in Part I.B.1.a of the permit. This proposal shall include, but is not limited to, the following items

B.2.1 Determine base loading for subwatershed areas consistent with TMDL

- a. Using the table below, the permittee must develop a target load consistent with the TMDL for any sampling point in the watershed (even if it includes area outside the jurisdictional area of the permit).

E. coli loading on a per area basis (cfu/sq mi/day)

	high	moist	mid	dry	low
Alameda to Isleta	1.79E+09	4.48E+08	3.02E+08	1.11E+08	2.58E+07
Angostura to Alameda	3.25E+09	9.41E+08	5.19E+08	3.37E+08	1.74E+08

- b. An estimation of the pertinent, subwatershed area that the permittee is responsible for and the basis for determining that area, including the means for excluding any tributary inholdings;
- c. Using the total loading for the watershed (from part a) and the percentage of the watershed area that is part of the permittee(s) jurisdiction (part b) to calculate a base WLA for this subwatershed.

B.2.2 Set Alternative subwatershed targets

- a. Permittee(s) may reallocate WLA within and between subwatershed based on factors including:
 - Population density within the pertinent watershed area;
 - Slope of the waterway;
 - Percent impervious surface and how that value was determined;
 - Stormwater treatment, installation of green infrastructure for the control or treatment of stormwater and stormwater pollution prevention and education programs within specific watersheds
- b. A proposal for an alternative subwatershed target must include the rationale for the factor(s) used

B.2.3 Ensure overall compliance with TMDL WLA allocation

The permittee(s) will provide calculations demonstrating the total WLA under the alternative proposed in (Part II) is consistent with the baseline calculated in (Part I) based on their total jurisdictional area. Permittee(s) will not be allowed to allocate more area within the watershed than is accorded to them under their jurisdictional area. For permittees that work cooperatively, WLA calculations may be combined and used where needed within the sub-watershed amongst the cooperating parties.

WLA calculations must be sent as part of the Notice of Intent to EPA via e-mail at R6_MS4Permits@epa.gov. These calculations must also be sent to:

Sarah Holcomb
 Industrial and Stormwater Team Leader
 NMED Surface Water Quality Bureau
 P.O. Box 5469,

Appendix C - Historic Properties Eligibility Procedures

MS4 operators must determine whether their MS4's storm water discharges, allowable non-storm water discharges, or construction of best management practices (BMPs) to control such discharges, have potential to affect a property that is either listed or eligible for listing on the National Register of Historic Places.

For existing dischargers who do not need to construct BMPs for permit coverage, a simple visual inspection may be sufficient to determine whether historic properties are affected. However, for MS4s which are new storm water dischargers and for existing MS4s which are planning to construct BMPs for permit eligibility, MS4 operators should conduct further inquiry to determine whether historic properties may be affected by the storm water discharge or BMPs to control the discharge. In such instances, MS4 operators should first determine whether there are any historic properties or places listed on the National Register or if any are eligible for listing on the register (e.g., they are "eligible for listing").

Due to the large number of entities seeking coverage under this permit and the limited number of personnel available to State and Tribal Historic Preservation Officers nationwide to respond to inquiries concerning the location of historic properties, EPA suggests that MS4 operators first access the "National Register of Historic Places" information listed on the National Park Service's web page (www.nps.gov/nr/). Addresses for State Historic Preservation Officers and Tribal Historic Preservation Officers are listed in Parts II and III of this appendix, respectively. In instances where a Tribe does not have a Tribal Historic Preservation Officer, MS4 operators should contact the appropriate Tribal government office when responding to this permit eligibility condition. MS4 operators may also contact city, county or other local historical societies for assistance, especially when determining if a place or property is eligible for listing on the register. Tribes that do not currently reside in an area may also have an interest in cultural properties in areas they formerly occupied. Tribal contact information is available at <http://www.epa.gov/region06/6dra/oejta/tribalaffairs/index.html>

The following three scenarios describe how MS4 operators can meet the permit eligibility criteria for protection of historic properties under this permit:

- (1) If historic properties are not identified in the path of an MS4's storm water and allowable non-storm water discharges or where construction activities are planned to install BMPs to control such discharges (e.g., diversion channels or retention ponds), then the MS4 operator has met the permit eligibility criteria under Part I.A.3.b.(i).
- (2) If historic properties are identified but it is determined that they will not be affected by the discharges or construction of BMPs to control the discharge, the MS4 operator has met the permit eligibility criteria under Part.I.A.3.b.(ii).
- (3) If historic properties are identified in the path of an MS4's storm water and allowable non-storm water discharges or where construction activities are planned to install BMPs to control such discharges, and it is determined that there is the potential to adversely affect the property, the MS4 operator can still meet the permit eligibility criteria under Part I.A.3.b.(ii) if he/she obtains and complies with a written agreement with the appropriate State or Tribal Historic Preservation Officer which outlines measures the MS4 operator will follow to mitigate or prevent those adverse effects. The operator should notify EPA before exercising this option.

The contents of such a written agreement must be included in the MS4's Storm Water Management Program.

In situations where an agreement cannot be reached between an MS4 operator and the State or Tribal Historic Preservation Officer, MS4 operators should contact EPA for assistance.

The term "adverse effects" includes but is not limited to damage, deterioration, alteration or destruction of the historic property or place. EPA encourages MS4 operators to contact the appropriate State or Tribal Historic Preservation Officer as soon as possible in the event of a potential adverse effect to a historic property.

MS4 operators are reminded that they must comply with applicable State, Tribal and local laws concerning the protection of historic properties and places.

I. Internet Information on the National Register of Historic Places

An electronic listing of the "National Register of Historic Places," as maintained by the National Park Service on its National Register Information System (NRIS), can be accessed on the Internet at www.nps.gov/nr/.

II. State Historic Preservation Officers (SHPO)

SHPO List for areas covered by the permit:

NEW MEXICO

Historic Preservation Div, Office of Cultural Affairs
Bataan Memorial Building, 407 Galisteo Street, Suite 236
Santa Fe, NM 87501
505-827-6320 FAX: 505-827-6338

III. Tribal Historic Preservation Officers
(THPO)

In instances where a Tribe does not have a Tribal Historic Preservation Officer, please contact the appropriate Tribal government office when responding to this permit eligibility condition.

Tribal Historic Preservation Officers:

Mescalero Apache Tribe
P.O. Box 227
Mescalero, New Mexico 88340

Pueblo of Sandia Environment Department
Attn: Frank Chaves, Environment Director
481 Sandia Loop
Bernalillo, New Mexico 87004

Pueblo of Isleta
Department of Cultural and Historic Preservation
Attn: Dr. Henry Walt, THPO
P.O. Box 1270
Isleta NM 87022

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

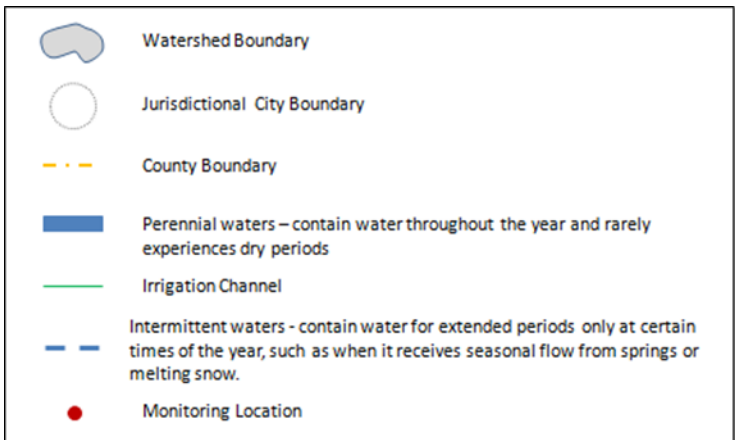
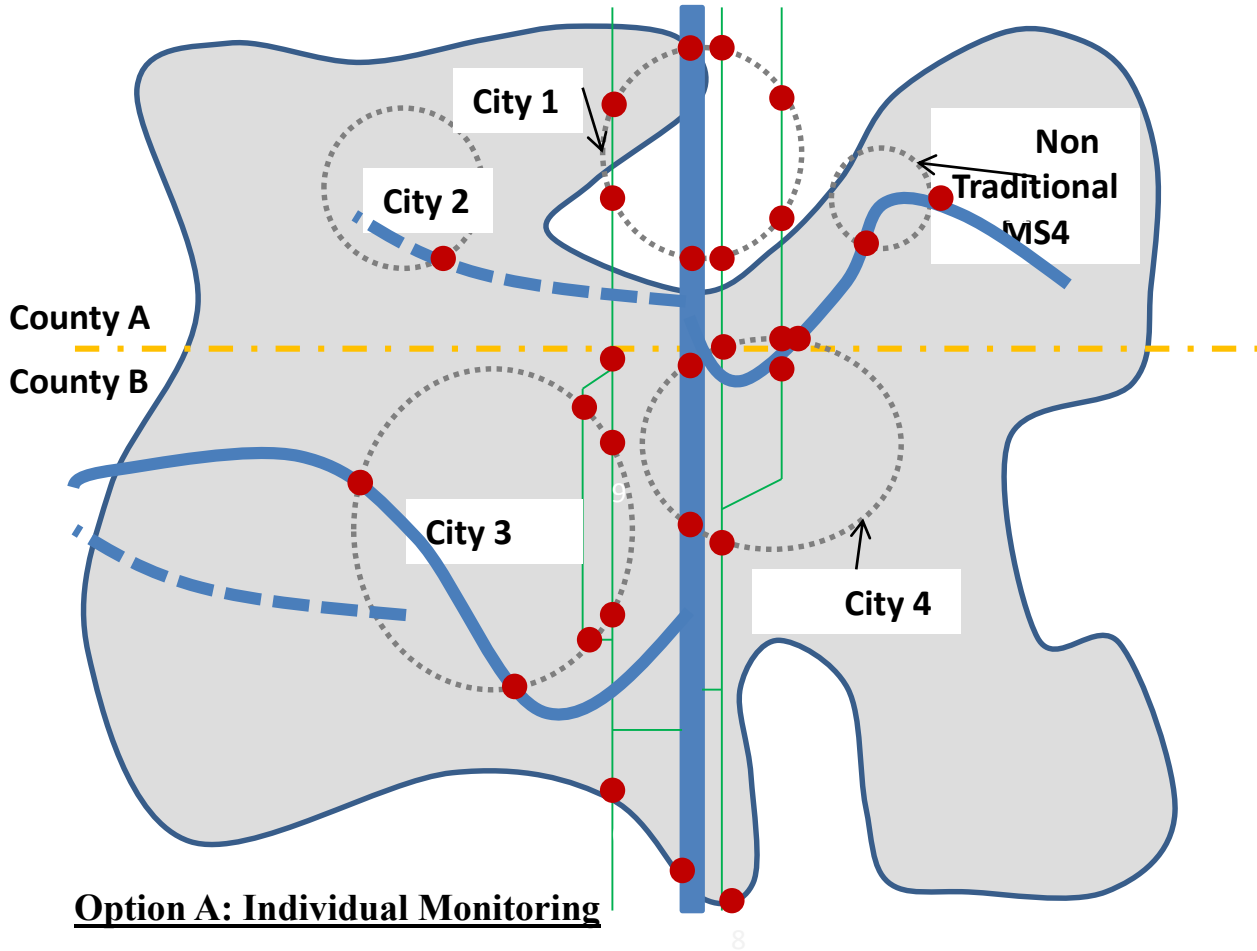
For more information:

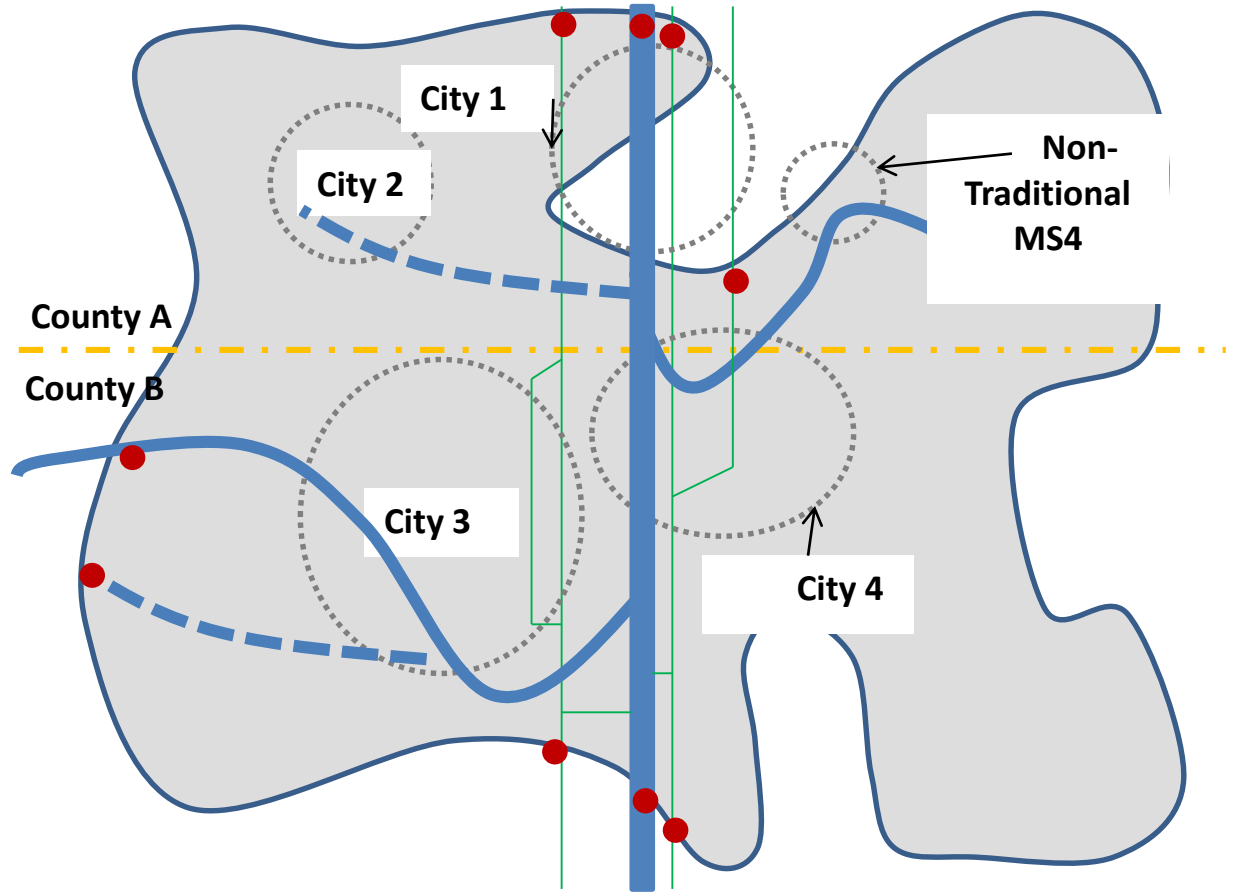
National Association of Tribal Historic
Preservation Officers
P.O. Box 19189
Washington, DC 20036-9189
Phone: (202) 628-8476
Fax: (202) 628-2241

IV. Advisory Council on Historic Preservation

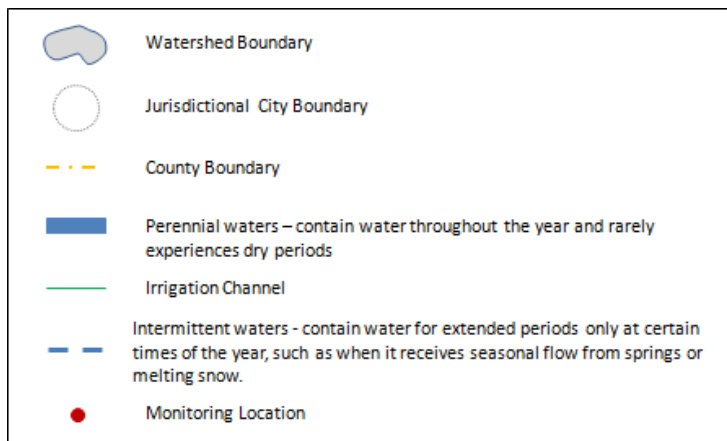
Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 803,
Washington, DC 20004 Telephone: (202) 606-8503, Fax: (202) 606-8647/8672, E-mail:
achp@achp.gov

Appendix D - Suggested Initial Phase Sampling Location Concepts – Wet Weather Monitoring





Option B: Cooperative Monitoring



Appendix E - Providing Comments or Requesting a Public Hearing on an MS4 Operator's NOI

NOTE: Appendix E is for public information only and does not impose conditions on the permittee.

Any interested person may provide comments or request a public hearing on a Notice of Intent (NOI) submitted under this general permit. The general permit itself is not reopened for comment during the period an NOI is available for review and comment.

A. How Will I Know A MS4 is Filing an NOI and How Can I Get a Copy?

The permittee is required to provide a local public notice that they are filing an NOI and make a copy of the draft NOI submittal available locally. EPA will put basic information from all NOIs received on the Internet at: <http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm> . You may contact the listed MS4 representative for local access to the NOI. You may also request a copy from EPA by contacting Ms. Dorothy Brown at 214-665-8141 or brown.dorothy@epa.gov or via mail at the Address in Item D below, attention Dorothy Brown.

B. When Can I File Comments or a Hearing Request?

You can file comments and/or request a hearing as soon as a NOI is filed, but your request must be postmarked or physically received by EPA within thirty (30) calendar days of the date the NOI is posted on the web site in Section A.

C. How Do I File Comments or Make My Hearing Request?

Your comments and/or hearing request must be in writing and must state the nature of the issues proposed to be raised in the hearing. You should be as specific as possible and include suggested remedies where possible. You should include any data supporting your position(s). If you are submitting the request on behalf of a group or organization, you should describe the nature and membership of the group or organization. Electronic format comments in MS-WORD or PDF format are preferred.

D. Where Do I Send Copies of My Comments or Hearing Request?

Electronic Format: Submit one copy of your comments or hearing request via e-mail to Ms. Dorothy Brown at brown.dorothy@epa.gov and copy the Operator of the MS4 at the address on the NOI (send hard copy to MS4 Operator if no e-mail address provided). You may also submit via compact disk or diskette formatted for PCs to addresses for hard copy below. (Hard Copy: You must send an original and one copy of your comments or hearing request to EPA at the address below and a copy to the Operator of the MS4 at the address provided on the NOI)

U.S. EPA Region 6
Water Quality Protection Division (6WQ-NP)
Attn: Dorothy Brown
1445 Ross Ave., Suite 1200
Dallas, TX 75202

E. How Will EPA Determine Whether or Not To Hold a Public Hearing?

EPA will evaluate all hearing requests received on an NOI to determine if a significant degree of public interest exists and whether issues raised may warrant clarification of the MS4 Operator's NOI submittal. EPA will hold a public hearing if a significant amount of public interest is evident. EPA may also, at the Agency's discretion, hold either a public hearing or an informal public meeting to clarify issues related to the NOI submittal. EPA may hold a single public hearing or public meeting covering more than one MS4 (e.g., for all MS4s in an Urbanized Area, etc.).

F. How Will EPA Announce a Public Hearing or Public Meeting?

EPA will provide public notice of the time and place for any public hearing or public meeting in a major newspaper with local distribution and via the Internet at <http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm>.

G. What Will EPA Do With Comments on an NOI?

EPA will take all comments made directly or in the course of a public hearing or public meeting into consideration in determining whether or not the MS4 that submitted the NOI is appropriately covered under the general permit. The MS4 operator will have the opportunity to provide input on issues raised. The Director may require the MS4 operator to supplement or amend the NOI submittal in order to be authorized under the general permit or may direct the MS4 Operator to submit an individual permit application. A summary of issues raised and EPA's responses will be made available online at <http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm>. A hard copy may also be requested by contacting Ms. Dorothy Brown (see paragraph D)

Appendix F - Minimum Quantification Levels (MQL's)

The following Minimum Quantification Levels (MQL's) are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

POLLUTANTS	MQL µg/l	POLLUTANTS	MQL µg/l
METALS, RADIOACTIVITY, CYANIDE and CHLORINE			
Aluminum	2.5	Molybdenum	10
Antimony	60	Nickel	0.5
Arsenic	0.5	Selenium	5
Barium	100	Silver	0.5
Beryllium	0.5	Thallium	0.5
Boron	100	Uranium	0.1
Cadmium	1	Vanadium	50
Chromium	10	Zinc	20
Cobalt	50	Cyanide	10
Copper	0.5	Cyanide, weak acid dissociable	10
Lead	0.5	Total Residual Chlorine	33
Mercury (*)	0.0005 0.005		
DIOXIN			
2,3,7,8-TCDD	0.00001		
VOLATILE COMPOUNDS			
Acrolein	50	1,3-Dichloropropylene	10
Acrylonitrile	20	Ethylbenzene	10
Benzene	10	Methyl Bromide	50
Bromoform	10	Methylene Chloride	20
Carbon Tetrachloride	2	1,1,2,2-Tetrachloroethane	10
Chlorobenzene	10	Tetrachloroethylene	10
Chlorodibromomethane	10	Toluene	10
Chloroform	50	1,2-trans-Dichloroethylene	10
Dichlorobromomethane	10	1,1,2-Trichloroethane	10
1,2-Dichloroethane	10	Trichloroethylene	10
1,1-Dichloroethylene	10	Vinyl Chloride	10
1,2-Dichloropropane	10		
ACID COMPOUNDS			
2-Chlorophenol	10	2,4-Dinitrophenol	50
2,4-Dichlorophenol	10	Pentachlorophenol	5
2,4-Dimethylphenol	10	Phenol	10
4,6-Dinitro-o-Cresol	50	2,4,6-Trichlorophenol	10

POLLUTANTS	MQL µg/l	POLLUTANTS	MQL µg/l
BASE/NEUTRAL			
Acenaphthene	10	Dimethyl Phthalate	10
Anthracene	10	Di-n-Butyl Phthalate	10
Benzidine	50	2,4-Dinitrotoluene	10
Benzo(a)anthracene	5	1,2-Diphenylhydrazine	20
Benzo(a)pyrene	5	Fluoranthene	10
3,4-Benzofluoranthene	10	Fluorene	10
Benzo(k)fluoranthene	5	Hexachlorobenzene	5
Bis(2-chloroethyl)Ether	10	Hexachlorobutadiene	10
Bis(2-chloroisopropyl)Ether	10	Hexachlorocyclopentadiene	10
Bis(2-ethylhexyl)Phthalate	10	Hexachloroethane	20
Butyl Benzyl Phthalate	10	Indeno(1,2,3-cd)Pyrene	5
2-Chloronaphthalene	10	Isophorone	10
Chrysene	5	Nitrobenzene	10
Dibenzo(a,h)anthracene	5	n-Nitrosodimethylamine	50
1,2-Dichlorobenzene	10	n-Nitrosodi-n-Propylamine	20
1,3-Dichlorobenzene	10	n-Nitrosodiphenylamine	20
1,4-Dichlorobenzene	10	Pyrene	10
3,3'-Dichlorobenzidine	5	1,2,4-Trichlorobenzene	10
Diethyl Phthalate	10		
PESTICIDES AND PCBS			
Aldrin	0.01	Beta-Endosulfan	0.02
Alpha-BHC	0.05	Endosulfan sulfate	0.02
Beta-BHC	0.05	Endrin	0.02
Gamma-BHC	0.05	Endrin Aldehyde	0.1
Chlordane	0.2	Heptachlor	0.01
4,4'-DDT and derivatives	0.02	Heptachlor Epoxide	0.01
Dieldrin	0.02	PCBs **	0.2
Alpha-Endosulfan	0.01	Toxaphene	0.3

(MQL's Revised November 1, 2007)

(*) Default MQL for Mercury is 0.005 unless Part I of your permit requires the more sensitive Method 1631 (Oxidation / Purge and Trap / Cold vapor Atomic Fluorescence Spectrometry), then the MQL shall be 0.0005.

(**) EPA Method 1668 should be utilized when PCB water column monitoring is conducted to determine compliance with permit requirements. Either the Arochlor test (EPA Method 8082) or USGS test method (8093) may be utilized for purposes of sediment sampling as part of a screening program, but must use EPA Method 1668 (latest revision) for confirmation and determination of specific PCB levels at that location.

Appendix G – Oxygen Saturation and Dissolved Oxygen Concentrations North Diversion Channel Area

Concentrations of dissolved oxygen in water at various atmospheric pressures and temperatures with 100 percent oxygen saturation, 54.3 percent oxygen saturation (associated with hypoxia and harassment of silvery minnows), and 8.7 percent oxygen saturation (associated with anoxia and lethality of silvery minnows) at the North Diversion Channel (NDC) (based on USGS DO website <<http://water.usgs.gov/software/DOTABLES/>> for pressures between 628 to 648 millimeters of mercury (Hg)). Source: Biological Consultation Cons. #22420-2011-F-0024-R001

Water temp. (°C)	100% Oxygen Saturation at NDC			54.3% saturation = Harassmen			8.7% saturation= 50%Lethality		
	628mmHg	638mmHg	648mmHg	628mmHg	638mmHg	648mmHg	628mmHg	638mmHg	64BmmHg
0	12.1	12.3	12.5	66	6.7	6.8	1.1	1.1	1.1
1	11.7	11.9	12.1	64	6.5	6.6	1.0	1.0	1.1
2	11.4	11.6	11.8	6.2	6.3	8.4	1.0	1.0	1.0
3	11.1	11.3	11.5	6.0	6.1	6.2	1.0	1.0	1.0
4	10.8	11	11.2	5.9	6.0	6.1	0.9	1.0	1.0
5	10.5	10.7	10.9	5.7	5.8	5.9	0.9	0.9	0.9
6	10.3	10.4	10.6	5.6	5.8	5.0	0.9	0.9	0.9
7	10	10.2	10.3	5.4	5.5	5.6	0.9	0.9	0.9
8	9.8	9.9	10.1	5.3	5.4	5.5	0.9	0.9	0.9
8	9.5	9.7	9.6	5.2	5.3	5.3	0.8	0.8	0.9
10	9.3	9.5	9.6	5.0	5.2	5.2	0.8	0.8	0.8
11	9.1	9.2	9.4	4.9	5.0	5.1	0.8	0.8	0.8
12	8.9	9	9.2	4.8	4.9	5.0	0.8	0.8	0.8
13	8.7	8.8	9	4.7	4.8	4.9	0.8	0.8	0.8
14	8.5	8.6	8.8	4.8	4.7	4.8	0.7	0.7	0.0
15	8.3	8.4	8.8	4.5	4.6	4.7	0.7	0.7	0.7
16	8.1	8.3	8.4	4.4	4.5	4.6	0.7	0.7	0.7
17	8	8.1	8.2	4.3	4.4	4.5	0.7	0.7	0.7
18	7.8	7.9	8	4.2	4.3	4.3	0.7	0.7	0.7
19	7.6	7.8	7.9	4.1	4.2	4.3	0.7	0.7	0.7
20	7.5	7.6	7.7	4.1	4.1	4.2	0.7	0.7	0.7
21	7.3	7.4	7.6	4.0	4.0	4.1	0.6	0.6	0.7
22	7.2	7.3	7.4	3.9	4.0	4.0	0.6	0.6	0.6
23	7	7.2	7.3	3.8	3.9	4.0	0.6	0.6	0.6
24	6.9	7	7.1	3.7	3.8	3.9	0.6	0.6	0.6
25	6.8	6.9	7	3.7	3.7	3.6	0.6	0.6	0.6
26	6.7	6.8	6.9	3.6	3.7	3.7	0.6	0.6	0.6
27	6.5	6.6	6.8	3.5	3.6	3.7	0.6	0.6	0.8
28	6.4	6.5	6.6	3.5	3.5	3.6	0.6	0.8	0.8
29	6.3	6.4	6.5	3.4	3.5	3.5	0.5	0.6	0.8
30	6.2	6.3	6.4	3.4	3.4	3.5	0.5	0.5	0.8
31	6.1	6.2	6.3	3.3	3.4	3.4	0.5	0.5	0.8
32	6	6.1	6.2	3.3	3.3	3.4	0.5	0.5	0.5
33	5.9	6	6.1	3.2	3.3	3.3	0.5	0.5	0.5
34	5.8	5.9	6	3.1	3.2	3.3	0.5	0.5	0.5
35	5.7	5.8	5.9	3.1	3.1	3.2	0.5	0.5	0.5

This page intentionally left blank

Exhibit 3

Boise, ID – Boise/Garden City Area MS4 Permit (Permit No. IDS-
027561)

This page intentionally left blank

United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

**Authorization to Discharge Under the
National Pollutant Discharge Elimination System**

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, as amended by the Water Quality Act of 1987, P.L. 100-4, the "Act",

**Ada County Highway District,
Boise State University,
City of Boise,
City of Garden City,
Drainage District #3,
and the Idaho Transportation Department District #3,

(hereinafter "the Permittees")**

are authorized to discharge from all municipal separate storm sewer system (MS4) outfalls existing as of the effective date of this Permit to waters of the United States, including the Boise River and its tributaries, in accordance with the conditions set forth herein.

This Permit will become effective February 1, 2013.

This Permit, and the authorization to discharge, expires at midnight, January 30, 2018.

Permittees must reapply for permit reissuance on or before August 3, 2017, 180 days before the expiration of this Permit, if the Permittees intend to continue operations and discharges from the MS4s beyond the term of this Permit.

Signed this 12th day of December, 2012.


Daniel D. Opalski, Director
Office of Water and Watersheds, Region 10
U.S. Environmental Protection Agency

Table of Contents

I. Applicability	3
I.A. Permit Area.....	3
I.B. Discharges Authorized Under This Permit.....	3
I.C. Permittees' Responsibilities.....	3
I.D. Limitations on Permit Coverage.....	4
II. Storm Water Management Program (SWMP) Requirements.....	6
II.A. General Requirements and Program Coordination.....	6
II.B. Minimum Control Measures.....	8
II.C. Discharges to Water Quality Impaired Receiving Waters.....	33
II.D. Reviewing and Updating the SWMP.....	34
II.E. Transfer of Ownership, Authority or Responsibility for SWMP Implementation.....	36
II.F. SWMP Resource.....	36
II.G. Legal Authority.....	36
III. Schedule for Implementation and Required Submissions	37
IV. Monitoring, Recordkeeping and Reporting Requirements.....	40
IV.A. Monitoring.....	40
IV.B. Recordkeeping.....	45
IV.C. Reporting Requirements.....	45
IV.D. Addresses.....	47
V. Compliance Responsibilities	48
V.A. Duty to Comply.....	48
V.B. Penalties for Violations of Permit Conditions.....	48
V.C. Need to Halt or Reduce Activity not a Defense.....	50
V.D. Duty to Mitigate.....	50
V.E. Proper Operation and Maintenance.....	50
V.F. Toxic Pollutants.....	50
V.G. Planned Changes.....	50
V.H. Anticipated Noncompliance.....	51
V.I. Twenty-Four Hour Notice of Noncompliance Reporting.....	51
V.J. Bypass of Treatment Facilities.....	53
V.K. Upset Conditions.....	54
VI. General Provisions.....	54
VI.A. Permit Actions.....	54
VI.B. Duty to Reapply.....	55
VI.C. Duty to Provide Information.....	55
VI.D. Other Information.....	55
VI.E. Signatory Requirements.....	56
VI.F. Availability of Reports.....	56
VI.G. Inspection and Entry.....	56
VI.H. Property Rights.....	57
VI.I. Transfers.....	57
VI.J. State/Tribal Environmental Laws.....	57
VI.K. Oil and Hazardous Substance Liability.....	57
VI.L. Severability.....	57
VII. Definitions and Acronyms.....	57

I. Applicability

A. Permit Area. This Permit covers all areas within the corporate boundary of the City of Boise and Garden City, Idaho, which are served by the municipal separate storm sewer systems (MS4s) owned or operated by the Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3, and/or the Idaho Transportation Department District #3 (the Permittees).

B. Discharges Authorized Under This Permit. Subject to the conditions set forth herein, the Permittees are authorized to discharge storm water to waters of the United States from the MS4s identified in Part I.A.

As provided in Part I.D, this Permit also authorizes the discharge of flows from the MS4s which are categorized as allowable non-storm water discharge, storm water discharge associated with industrial activity, and storm water discharge associated with construction activity.

C. Permittees' Responsibilities

1. **Individual Responsibility.** Each Permittee is individually responsible for Permit compliance related only to portions of the MS4 owned or operated solely by that Permittee, or where this Permit requires a specific Permittee to take an action.
2. **Joint Responsibility.** Each Permittee is jointly responsible for Permit compliance:
 - a) related to portions of the MS4 where operational or storm water management program (SWMP) implementation authority has been transferred to all of the Permittees in accordance with an intergovernmental agreement or agreement between the Permittees;
 - b) related to portions of the MS4 where Permittees jointly own or operate a portion of the MS4;
 - c) related to the submission of reports or other documents required by Parts II and IV of this Permit; and
 - d) Where this Permit requires the Permittees to take an action and a specific Permittee is not named.
3. **Intergovernmental Agreement.** The Permittees must maintain an intergovernmental agreement describing each organization's respective roles and responsibilities related to this Permit. Any previously signed agreement may be updated, as necessary, to comply with this requirement. An updated intergovernmental agreement must be completed no later than July 1, 2013. A copy of the updated intergovernmental agreement must be submitted to the Environmental Protection Agency (EPA) with the 1st Year Annual Report.

D. Limitations on Permit Coverage

1. **Non-Storm Water Discharges.** Permittees are not authorized to discharge non-storm water from the MS4, except where such discharges satisfy one of the following three conditions:
 - a) The non-storm water discharges are in compliance with a separate NPDES permit;
 - b) The non-storm water discharges result from a spill and:
 - (i) are the result of an unusual and severe weather event where reasonable and prudent measures have been taken to prevent and minimize the impact of such discharge; or
 - (ii) consist of emergency discharges required to prevent imminent threat to human health or severe property damage, provided that reasonable and prudent measures have been taken to prevent and minimize the impact of such discharges;

or

- c) The non-storm water discharges satisfy each of the following two conditions:
 - (i) The discharges consist of uncontaminated water line flushing; potable water sources; landscape irrigation (provided all pesticides, herbicides and fertilizer have been applied in accordance with manufacturer's instructions); lawn watering; irrigation water; flows from riparian habitats and wetlands; diverted stream flows; springs; rising ground waters; uncontaminated ground water infiltration (as defined at 40 CFR § 35.2005(20)) to separate storm sewers; uncontaminated pumped ground water or spring water; foundation and footing drains (where flows are not contaminated with process materials such as solvents); uncontaminated air conditioning or compressor condensate; water from crawlspace pumps; individual residential car washing; dechlorinated swimming pool discharges; routine external building wash down which does not use detergents; street and pavement wash waters, where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed); fire hydrant flushing; or flows from emergency firefighting activities; and
 - (ii) The discharges are not sources of pollution to waters of the United States. A discharge is considered a source of pollution to waters of the United States if it:
 - 1) Contains hazardous materials in concentrations found to be of public health significance or to impair beneficial uses in receiving waters. (Hazardous materials are those

that are harmful to humans and animals from exposure, but not necessarily ingestion);

- 2) Contains toxic substances in concentrations that impair designated beneficial uses in receiving waters. (Toxic substances are those that can cause disease, malignancy, genetic mutation, death, or similar consequences);
 - 3) Contains deleterious materials in concentrations that impair designated beneficial uses in receiving waters. (Deleterious materials are generally substances that taint edible species of fish, cause taste in drinking waters, or cause harm to fish or other aquatic life);
 - 4) Contains radioactive materials or radioactivity at levels exceeding the values listed in 10 CFR Part 20 in receiving waters;
 - 5) Contains floating, suspended, or submerged matter of any kind in concentrations causing nuisance or objectionable conditions or in concentrations that may impair designated beneficial uses in receiving waters;
 - 6) Contains excessive nutrients that can cause visible slime growths or other nuisance aquatic growths that impair designated beneficial uses in receiving waters;
 - 7) Contains oxygen-demanding materials in concentrations that would result in anaerobic water conditions in receiving waters; or
 - 8) Contains sediment above quantities specified in IDAPA 58.01.02.250.02.e or in the absence of specific sediment criteria, above quantities that impair beneficial uses in receiving waters; or
 - 9) Contains material in concentrations that exceed applicable natural background conditions in receiving waters (IDAPA 58.01.02.200.09). Temperature levels may be increased above natural background conditions when allowed under IDAPA 58.01.02.401.
2. **Discharges Threatening Water Quality.** Permittees are not authorized to discharge storm water that will cause, or have the reasonable potential to cause or contribute to, an excursion above the Idaho water quality standards.
 3. **Snow Disposal to Receiving Waters.** Permittees are not authorized to push or dispose of snow plowed within the Permit area directly into waters of the United States, or directly into the MS4(s). Discharges from any Permittee's snow disposal and snow management practices are authorized under this Permit only when such sites and practices are designed, conducted, operated, and maintained to prevent and reduce pollutants in the discharges to the maximum

extent practicable so as to avoid excursions above the Idaho water quality standards.

4. **Storm Water Discharge Associated with Industrial and Construction Activity.** Permittees are authorized to discharge storm water associated with industrial activity (as defined in 40 CFR 122.26(b)(14)), and storm water associated with construction activity (as defined in 40 CFR 122.26(b)(14)(x) and (b)(15)), from their MS4s, only when such discharges are otherwise authorized under an appropriate NPDES permit.

II. Storm Water Management Program (SWMP) Requirements

A. General Requirements

1. **Reduce pollutants to the maximum extent practicable.** The Permittees must implement and enforce a SWMP designed to reduce the discharge of pollutants from their MS4 to the maximum extent practicable (MEP), and to protect water quality in receiving waters. The SWMP as defined in this Permit must include best management practices (BMPs), controls, system design, engineering methods, and other provisions appropriate to control and minimize the discharge of pollutants from the MS4s.
 - a) **SWMP Elements.** The required SWMP control measures are outlined in Part II.SWMP assessment/monitoring requirements are described in Part IV. Each Permittee must use practices that are selected, implemented, maintained, and updated to ensure that storm water discharges do not cause or contribute to an exceedance of an applicable Idaho water quality standard.
 - b) **SWMP Documentation.** Each Permittee must prepare written documentation of the SWMP as implemented within their jurisdiction. The SWMP documentation must be organized according to the program components in Parts II and IV of this Permit, and must provide a current narrative physical description of the Permittee's MS4, illustrative maps or graphics, and all related ordinances, policies and activities as implemented within their jurisdiction. Each Permittee's SWMP documentation must be submitted to EPA with the 1st Year Annual Report.
 - (i) Each Permittee must provide an opportunity for public review and comment on their SWMP documentation, consistent with applicable state or local requirements and Part II.B.6 of this Permit.
 - (ii) Each Permittee's SWMP documentation must be updated at least annually and submitted as part of each subsequent Annual Report. (The document format used for Annual Report(s) submitted to EPA by the Permittees' prior to the effective date of this Permit may be modified to meet this requirement.)
 - c) **SWMP Information.** The SWMP must include an ongoing program for gathering, tracking, maintaining, and using information to set priorities, evaluate SWMP implementation and Permit compliance.

- d) **SWMP Statistics.** Permittees must track the number of inspections, official enforcement actions and types of public education activities and outcomes as stipulated by the respective program component. This information must be included in the Annual Report.
2. **Shared Implementation with outside entities.** Implementation of one or more of the SWMP minimum control measures may be shared with or delegated to another entity other than the Permittee(s). A Permittee may rely on another entity only if:
 - a) The other entity, in fact, implements the minimum control measure;
 - b) The action, or component thereof, is at least as stringent as the corresponding Permit requirement; and
 - c) The other entity agrees to implement the minimum control measure on the Permittee's behalf. A binding written acceptance of this obligation is required. Each Permittee must maintain and record this obligation as part of the SWMP documentation. If the other entity agrees to report on the minimum control measure, the Permittees must supply the other entity with the reporting requirements in Part IV.C of this Permit. The Permittees remain responsible for compliance with the Permit obligation if the other entity fails to implement the required minimum control measure.
 3. **Modification of the SWMP.** Minor modifications to the SWMP may be made in accordance with Part II.E of this Permit.
 4. **Subwatershed Planning.** No later than September 30, 2016, the Permittees must jointly complete at least two individual sub-watershed plans for areas served by the MS4s within the Permit area. For the purposes of this Permit, the terms "subwatershed" and "storm sewershed" are defined as in Part VII. For each plan document, the subwatershed planning area must drain to at least one of the water bodies listed in Table II.C.

Selected subwatersheds must be identified in the 1st Year Annual Report. Two completed subwatershed plan documents must be submitted to EPA as part of the 4th Year Annual Report.

- a) The Permittees must actively engage stakeholders in the development of each plan, and must provide opportunities for public input, consistent with Part II.B.6.
- b) The Permittees may modify and update any existing watershed planning document(s) to address the requirements of this Part.
- c) Each subwatershed plan must describe the extent and nature of the existing storm sewershed, and identify priority aquatic resources and beneficial uses to be protected or restored within the subwatershed planning area. Each subwatershed plan must contain a prioritized list of potential locations or opportunities for protecting or restoring such resources or beneficial uses through storm water infiltration, evapotranspiration or rainfall

harvesting/reuse, or other site-based low impact development (LID) practices. See Parts II.B.2.a, and II.B.2.c.

- d) Each subwatershed plan must include consideration and discussion of how the Permittees will provide incentives, or enforce requirements, through their respective Stormwater Management Programs to address the following principles:
- (i) Minimize the amount of impervious surfaces (roads, parking lots, roofs) within each watershed, by minimizing the creation, extension and widening of roads and associated development.
 - (ii) Preserve, protect, create and restore ecologically sensitive areas that provide water quality benefits and serve critical watershed functions. These areas may include, but are not limited to; riparian corridors, headwaters, floodplains and wetlands.
 - (iii) Prevent or reduce thermal impacts to water bodies, including requiring vegetated buffers along waterways, and disconnecting discharges to surface waters from impervious surfaces such as parking lots.
 - (iv) Seek to avoid or prevent hydromodification of streams and other water bodies caused by development, including roads, highways, and bridges.
 - (v) Preserve and protect trees, and other vegetation with important evapotranspirative qualities.
 - (vi) Preserve and protect native soils, prevent topsoil stripping, and prevent compaction of soils.

B. Minimum Control Measures. The following minimum control measures must be accomplished through each Permittee's Storm Water Management Program:

1. **Construction Site Runoff Control Program.** The Permittees must implement a construction site runoff control program to reduce discharges of pollutants from public and private construction activity within its jurisdiction. The Permittees' construction site management program must include the requirements described below:
 - a) **Ordinance and/or other regulatory mechanism.** To the extent allowable under local or state law, Permittees must adopt, implement, and enforce requirements for erosion controls, sediment controls, and materials management techniques to be employed and maintained at each construction project from initial clearing through final stabilization. Each Permittee must require construction site operators to maintain adequate and effective controls to reduce pollutants in storm water discharges from construction sites. The Permittees must use enforcement actions (such as, written warnings, stop work orders or fines) to ensure compliance.

No later than September 30, 2015, each Permittee must update their ordinances or other regulatory mechanisms, as necessary, to be consistent with this Permit and with the current version of the *NPDES General Permit for Storm Water Discharges from Construction Activities*, Permit #IDR12-0000 (NPDES Construction General Permit or CGP).

- b) **Manuals Describing Construction Storm Water Management Controls and Specifications.** The Permittees must require construction site operators within their jurisdiction to use construction site management controls and specifications as defined within manuals adopted by the Permittees.

No later than September 30, 2015, the Permittees must update their respective manuals, as necessary, to include requirements for the proper installation and maintenance of erosion controls, sediment controls, and material containment/pollution prevention controls during all phases of construction activity. The manual(s) must include all acceptable control practices, selection and sizing criteria, illustrations, and design examples, as well as recommended operation and maintenance of each practice. At a minimum, the manual(s) must include requirements for erosion control, sediment control, and pollution prevention which complement and do not conflict with the current version of the CGP. If the manuals previously adopted by the individual Permittee do not meet these requirements, the Permittee may create supplemental provisions to include as part of the adopted manual in order to comply with this Permit.

- c) **Plan Review and Approval.** The Permittees must review and approve preconstruction site plans from construction site operators within their jurisdictions. Permittees must ensure that the construction site operator is prohibited from commencing construction activity prior to receipt of written approval.
- (i) The Permittees must not approve any erosion and sediment control (ESC) plan or Storm Water Pollution Prevention Plan (SWPPP) unless it contains appropriate site-specific construction site control measures meeting the Permittee's requirements as outlined in Part II.B.1.b.
 - (ii) Prior to the start of a construction project disturbing one or more acres, or disturbing less than one acre but is part of a larger common plan of development, the Permittees must advise the construction site operator(s) to seek or obtain necessary coverage under the NPDES Construction General Permit.
 - (iii) Permittees must use qualified individuals, knowledgeable in the technical review of ESC plans/SWPPPs, to conduct such reviews.
 - (iv) Permittees must document the review of each ESC plan and/or SWPPP using a checklist or similar process.
- d) **Construction Site Inspections.** The Permittees must inspect construction sites occurring within their jurisdictions to ensure compliance with their

applicable requirements. The Permittees may establish an inspection prioritization system to identify the frequency and type of inspection based upon such factors as project type, total area of disturbance, location, and potential threat to water quality. If a prioritization system is used, the Permittee must include a description of the current inspection prioritization in the SWMP document required in Part II.A, and summarize the nature and number of inspections conducted during the previous reporting period in each Annual Report.

(i) Inspections of construction sites must include, but not be limited to:

- As applicable, a check for coverage under the Construction General Permit by reviewing any authorization letter or Notice of Intent (NOI) during initial inspections;
- Review the applicable ESC plan/SWPPP to determine if control measures have been installed, implemented, and maintained as approved;
- Assessment of compliance with the Permittees' ordinances/requirements related to storm water runoff, including the implementation and maintenance of required control measures;
- Assessment of the appropriateness of planned control measures and their effectiveness;
- Visual observation of non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
- Education or instruction related to on storm water pollution prevention practices, as needed or appropriate; and
- A written or electronic inspection report.

(ii) The Permittees must track the number of construction site inspections conducted throughout the reporting period, and verify that the sites are inspected at the minimum frequencies required by the inspection prioritization system. Construction site inspections must be tracked and reported with each Annual Report.

(iii) Based on site inspection findings, each Permittee must take all necessary follow-up actions (i.e., re-inspection, enforcement) to ensure compliance. Follow-up and enforcement actions must be tracked and reported with each Annual Report.

- e) **Enforcement Response Policy for Construction Site Management Program.** No later than September 30, 2016, each Permittee must develop and implement a written escalating enforcement response policy (ERP) appropriate to their organization. Upon implementation of the policy in its jurisdiction, each Permittee must submit its completed ERP to EPA with the 4th Year Annual Report. The ERP for City of Boise, City of Garden City, and Ada County Highway District must address enforcement of construction site runoff controls for all currently regulated construction projects within their jurisdictions. The ERP for Idaho Transportation Department District 3, Drainage District 3, and Boise State University must address contractual enforcement of construction site runoff controls at construction sites within their jurisdictions. Each ERP must describe the Permittee's potential responses to violations with an appropriate educational or enforcement response. The ERP must address repeat violations through progressively stricter responses as needed to achieve compliance. Each ERP must describe how the Permittee will use the following types of enforcement response, as available, based on the type of violation:
- (i) **Verbal Warnings:** Verbal warnings are primarily consultative in nature. At a minimum, verbal warnings must specify the nature of violation and required corrective action.
 - (ii) **Written Notices:** Written notices must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.
 - (iii) **Escalated Enforcement Measures:** The Permittees must have the legal ability to employ any combination of the enforcement actions below (or their functional equivalent):
 - The ERP must indicate when the Permittees will initiate a Stop Work Order. Stop work orders must require that construction activities be halted, except for those activities directed at cleaning up, abating discharge, and installing appropriate control measures.
 - The Permittees must also use other escalating measures provided under local or state legal authorities, such as assessing monetary penalties. The Permittees may perform work necessary to improve erosion control measures and collect the funds from the responsible party in an appropriate manner, such as collecting against the project's bond, or directly billing the responsible party to pay for work and materials.
- f) **Construction General Permit Violation Referrals.** For those construction projects which are subject to the NPDES Construction General Permit and do not respond to Permittee educational efforts, the Permittee may provide to EPA information regarding construction project operators which cannot demonstrate that they have appropriate NPDES Permit

coverage and/or site operators deemed by the Permittee as not complying with the NPDES Construction General Permit. Permittees may submit such information to the EPA NPDES Compliance Hotline in Seattle, Washington, by telephone, at (206) 553-1846, and include, at a minimum, the following information:

- Construction project location and description;
 - Name and contact information of project owner/ operator;
 - Estimated construction project disturbance size; and
 - An account of information provided by the Permittee to the project owner/ operator regarding NPDES filing requirements.
- (i) **Enforcement Tracking.** Permittees must track instances of non-compliance either in hard-copy files or electronically. The enforcement case documentation must include, at a minimum, the following:
- Name of owner/operator;
 - Location of construction project;
 - Description of violation;
 - Required schedule for returning to compliance;
 - Description of enforcement response used, including escalated responses if repeat violations occur;
 - Accompanying documentation of enforcement response (e.g., notices of noncompliance, notices of violations, etc.); and
 - Any referrals to different departments or agencies.
- g) **Construction Program Education and Training.** Throughout the Permit term, the Permittees must ensure that all staff whose primary job duties are related to implementing the construction program (including permitting, plan review, construction site inspections, and enforcement) are trained to conduct such activities. The education program must also provide regular training opportunities for construction site operators. This training must include, at a minimum:
- (i) *Erosion and Sediment Control/Storm Water Inspectors:*
- Initial training regarding proper control measure selection, installation and maintenance as well as administrative requirements such as inspection reporting/tracking and the implementation of the enforcement response policy; and

- Annual refresher training for existing inspection staff to update them on preferred BMPs, regulation changes, Permit updates, and policy or standards updates.
- (ii) *Other Construction Inspectors:* Initial training on general storm water issues, basic control measure implementation information, and procedures for notifying the appropriate personnel of noncompliance.
- (iii) *Plan Reviewers:*
- Initial training regarding control measure selection, design standards, review procedures;
 - Annual training regarding new control measures, innovative approaches, Permit updates, regulation changes and policy or standard updates.
- (iv) *Third-Party Inspectors and Plan Reviewers.* If the Permittee utilizes outside parties to either conduct inspections and or review plans, these outside staff must be trained per the requirements listed in Part II.B.1.f.i.-iii above.
- (v) *Construction Operator Education.* At a minimum, the Permittees must educate construction site operators within the Permit area as follows:
- At least once per year, the Permittees must either provide information to all construction companies on existing training opportunities or develop new training for construction operators regarding appropriate selection, installation, and use of required construction site control measures at sites within the Permit area.
 - The Permittees must require construction site operators to have at least one person on-site during construction that is appropriately trained in erosion and sediment control.
 - The Permittees must require construction operators to attend training at least once every three years.
 - The Permittees must provide appropriate information and outreach materials to all construction operators who may disturb land within their jurisdiction.

2. Storm Water Management for Areas of New Development and

Redevelopment. At a minimum, the Permittees must implement and enforce a program to control storm water runoff from new development and redevelopment projects that result in land disturbance of 5,000 square feet or more, excluding individual one or two family dwelling development or redevelopment. This program must apply to private and public sector development, including roads and streets. The program implemented by the Permittees must ensure that permanent controls or practices are utilized at each new development and redevelopment site to protect water quality. The program must include, at a minimum, the elements described below:

- a) **Ordinance or other regulatory mechanisms.** No later than the expiration date of this Permit, each Permittee must update its applicable ordinance or regulatory mechanism which requires the installation and long-term maintenance of permanent storm water management controls at new development and redevelopment projects. Each Permittee must update their ordinance/regulatory mechanism to the extent allowed by local and state law, consistent with the individual Permittee's respective legal authority. Permittees must submit their revised ordinance/regulatory mechanism as part of the 5th Year Annual Report.
 - (i) The ordinance/regulatory mechanism must include site design standards for all new and redevelopment that require, in combination or alone, storm water management measures that keep and manage onsite the runoff generated from the first 0.6 inches of rainfall from a 24-hour event preceded by 48 hours of no measureable precipitation. Runoff volume reduction can be achieved by canopy interception, soil amendments, bioretention, evapotranspiration, rainfall harvesting, engineered infiltration, extended filtration, and/or any combination of such practices that will capture the first 0.6 inches of rainfall. An Underground Injection Control permit may be required when certain conditions are met. The ordinance or regulatory mechanism must require that the first 0.6 inches of rainfall be 100% managed with no discharge to surface waters, except when the Permittee chooses to implement the conditions of II.B.2.a.ii below.
 - (ii) For projects that cannot meet 100% infiltration/evapotranspiration/reuse requirements onsite, the Permittees' program may allow offsite mitigation within the same subwatershed, subject to siting restrictions established by the Permittee. The Permittee allowing this option must develop and apply criteria for determining the circumstances under which offsite mitigation may be allowed. A determination that the onsite retention requirement cannot be met must be based on multiple factors, including but not limited to technical feasibility or logistic practicality (e.g. lack of available space, high groundwater, groundwater contamination, poorly infiltrating soils, shallow bedrock, and/or a land use that is inconsistent with

capture and reuse or infiltration of storm water). Determinations may not be based solely on the difficulty and/or cost of implementing such measures. The Permittee(s) allowing this option must create an inventory of appropriate mitigation projects and develop appropriate institutional standards and management systems to value, estimate and track these situations. Using completed subwatershed plans or other mechanisms, the Permittee(s) must identify priority areas within subwatersheds in which off-site mitigation may be conducted.

- (iii) The ordinance or regulatory mechanism must include the following water quality requirements:
- Projects with potential for excessive pollutant loading(s) must provide water quality treatment for associated pollutants before infiltration.
 - Projects with potential for excessive pollutant loading(s) that cannot implement adequate preventive or water quality treatment measures to ensure compliance with Idaho surface water standards must properly convey storm water to a NPDES permitted wastewater treatment facility or via a licensed waste hauler to a permitted treatment and disposal facility.
- (iv) The ordinance or other regulatory mechanism must include procedures for the Permittee's review and approval of permanent storm water management plans for new development and redevelopment projects consistent with Part II.B.1.d.
- (v) The ordinance or other regulatory mechanism must include sanctions (including fines) to ensure compliance, as allowed under state or local law.
- b) **Storm Water Design Criteria Manual.** No later than September 30, 2015, each Permittee must update as necessary their existing Storm Water Design Criteria Manual specifying acceptable permanent storm water management and control practices. The manual must contain design criteria for each practice. In lieu of updating a manual, a Permittee may adopt a manual created by another entity which complies with this section. The manual must include:
- (i) Specifications and incentives for the use of site-based practices appropriate to local soils and hydrologic conditions;
 - (ii) A list of acceptable practices, including sizing criteria, performance criteria, design examples, and guidance on selection and location of practices; and
 - (iii) Specifications for proper long term operation and maintenance, including appropriate inspection interval and self-inspection checklists for responsible parties.

- c) **Green Infrastructure/Low Impact Development (LID) Incentive Strategy and Pilot Projects.** No later than September 30, 2015, the Permittees must develop a strategy to provide incentives for the increased use of LID techniques in private and public sector development projects within each Permittee's jurisdiction. Permittees must comply with applicable State and local public notice requirements when developing this Strategy. Pursuant to Part IV.A.2.a, the Strategy must reference methods of evaluating at least three (3) Green Infrastructure/LID pilot projects as described below. Permittees must implement the Green Infrastructure/LID Incentive Strategy, and complete an effectiveness evaluation of at least three pilot projects, prior to the expiration date of this Permit.
- (i) As part of the 3rd Year Annual Report, the Permittees must submit the written Green Infrastructure /LID Incentive Strategy; the Strategy must include a description of at least three selected pilot projects, and a narrative report on the progress to evaluate the effectiveness of each selected LID technique or practice included in the pilot project. Each pilot project must include an evaluation of the effectiveness of LID technique(s) or practice(s) used for on-site control of water quality and/or quantity. Each Pilot Project must involve at least one or more of the following characteristics:
- The project manages runoff from at least 3,000 square feet of impervious surface;
 - The project involves transportation related location(s) (including parking lots);
 - The drainage area of the project is greater than five acres in size; and/or
 - The project involves mitigation of existing storm water discharges to one or more of the water bodies listed in Table II.C.
- (ii) Consistent with Part IV.A.10, the Permittees must evaluate the performance of LID technique(s) or practice(s) in each pilot project, and include a progress report on overall strategy implementation in the 4th Annual Report. Final pilot project evaluations must be submitted in the 5th Year Annual Report. The Permittees must monitor, calculate or model changes in runoff quantities for each of the pilot project sites in the following manner:
- For retrofit projects, changes in runoff quantities shall be calculated as a percentage of 100% pervious surface before and after implementation of the LID technique(s) or practice(s).
 - For new construction projects, changes in runoff quantities shall be calculated for development scenarios both with LID technique(s) or practice(s) and without LID technique(s) or practice(s).

- The Permittees must measure runoff flow rate and subsequently prepare runoff hydrographs to characterize peak runoff rates and volumes, discharge rates and volumes, and duration of discharge volumes. The evaluation must include quantification and description of each type of land cover contributing to surface runoff for each pilot project, including area, slope, vegetation type and condition for pervious surfaces, and the nature of impervious surfaces.
 - The Permittees must use these runoff values to evaluate the overall effectiveness of various LID technique(s) or practice(s) and to develop recommendations for future adoption of LID technique(s) or practice(s) that address appropriate use, design, type, size, soil type and operation and maintenance practices.
- (iii) **Riparian Zone Management and Outfall Disconnection.** No later than September 30, 2015, the Permittees must identify and prioritize riparian areas appropriate for Permittee acquisition and protection. Prior to the expiration date of this Permit, the Permittees must undertake and complete at least one project designed to reduce the flow of untreated urban storm water discharging through the MS4 system through the use of vegetated swales, storm water treatment wetlands and/or other appropriate techniques. The Permittees must submit the list of prioritized riparian protection areas, and a status report on the planning and implementation of the outfall disconnection project, as part of the 3rd Year Annual Report. Documentation of the completed outfall disconnection project must be included in the 5th Year Annual Report.
- (iv) **Repair of Public Streets, Roads and Parking Lots.** When public streets, roads or parking lots are repaired (as defined in Part VII), the Permittees performing these repairs must evaluate the feasibility of incorporating runoff reduction techniques into the repair by using canopy interception, bioretention, soil amendments, evaporation, rainfall harvesting, engineered infiltration, rain gardens, infiltration trenches, extended filtration and/or evapotranspiration and/or any combination of the aforementioned practices. Where such practices are found to be technically feasible, the Permittee performing the repair must use such practices in the design and repair. These requirements apply only to projects whose design process is started after the effective date of this Permit. As part of the 5th Year Annual Report, the Permittees must list the locations of street, road and parking lot repair work completed since the effective date of the Permit that have incorporated such runoff reduction practices, and the receiving water body(s) benefitting from such practices. This documentation must include a general description of the project design, estimated total cost, and estimates of total flow

volume and pollutant reduction achieved compared to traditional design practices.

- d) **Plan Review and Approval.** The Permittees must review and approve pre-construction plans for permanent storm water management. The Permittees must review plans for consistency with the ordinance/regulatory mechanism and Storm Water Design Criteria Manual required by this Part. The Permittees must ensure that the project operator is prohibited from commencing construction activity prior to receipt of written approval from the Permittee.
- (i) The Permittees must not approve or recommend for approval any plans for permanent storm water controls that do not contain appropriate permanent storm water management practices that meet the minimum requirements specified in this Part.
 - (ii) Permittees must use qualified individuals, knowledgeable in the technical review of plans for permanent storm water controls to conduct such reviews.
 - (iii) Permittees must document the review of each plan using a checklist or similar process.
- e) **Operation and Maintenance (O&M) of Permanent Storm Water Management Controls.**
- (i) **Inventory and Tracking.** The Permittees must maintain a database tracking all new public and private sector permanent storm water controls. No later than January 30, 2018, all of the available data on existing permanent storm water controls known to the Permittees must be included in the inventory database. For the purposes of this Part, new permanent controls are those installed after February 1, 2013; existing permanent controls are those installed prior to February 1, 2013. The tracking must begin in the plan review stage with a database that incorporates geographic information system (GIS) information. The tracking system must also include, at a minimum: type and number of practices; O&M requirements, activity and schedule; responsible party; and self-inspection schedule.
 - (ii) **O&M Agreements.** Where parties other than the Permittees are responsible for operation and maintenance of permanent storm water controls, the Permittees must require a legally enforceable and transferable O&M agreement with the responsible party, or other mechanism, that assigns permanent responsibility for maintenance of structural or treatment control storm water management practices.
- f) **Inspection and Enforcement of Permanent Storm Water Management Controls.** The Permittees must ensure proper long term operation and

maintenance of all permanent storm water management practices within the Permittees' respective jurisdiction. The Permittees must implement an inspection program, and define and prioritize new development and redevelopment sites for inspections of permanent storm water management controls. Factors used to prioritize sites must include, but not be limited to: size of new development or redevelopment area; sensitivity and/or impaired status of receiving water(s); and, history of non-compliance at the site during the construction phase.

- (i) No later than September 30, 2017, all high priority locations must be inventoried and associated inspections must be scheduled to occur at least once annually. The inspections must determine whether storm water management or treatment practices have been properly installed (i.e., an "as built" verification). The inspections must evaluate the operation and maintenance of such practices, identify deficiencies and potential solutions, and assess potential impacts to receiving waters.
 - (ii) No later than September 30, 2017, the Permittees must develop checklists to be used by inspectors during these inspections, and must maintain records of all inspections conducted on new development and redevelopment sites.
 - (iii) No later than September 30, 2017, the Permittees must develop and implement an enforcement strategy similar to that required in Section II.B.1.e to maintain the integrity of permanent storm water management and treatment practices.
- g) **Education and Training on Permanent Storm Water Controls.** No later than September 30, 2015, the Permittees must begin a training program for appropriate audiences regarding the selection, design, installation, operation and maintenance of permanent storm water controls. The training program and materials must be updated as necessary to include information on updated or revised storm water treatment standards, design manual specifications, Low Impact Development techniques or practices, and proper operation and maintenance requirements.
- (i) No later than September 30, 2016, and annually thereafter, all persons responsible for reviewing plans for new development and redevelopment and/or inspecting storm water management practices and treatment controls must receive training sufficient to determine the adequacy of storm water management and treatment controls at proposed new development and redevelopment sites.
 - (ii) No later than September 30, 2016, and at least annually thereafter, Permittees must provide training to local audiences on the storm water management requirements described in this Part.

3. Industrial and Commercial Storm Water Discharge Management. The Permittees must implement a program to reduce to the MEP the discharge of pollutants from industrial and commercial operations within their jurisdiction. Throughout the Permit term, the Permittees must conduct educational and/or enforcement efforts to reduce the discharge of pollutants from those industrial and commercial locations which are considered to be significant contributors of phosphorus, bacteria, temperature, and/or sediment to receiving waters. At a minimum, the program must include the following elements:

- a) **Inventory of Industrial and Commercial Facilities/Activities.** No later than September 30, 2016, the Permittees must update the inventory and map of facilities and activities discharging directly to their MS4s.
 - (i) At a minimum, the inventory must include information listing the watershed/receiving water body, facility name, address, nature of business or activity, and North American or Standard Industrial Classification code(s) that best reflect the facility's product or service;
 - (ii) The inventory must include the following types of facilities: municipal landfills (open and closed); Permittee-owned maintenance yards and facilities; hazardous waste recovery, treatment, storage and disposal facilities; facilities subject to Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11023; all industrial sectors listed in 40 CFR §122.26(b)(14); vehicle or equipment wash systems; commercial animal facilities, including kennels, race tracks, show facilities, stables, or other similar commercial locations where improper management of domestic animal waste may contribute pollutants to receiving waters or to the MS4; urban agricultural activities; and other industrial or commercial facility that the Permittees determine is contributing a substantial pollutant loading to the MS4 and associated receiving waters.
 - (iii) The Permittees must collectively identify at least two specific industrial/commercial activities or sectors operating within the Permit area for which storm water discharges are not being adequately addressed through existing programs. No later than September 30, 2016, the Permittees must develop best management practices for each activity, and educate the selected industrial/commercial audiences regarding these performance expectations. Example activities for consideration include, but are not limited to: landscaping businesses; wholesale or retail agricultural and construction supply businesses; urban agricultural activities; power washers; commercial animal facilities; commercial car/truck washing operations; and automobile repair shops.
- b) **Inspection of Industrial and Commercial Facilities/Activities.** The Permittees must work cooperatively throughout the Permit term to prioritize

and inspect selected industrial and commercial facilities/activities which discharge to receiving waters or to the MS4. No later than September 30, 2016, any existing agreements between the Permittees to accomplish such inspections must be updated as necessary to comply with this permit. At a minimum, the industrial and commercial facility inspection program must include:

- (i) Priorities and procedures for inspections, including inspector training, and compliance assistance or education materials to inform targeted facility/activity operators of applicable requirements;
 - (ii) Provisions to record observations of a facility or activity;
 - (iii) Procedures to report findings to the inspected facility or activity, and to follow-up with the facility/activity operator as necessary;
 - (iv) A monitoring (or self monitoring) program for facilities that assesses the type and quantity of pollutants discharging to the MS4s;
 - (v) Procedures to exercise legal authorities to ensure compliance with applicable local storm water ordinances.
- c) **Maintain Industrial and Commercial Facility/Activity Inventory.** The industrial and commercial facility/activity inventory must be updated at least annually. The updated inventory and a summary of the compliance assistance and inspection activities conducted, as well as any follow-up actions, must be submitted to EPA with each Annual Report.

4. Storm Water Infrastructure and Street Management. The Permittees must maintain their MS4 and related facilities to reduce the discharge of pollutants from the MS4 to the MEP. All Permittee-owned and operated facilities must be properly operated and maintained. This maintenance requirement includes, but is not limited to, structural storm water treatment controls, storm sewer systems, streets, roads, parking lots, snow disposal sites, waste facilities, and street maintenance and material storage facilities. The program must include the following:

- a) **Storm Sewer System Inventory and Mapping.** No later than January 30, 2018, the Permittees must update current records to develop a comprehensive inventory and map of the MS4s and associated outfall locations. The inventory must identify all areas over which each Permittee has responsibility. The inventory must include:
 - (i) the location of all inlets, catch basins and outfalls owned/operated by the Permittee;
 - (ii) the location of all MS4 collection system pipes (laterals, mains, etc.) owned/operated by the Permittee, including locations where the MS4 is physically interconnected to the MS4 of another operator ;

- (iii) the location of all structural flood control devices, if different from the characteristics listed above;
- (iv) the names and locations of receiving waters of the U.S. that receive discharges from the outfalls;
- (v) the location of all existing structural storm water treatment controls;
- (vi) identification of subwatersheds, associated land uses, and approximate acreage draining into each MS4 outfall; and
- (vii) the location of Permittee-owned vehicle maintenance facilities, material storage facilities, maintenance yards, and snow disposal sites; Permittee-owned or operated parking lots and roadways.

A summary description of the Permittees' storm sewer system inventory and a map must be submitted to EPA as part of the reapplication package required by Part VI.B

- b) **Catch Basin and Inlet Cleaning.** No later than September 30, 2016, the Permittees must initiate an inspection program to inspect all Permittee-owned or operated catch basins and inlets at least every two years and take appropriate maintenance action based on those inspections. Inspection records must be maintained and summarized in each Annual Report.
- c) **Street and Road Maintenance.** No later than September 30, 2015, the Permittees responsible for road and street maintenance must update any standard operating procedures for storm water controls to ensure the use of BMPs that, when applied to the Permittee's activity or facility, will protect water quality, and reduce the discharge of pollutants to the MEP. The operating procedures must contain, for each activity or facility, inspection and maintenance schedules specific to the activity, and appropriate pollution prevention/good housekeeping procedures for all of the following types of facilities and/or activities listed below. Water conservation measures should be considered for all landscaped areas.
 - (i) **Streets, roads, and parking lots.** The procedures must address, but are not limited to: road deicing, anti-icing, and snow removal practices; snow disposal areas; street/road material (e.g. salt, sand, or other chemical) storage areas; maintenance of green infrastructure/low impact development practices; and BMPs to reduce road and parking lot debris and other pollutants from entering the MS4. Within four years of the effective date of this permit, the Permittees must implement all of the pollution prevention/good housekeeping practices established in the SOPs for all streets, roads, highways, and parking lots with more than 3,000 square feet of impervious surface that are owned, operated, or maintained by the Permittees.
 - (ii) **Inventory of Street Maintenance Materials.** Throughout the Permit term, all Permittees with street maintenance

responsibilities must maintain an inventory of street /road maintenance materials, including use of sand and salt, and document the inventory in the corresponding Annual Reports.

- (iii) **Manage Sand with Salt and Salt Storage Areas.** No later than September 30, 2017, the Permittees must address any sand, salt, or sand with salt material stockpiles at each of their materials storage locations to prevent pollutants in stormwater runoff from discharging to the MS4 or into any receiving waterbody. Examples how the Permittee may choose to address runoff from their material storage areas include, but are not limited to: building covered storage areas; fully containing the material stockpile area in a manner that prevents runoff from discharging to the MS4 or a receiving waterbody; relocating and/or otherwise consolidating material storage piles to alternative locations which prevents discharges to the MS4 or a receiving waterbody. The Permittees must identify their material storage locations in the SWMP documentation submitted to EPA with the 1st year Annual Report and reference the average quantity of material stored at each location in the inventory required in Part II.B.4.c.ii. Permittees must document in the 5th Year Annual Report how their material stockpiles have been addressed to prevent runoff from discharging to the MS4 or a receiving waterbody.
- d) **Street, Road and Parking Lot Sweeping.** Each Permittee with street, road, and/or public parking lot maintenance responsibilities must update their respective sweepings management plans no later than September 30, 2015. Each updated plan must designate all streets, roads, and/or public parking lots which are owned, operated or maintained by that Permittee to fit within one of the following categories for sweeping frequency based on land use, traffic volumes or other factors:
- Residential – Streets and road segments that include, but are not limited to, light traffic zones and residential zones.
 - Arterial and all other – Streets and road segments with high traffic volumes serving commercial or industrial districts.
 - Public Parking Lots – large lots serving schools and cultural facilities, plazas, sports and event venues or similar facilities.
- (i) No later than September 30, 2014, each Permittee with street, road, and/or public parking lot maintenance responsibilities must inventory and map all of their designated streets, roads, and public parking lots for sweeping frequency. The resulting inventory and map must be submitted as part of the 2nd Year Annual Report.
- (ii) No later than September 30, 2015, Permittees with street, road, and/or public parking lot maintenance responsibilities must

sweep all streets, roads, and public parking lots that are owned, operated or maintained by that Permittee according to the following schedule:

Table II.B-2

Roadway Type	Sweeping Schedule			
	Two Times Per Month	Every Six Weeks	Four Times Per Year	One Time Per Year
Downtown Areas of Boise and Garden City	X			
Arterial and Collector Roadways (non-downtown)		X		
Residential Roadways			X	
Paved Alleys and Public Parking Lots				X

- (iii) If a Permittee’s existing overall street/road/parking lot sweeping program provides equivalent or greater street sweeping frequency to the requirements above, the Permittee must continue to implement its existing street/road/parking lot sweeping program.
- (iv) For areas where sweeping is technically infeasible, the Permittees with street, road, and/or public parking lot maintenance responsibilities must document in the 1st Year Annual Report each area and indicate why sweeping is infeasible. The Permittee must document what alternative sweeping schedule will be used, or how the Permittee will increase implementation of other trash/litter control procedures to minimize pollutant discharges to the MS4 and to receiving waters.
- (v) The Permittees with street, road, and/or public parking lot maintenance responsibilities must estimate the effectiveness of their street sweeping activities to minimize pollutant discharges to the MS4 and receiving waters, and document the following in each Annual Report:

- Identify any significant changes to the designated road/street/parking lot inventory and map, and the basis for those changes;
 - Report annually on types of sweepers used, swept curb and/or lane miles, dates of sweeping by general location and frequency category, volume or weight of materials removed and a representative sample of the particle size distribution of swept material;
 - Report annually on any public outreach efforts or other means to address excess leaves and other material as well as areas that are infeasible to sweep.
- e) **Implement appropriate requirements for pesticide, herbicide, and fertilizer applications.** Permittees must continue to implement practices to reduce the discharge of pollutants to the MS4 associated with the application, storage and disposal of pesticides, herbicides and fertilizers from municipal areas and activities. Municipal areas and activities include, at a minimum, municipal facilities, public right-of-ways, parks, recreational facilities, golf courses, and landscaped areas. All employees or contractors of the Permittees applying restricted use pesticides must be registered as certified applicators.
- f) **Develop and implement Storm Water Pollution Prevention Plans.** No later than September 30, 2015, the Permittees must develop and implement SWPPPs for all Permittee-owned material storage facilities, and maintenance yards located within the Permit area and identified in the inventory required in Parts II.B.3.a and II.B.4.a.viii. Permittee-owned facilities discharging storm water associated with industrial activity as defined in 40 CFR 122.26(b)(14) must obtain separate NPDES permit coverage as required in Part I.D.4 of this permit.
- g) **Storm Water Management.** Each Permittee must ensure that any storm water management projects it undertakes after the effective date of this Permit are designed and implemented to prevent adverse impacts on water quality.
- (i) Permittees must evaluate the feasibility of retrofitting existing storm water control devices to provide additional pollutant removal from collected storm water.
 - (ii) No later than the expiration date of this Permit, Permittees must identify and define all locations where such retrofit project opportunities are feasible, identify appropriate funding sources, and outline project timelines or schedule(s) for retrofit projects designed to better control the discharge of pollutants of concern to the Boise River and its tributaries.
- h) **Litter Control.** Throughout the Permit term, each Permittee must continue to implement effective methods to reduce litter within their jurisdiction. Permittees must work with others as appropriate to control litter on a

regular basis and after major public events to reduce the discharge of pollutants to receiving waters.

- i) **Training.** The Permittees must provide regular training to appropriate Permittee staff on all operations and maintenance procedures designed to prevent pollutants from entering the MS4 and receiving waters. Appropriate Permittee staff must receive training no later than September 30, 2015, and annually thereafter.

5. Illicit Discharge Management. An illicit discharge is any discharge to an MS4 that is not composed entirely of storm water. Exceptions are described in Part I.D. of this permit. The Permittees must continue to implement their illicit discharge management program to reduce to the MEP the unauthorized and illegal discharge of pollutants to the MS4. The program must include:

- a) **Ordinance or other regulatory mechanisms.** Upon the effective date of this Permit, the Permittees must effectively prohibit non-storm water discharges to the MS4 (except those identified in Part 1.D of this permit) through enforcement of relevant ordinances or other regulatory mechanisms. Such ordinances/regulatory mechanisms must be updated prior to the expiration date of this Permit as necessary to provide adequate controls. To be considered adequate, an ordinance or regulatory mechanism must:
 - (i) Authorize the Permittee to prohibit, at a minimum, the following discharges to the MS4, unless otherwise authorized in Part 1.D:
 - Sewage;
 - Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;
 - Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility, including motor vehicles, cement-related equipment, and port-a-potty servicing, etc.;
 - Discharges of wash water from mobile operations, such as mobile automobile or truck washing, steam cleaning, power washing, and carpet cleaning, etc.;
 - Discharges of wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas - including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc. - where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed);
 - Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;

- Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; discharges of pool or fountain filter backwash water;
 - Discharges of sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and
 - Discharges of food-related wastes (grease, fish processing, and restaurant kitchen mat and trash bin wash water, etc.).
- (ii) Prohibit and eliminate illicit connections to the MS4;
- (iii) Control the discharge of spills, and prohibit dumping or disposal of materials other than storm water into the MS4.
- b) **Illicit Discharge Complaint Reporting and Response Program.** At a minimum, Permittees must respond to reports of illicit discharges from the public in the following manner:
- (i) **Complaint/Reporting Hotline.** The Permittees must maintain the dedicated telephone number and email address, or other publicly available and accessible means in addition to the website required in Part II.B.6, for use by the public to report illicit discharges. This complaint hotline must be answered by trained staff during normal business hours. During non-business hours, a system must be in place to record incoming calls to the hotline and a system must be in place to guarantee timely response. The telephone number must be printed on appropriate education, training, and public participation materials produced under Part II.B.6, and clearly listed in the local telephone book as appropriate.
- (ii) **Response to Complaints/Reports.** The Permittees must respond to all complaints or reports of illicit discharges as soon as possible, but no later than within two working days.
- (iii) **Maintain log of complaints/reports received and actions taken.** The Permittees must maintain a record documenting all complaints or reports of illicit discharges and responses taken by the Permittees.
- c) **Illicit Discharge Mapping.** No later than September 30, 2014, the Permittees must develop a map of reported and documented illicit discharges or illicit connections to identify priority areas. The map must identify, at a minimum, the location, type and relative quantity or severity of the known, recurrent or ongoing non-storm water discharges to the MS4. This map must be updated annually and used to target the specific outfall locations for that field screening season.
- d) **Dry Weather Outfall Screening Program.** Permittees must implement, and update as necessary, a dry weather analytical and field screening monitoring program. This dry weather outfall screening program must emphasize frequent, geographically widespread monitoring to detect illicit discharges and illegal connections, and to reinvestigate potentially

problematic outfalls. At a minimum, the procedures must be based on the following guidelines and criteria:

- (i) **Outfall Identification.** The Permittees must update as necessary the storm water outfall identification and screening plan, describing the reconnaissance activities that must be performed and information used to prioritize targeted outfalls and associated land uses.. The plan must discuss how chemical and microbiological analysis will be conducted on any flows identified during dry weather screening, including field screening methodologies and associated trigger thresholds to be used for determining follow-up action.
- (ii) **Monitoring Illicit Discharges.** No later than September 30, 2015, dry weather analytical and field screening monitoring must be conducted at least once annually (or more often if the Permittees deem necessary). One third of the outfalls to be screened annually must be conducted within the June 1 and September 30th timeframe.
 - Upon the effective date of the Permit, the Permittees must conduct visual dry weather screening of at least 20% of their total outfalls per year.
 - The outfalls must be geographically dispersed across the MS4 and must represent all major land uses in the Permit area. In addition, the Permittees must ensure that dry weather screening includes, but is not limited to, screening of 20% outfalls discharging to impaired waters listed in Table II.C.
 - When flows during dry weather are identified the Permittees must collect grab samples of the discharge for in-field analysis of the following indicator constituents: pH; total chlorine; detergents as surfactants; total copper; total phenols; *E. coli*; total phosphorus; turbidity; temperature; and suspended solids concentrations (to be measured in mg/L).
 - Photos may be used to document conditions.
 - Results of field sampling must be compared to established trigger threshold levels and/or existing state water quality standards. If the outfall is dry (no flowing or ponded runoff), the Permittees must make and record all applicable visual observations.
 - All dry weather flows previously identified or documented by the Permittees to be associated with irrigation flows or ground water seepage must be sampled to assess pollutant loading associated with such flows. The results must be evaluated to identify feasible actions necessary to eliminate such flows and ensure compliance with Part I.D of this Permit. If field sample

results of such irrigation or groundwater seepage comply with Part I.D of this permit, annual sampling of that dry weather flow at that outfall is no longer required. Permittees must document in the SWMP document the specific location(s) of outfalls associated with these results as well as the Permittee's rationale for the conclusion to discontinue future dry weather screening at that location..

- (iii) **Maintain Records of Dry Weather Screening.** The Permittees must keep detailed records of the dry weather screening with the following information at a minimum: time since last rain event; quantity of last rain event; site description (e.g., conveyance type, dominant watershed land uses); flow estimation (e.g., width of water surface, approximate depth of water, approximate flow velocity, flow rate); visual observations (e.g., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology); results of any in field sampling; and recommendations for follow-up actions to address identified problems, and documentation of completed follow-up actions.
- e) **Follow-up.** The Permittees must investigate recurring illicit discharges identified as a result of complaints or as a result of dry weather screening inspections and sampling within fifteen (15) days of its detection to determine the source. Permittees must take appropriate action to address the source of the ongoing illicit discharge within 45 days of its detection.
- f) **Prevent and Respond to Spills to the MS4.** Throughout the Permit term, the Permittees must coordinate appropriate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies to ensure maximum water quality protection at all times. The Permittees must respond to, contain and clean up all sewage and other spills that may discharge into the MS4 from any source (including private laterals and failing septic systems).
- g) **Facilitate Disposal of Used Oil and Toxic Materials.** The Permittees must continue to coordinate with appropriate agencies to ensure the proper management and disposal or recycling of used oil, vehicle fluids, toxic materials, and other household hazardous wastes by their employees and the public. Such a program must include educational activities, public information activities, and establishment of collection sites operated by the Permittees or other entity. The program must be implemented throughout the Permit term.
- h) **Training.** No later than September 30, 2014, and annually thereafter, the Permittees must develop and provide training to staff on identifying and eliminating illicit discharges, spill, and illicit connections to the MS4. At a minimum, the Permittee's construction inspectors, maintenance field staff, and code compliance officers must be sufficiently trained to respond to illicit discharges and spills to the MS4.

6. Education, Outreach and Public Involvement.

a) **Comply with Applicable Requirements.** The Permittees must comply with applicable State and local public notice requirements when implementing their SWMP public involvement activities.

b) **Implement an Ongoing Education Outreach and Involvement Program.** The Permittees must conduct, or contract with other entities to conduct, an ongoing joint education, outreach and public involvement program aimed at residents, businesses, industries, elected officials, policy makers, and Permittee planning staff /other employees.

The goal of the education and outreach program is to reduce or eliminate behaviors and practices that cause or contribute to adverse storm water impacts. The goal of the public involvement program is to engage interested stakeholders in the development and implementation of the Permittees' SWMP activities to the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law.

The Permittees' joint education and public involvement program must be designed to improve each target audience's understanding of the selected storm water issues, engage stakeholders, and help target audiences understand what they can do to positively impact water quality by preventing pollutants from entering the MS4.

(i) No later than September 30, 2014, the Permittees must implement or participate in an education, outreach and public involvement program using a variety of methods to target each of the audiences and at least one or more of the topics listed below:

1) General Public

- Watershed characteristics and subwatershed planning efforts as required in Part II.A.4;
- General impacts of storm water flows into surface water;
- Impacts from impervious surfaces;
- Source control best management practices and environmental stewardship, actions and opportunities for pet waste control/disposal, vehicle maintenance, landscaping and vegetative buffers;
- Water wise landscaping, water conservation, water efficiency.

2) General public and businesses, including home based and mobile businesses

- Best management practices for use and storage of automotive chemicals, hazardous cleaning supplies, vehicle wash soaps and other hazardous materials;

- Proper use and application of pesticides, herbicides and fertilizers;
 - Impacts of illicit discharges and how to report them;
 - Water wise landscaping, water conservation, water efficiency.
- 3) Homeowners, homeowner's associations, landscapers, and property managers
- Yard care techniques protective of water quality, such as composting;
 - Best management practices for use and storage of pesticides, herbicides, and fertilizers;
 - Litter and trash control and recycling programs;
 - Best management practices for power washing, carpet cleaning and auto repair and maintenance;
 - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
 - Storm water treatment and flow/volume control practices;
 - Water wise landscaping, water conservation, water efficiency.
- 4) Engineers, contractors, developers, review staff, and land use planners
- Technical standards for storm water site plans;
 - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
 - Storm water treatment and flow/volume control practices;
 - Water wise landscaping, water conservation, water efficiency.
- 5) Urban farmers and managers of public and private community gardens
- Water wise landscaping, water conservation, and water efficiency.
- (ii) The Permittees must assess, or participate in an effort to assess understanding and adoption of behaviors by the target audiences.

The resulting assessments must be used to direct storm water education and outreach resources most effectively.

- (iii) The Permittees must track and maintain records of public education, outreach and public involvement activities.
- c) **Targeted Education and Training.** For the specific topics identified in the Permit sections listed below, the Permittees must develop and implement, or contract with other entities to implement, targeted training programs to educate appropriate Permittee staff or other audiences within their jurisdiction. Where joint, cooperative education efforts to address these topics are not feasible, the individual Permittee must ensure that the necessary education and training occurs for the following topics:
- (i) II.B.1.f - Construction Storm Water Management Training for construction site operators and Permittee staff;
 - (ii) II.B.2.g – Permanent Storm Water Control Training for project operators and Permittee staff;
 - (iii) II.B.4.i– Storm Water Infrastructure and Street Management/ Maintenance training for the Permittee staff; and
 - (iv) II.B.5.h – Illicit Discharge Management Training for Permittee staff.
- d) **Storm Water Website.** The Permittees must maintain and promote at least one publicly-accessible website that identifies each Permittee’s SWMP activities and seeks to educate the audiences listed in Part II.B.6.b.i. The website(s) must describe and provide relevant information regarding the activities of all Permittees. The website must be updated no later than February 1, 2014, and updated at least quarterly thereafter as new material is available. The website must incorporate the following features:
- (i) All reports, plans, or documents generated by each Permittee in compliance with this Permit must be posted on the website in draft form when input from the public is being solicited, and in final form when the document is completed.
 - (ii) Information and/or links to key sites that provide education, training, licensing, and permitting related to construction and post-construction storm water management controls and requirements for each jurisdiction. The website must include links to all applicable ordinances, policies and/or guidance documents related to the Permittees’ construction and post-construction stormwater management control programs.
 - (iii) Information and/or links to appropriate controls for industrial and commercial activities,
 - (iv) Information and/or links to assist the public to report illicit connections and illegal dumping activity;

- (v) Appropriate Permittee contact information, including phone numbers for relevant staff and telephone hotline, mailing addresses, and electronic mail addresses.

C. Discharges to Water Quality Impaired Receiving Waters.

1. The Permittees must conduct a storm water discharge monitoring program as required in Part IV.
2. For the purposes of this Permit and as listed in Table II.C, the Clean Water Act §303 (d) listed water bodies are those cited in the IDEQ 2010 Integrated Report including, but not limited to the Lower Boise River, and its associated tributaries. "Pollutant(s) of concern" refer to the pollutant(s) identified as causing or contributing to the water quality impairment. Pollutants of concern for the purposes of this Permit are: total phosphorus, sediment, temperature, and *E. coli*.
3. Each Permittees' SWMP documentation must include a description of how the activities of each minimum control measure in Part II.B are implemented by the Permittee to control the discharge of pollutants of concern and ensure that the MS4 discharges will not cause or contribute to an excursion above the applicable Idaho water quality standards. This discussion must specifically identify how the Permittee evaluates and measures the effectiveness of the SWMP to control the pollutants of concern. For those activities identified in Part II.B requiring multiple years to develop and implement, the Permittee must provide interim updates on progress to date. Consistent with Part II.A.1.b, each Permittee must submit this description of the SWMP implementation to EPA and IDEQ as part of the 1st Year Annual Report required in Part IV.C, and must update its description annually in subsequent Annual Reports.

Table II.C	
Clean Water Act §303 (d) listed Water Bodies and Pollutants of Concern	
Receiving Water Body Assessment Unit/ Description	Pollutants of Concern Causing Impairment
<i>ID17050114SW011a_06</i> <i>Boise River – Diversion Dam to River Mile 50</i>	Temperature
<i>ID17050114SW005_06</i> <i>Boise River – River Mile 50 to Star Bridge</i>	Temperature, Sediment, <i>E. coli.</i>
<i>ID17050114SW005_06a</i> <i>Boise River – Star to Middleton</i>	Temperature, Sediment, <i>E. coli.</i>
<i>ID17050114SW005_06b</i> <i>Boise River- Middleton to Indian Creek</i>	Temperature, Total phosphorus, Sediment, <i>E. coli.</i>
<i>ID17050114SW001_06</i> <i>Boise River- Indian Creek to the mouth</i>	Temperature, Total phosphorus, Sediment, <i>E. coli.</i>
<i>ID17050114SW008_03</i> <i>Tenmile Creek - 3rd order below Blacks Creek Reservoir</i>	Sediment, <i>E. coli.</i>
<i>ID17050114SW010_02</i> <i>Fivemile Creek - 1st & 2nd order tributaries</i>	<i>E. coli.</i>
<i>ID17050114SW010_03</i> <i>Fivemile Creek - 3rd order-tributaries</i>	Sediment, <i>E. coli.</i>

D. Reviewing and Updating the SWMP.

1. Permittees must annually review their SWMP actions and activities for compliance with this Permit as part of the preparation of the Annual Report required under Part IV.C.2.
2. Permittees may request changes to any SWMP action or activity specified in this Permit in accordance with the following procedures:
 - a) Changes to delete or replace an action or activity specifically identified in this Permit with an alternate action or activity may be requested by the Permittees at any time. Modification requests to EPA must include:
 - (i) An analysis of why the original action or activity is ineffective, infeasible, or cost prohibitive;
 - (ii) Expectations on the effectiveness of the replacement action or activity; and
 - (iii) An analysis of why the replacement action or activity is expected to better achieve the Permit requirements.
 - b) Change requests must be made in writing and signed by the Permittees in accordance with Part VI.E.
 - c) Documentation of any of the actions or activities required by this Permit must be submitted to EPA upon request.
 - d) EPA may review Annual Reports or other such documentation and subsequently notify the Permittees that changes to the SWMP actions and activities are necessary to:
 - (i) Address discharges from the MS4 that are causing or contributing to water quality impacts;
 - (ii) Include more stringent requirements necessary to comply with new federal or state statutory or regulatory requirements; or
 - (iii) Include other conditions deemed necessary by EPA to comply with water quality standards, and/or other goals and requirements of the CWA.
 - e) If EPA notifies the Permittees that changes are necessary pursuant to Parts II.D.2.a or II.D.2.d, the notification will offer the Permittees an opportunity to propose alternative program changes to meet the objectives of the requested modification. Following this opportunity, the Permittees must implement any required changes according to the schedule set by EPA.
4. Any modifications to this Permit will be accomplished according to Part VI.A of this Permit.

E. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation. The Permittees must implement the actions and activities of the SWMP in all new areas added or transferred to the Permittee's MS4 (or for which a Permittee becomes responsible for implementation of storm water quality controls) as expeditiously as practicable, but not later than one year from the date upon which the new areas were added. Such additions and schedules for implementation must be documented in the next Annual Report following the transfer.

F. SWMP Resources. The Permittees must continue to provide adequate finances, staff, equipment and other support capabilities to implement their SWMP actions and activities outlined in this permit. The Permittees must report on total costs associated with SWMP implementation over the prior 12 month reporting period in each Annual Report. Permittees are encouraged to consider establishing consistent funding sources for continued program implementation.

G. Legal Authority. To the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law, each Permittee must operate to, at a minimum:

- Prohibit and eliminate, through statute, ordinance, policy, permit, contract, court or administrative order or other similar means, the contribution of pollutants to the MS4 by illicit connections and discharges to the MS4. Illicit connections include pipes, drains, open channels, or other conveyances that have the potential to allow an illicit discharge to enter the MS4. Illicit discharges include all non-storm water discharges not otherwise authorized under Part I.D. of this Permit;
- Control through statute, ordinance, policy, permit, contract, court or administrative order, or other similar means, the discharge to the MS4 of spills, dumping or disposal of materials other than storm water;
- Control through interagency agreements among the Permittees the contribution of pollutants from one portion of the MS4 to another portion of the MS4;
- Require compliance with conditions in statutes, ordinances, policy, permits, contracts, or court or administrative orders; and
- Carry out all inspection, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with Permit conditions including the prohibition on illicit discharges to the MS4.

No later than January 30, 2014, each Permittee must review and revise its relevant ordinances or other regulatory mechanisms, (or adopt new ordinances or regulatory mechanisms that provide it with adequate legal authority as allowed and authorized pursuant to applicable Idaho law), to control pollutant discharges into and from its MS4 and to meet the requirements of this permit. As part of the SWMP documentation that accompanies the 1st Year Annual Report, each Permittee must summarize all of its unique legal authorities which satisfy the five criteria listed above.

III. Schedule for Implementation and Required Submissions

The Permittees must complete SWMP actions, and/or submit documentation, to EPA and IDEQ as summarized below. Unless otherwise noted, Annual Reports must include the interim or completed status of required SWMP activities occurring during the corresponding reporting period as specified in Part IV.C.3, and include program summary statistics, copies of interim or final documents, and/or other supporting information.

Table III. Schedule for Implementation and Required Submissions		
Permit Part	Item/Action	Due Date
I.C.3	Update intergovernmental agreement no later than July 1, 2013.	Submit updated intergovernmental agreement with the 1 st Year Annual Report.
II.A.1.b, II.C.3	SWMP documentation	Submit SWMP documentation with the 1 st Year Annual Report. Include updated documentation in each subsequent Annual Report.
II.A.4	Complete two subwatershed planning documents	Identify subwatersheds in 1 st Year Annual Report; Submit two completed planning documents with the 4 th Year Annual Report.
II.B.1.a	Update construction runoff control ordinances/regulatory mechanisms, if necessary	September 30, 2015; submit any updated ordinances etc w/ 3 rd Year Annual Report.
II.B.1.b	Update Construction Stormwater Management Manual(s)	September 30, 2015; submit any updated documents with 3 rd Year Annual Report.
II.B.1.e	Develop & Implement Enforcement Response Policy (ERP)	September 30, 2016; submit final ERPs w/ 4 th Year Annual Report
II.B.2.a	Update ordinance or regulatory mechanism requiring long term onsite stormwater management controls	January 30, 2018; submit ordinance or regulatory mechanism with 5 th Year Annual Report.
II.B.2.b	Update Stormwater Design Criteria Manual(s)	September 30, 2015; submit any updated ordinances etc w/ 3 rd Year Annual Report
II.B.2.c	Develop & Implement Green Infrastructure/Low Impact Development (LID) Incentive Strategy;	September 30, 2015;
II.B.2.c.i	Evaluate Effectiveness of LID Practices via three Pilot Projects;	Submit strategy document, identify 3 pilot projects in the 3 rd Year Annual Report.
II.B.2.c.ii, IV.A.10	Identify recommendations for specific LID practices to be adopted within the Permit area	Progress report on strategy implementation/ Pilot Project evaluations w/4 th Year Annual Report. Submit final evaluations & recommendations with the 5 th Year Annual Report.
II.B.2.c.iii	Develop Priority Riparian Area List	September 30, 2015; Submit priority area list with the 3 rd Year Annual Report.
II.B.2.c.iii	Complete Outfall Disconnection Project	Document progress on outfall disconnection project w/3 rd Year Annual Report. Complete outfall disconnection project by January 30, 2018; document completed project in 5 th Year Annual Report.

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.2.c.iv	Consider/install stormwater runoff reduction techniques for streets, roads & parking lot repair work entering design phase after February 1, 2013 where feasible	Document all locations of street/road/parking lot repair projects where runoff reduction techniques were installed w/5 th Year Annual Report.
II.B.2.e.i	O&M Database of new permanent stormwater controls; Incorporate all existing controls into database	Include new controls beginning February 1, 2013; Existing controls, no later than January 30, 2018.
II.B.2.f.i	Identify high priority locations; annual inspections	September 30, 2017
II.B.2.f.ii	Develop inspection checklists	September 30, 2017
II.B.2.f.iii	Enforcement Response Policy for SW controls	September 30, 2017
II.B.2.g	Conduct Education/Training on Permanent SW Controls	September 30, 2015; staff training & training for local audiences, September 30, 2016.
II.B.3.a	Inventory Industrial & Commercial facilities/activities	September 30, 2016
II.B.3.a.iii	Identify two specific activities, develop BMPs, and begin compliance assistance education program	September 30, 2016
II.B.3.b	Update Permittee agreements; inspect selected industrial & commercial facilities/activities	September 30, 2016
II.B.3.c	Document industrial & commercial inspection and compliance assistance activities	Annually
II.B.4.a	Update MS4 system inventory & map	No later than January 30, 2018; include w/5 th Year Annual Report
II.B.4.b	Inspect of catch basins at least every two years	September 30, 2016
II.B.4.c	Update SOPs for Street & Road Maintenance	September 30, 2015
II.B.4.c.iii	Cover storage facilities for sand/salt storage areas	September 30, 2017; Identify locations in SWMP w/1 st year Annual Report; Final documentation w/5 th Year Annual Report
II.B.4.d	Update Street/Road/Parking Lot Sweeping Plans	September 30, 2015
II.B.4.d.i	Inventory/map designated areas	September 30, 2014; submit w/2 st Year Annual Report
II.B.4.d.ii	Sweep according to schedule	September 30, 2015
II.B.4.d.iv,	Identify infeasible sweeping areas, alternative schedule or other program	Document in 1 st Year Annual Report
II.B.4.d.v	Estimate sweeping effectiveness	Document in each Annual Report
II.B.4.f	Develop facility& maintenance yards SWPPPs	September 30, 2015
II.B.4.i	Train Permittee staff	September 30, 2016; annually thereafter
II.B.4.g	Evaluate the feasibility of retrofitting existing control devices	January 30, 2018; submit evaluation with 5 th Year Annual Report

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.5.c	Inventory/Map Illicit Discharge Reports	September 30, 2014, update annually
II.B.5.d.ii, IV.A.11	Conduct dry weather outfall screening; update screening plan; inspect 20% of outfalls per year	September 30, 2015; inspect 20% annual ly
II.B.6.b	Conduct public education & assess understanding to specific audiences	September 30, 2014; ongoing
II.B.6.d	Maintain, Promote, and Update Storm water Website	September 30, 2014, quarterly thereafter
II.C.3, II.A.1.b	Identify how Permittee controls are implemented to reduce discharge of pollutants of concern, measure SWMP effectiveness	Include discussion in SWMP documentation submitted with 1 st Year Annual Report
II.E	Implement SWMP in all geographic areas newly added or annexed by Permittee	No later than one year from date new areas are added to Permittee's jurisdiction
II.F	Report SWMP implementation costs for the corresponding 12 month reporting period	Within each Annual Report
II.G	Review & Summarize legal authorities or regulatory mechanisms used by Permittee to implement & enforce SWMP & Permit requirements	No later than January 30, 2014, summarize legal authorities within the required SWMP documentation submitted with 1 st Annual Report
IV.A.1	Assess & Document Permit Compliance	Annually; submit with Annual Reports
IV.A.2	Develop & Complete Stormwater Monitoring & Evaluation Plan	September 30, 2014; Submit Completed Plan with 2 nd Year Annual Report
IV.A.7.a	Update <i>Boise NPDES Municipal SW Monitoring Plan</i>	September 30, 2015
IV.A.7.b	Monitor Five Representative Outfalls During Wet Weather; sample three times per year thereafter	No later than September 30, 2014
IV.A.8	If Applicable: update SW Monitoring & Evaluation Plan to include WQ Monitoring and/or Fish Tissue Sampling	If applicable: Update SW Monitoring & Evaluation Plan by September 30, 2014 to include WQ Monitoring and/or Fish Tissue Sampling; submit with 2 nd Year Annual Report
IV.A.9	Evaluate Effectiveness of 2 Structural Control Techniques Currently Required by the Permittees	Begin evaluations no later than September 30, 2015; document in Annual Report(s)
IV.C.1	Submit Stormwater Outfall Discharge Data	2 nd Year Annual Report, annually thereafter
IV.C.2	Submit WQ Monitoring or Fish Tissue Sampling Data Report (if applicable)	2 nd Year Annual Report, annually thereafter
IV.C.3	Submit Annual Reports	1 st Year Annual Report due January 30, 2014; all subsequent Annual Reports are due annually no later than January 30 th ; See Table IV.C.
VI.B	Submit Permit Renewal Application	No later than 180 days prior to Permit Expiration Date; see cover page. Alternatively, Renewal Application may be submitted as part of the 4 th Year Annual Report.

IV. Monitoring, Recordkeeping and Reporting Requirements.

A. Monitoring

1. **Assess Permit Compliance.** At least once per year, each Permittee must individually evaluate their respective organization's compliance with these Permit conditions, and progress toward implementing each of the control measures defined in Part II. The compliance evaluation must be documented in each Annual Report required in Part IV.C.2.
2. **Stormwater Monitoring and Evaluation Program Plan and Objectives.** The Permittees must conduct a wet weather monitoring and evaluation program, or contract with another entity to implement such a program. This stormwater monitoring and evaluation program must be designed to characterize the quality of storm water discharges from the MS4, and to evaluate overall effectiveness of selected storm water management practices.
 - a) No later than September 30, 2014, the Permittees must develop a stormwater monitoring and evaluation plan that includes the quality assurance requirements, outfall monitoring, in-stream and/or fish tissue monitoring (as appropriate), evaluation of permanent storm water controls and evaluation of LID pilot project effectiveness as described later in this Part. In general, the Permittees must develop and conduct a stormwater monitoring and evaluation program to:
 - (i) Broadly estimate reductions in annual pollutant loads of sediment, bacteria, phosphorus and temperature discharged to impaired receiving waters from the MS4s, occurring as a result of the implementation of SWMP activities;
 - (ii) Assess the effectiveness and adequacy of the permanent storm water controls and LID techniques or controls selected for evaluation by the Permittees and which are intended to reduce the total volume of storm water discharging from impervious surfaces and/or improve overall pollutant reduction in stormwater discharges; and
 - (iii) Identify and prioritize those portions of each Permittee's MS4 where additional controls can be accomplished to further reduce total volume of storm water discharged and/or reduce pollutants in storm water discharges to waters of the U.S.
 - b) The final, updated stormwater monitoring and evaluation plan must be submitted to EPA with the 2nd Year Annual Report.
3. **Representative Sampling.** Samples and measurements must be representative of the nature of the monitored discharge or activity.
4. **Analytical Methods.** Sample collection, preservation, and analysis must be conducted according to sufficiently sensitive methods/test procedures approved under 40 CFR Part 136, unless otherwise approved by EPA. Where an approved 40 CFR Part 136 method does not exist, and other test procedures

have not been specified, any available method may be used after approval from EPA.

5. **Quality Assurance Requirements.** The Permittees must develop or update a quality assurance plan (QAP) for all analytical monitoring conducted in accordance with this Part. The QAP must be developed concurrently as part of the stormwater monitoring and evaluation plan. The Permittees must submit the QAP as part of the stormwater monitoring and evaluation plan to EPA and IDEQ in the 2nd Year Annual Report. Any existing QAP may be modified for the requirements under this section.

- a) The QAP must be designed to assist in the collection and analysis of storm water discharges in support of this Permit and in explaining data anomalies when they occur.
- b) Throughout all sample collection, analysis and evaluation activities, Permittees must use the EPA-approved QA/QC and chain-of-custody procedures described in the most current version of the following documents:
 - (i) *EPA Requirements for Quality Assurance Project Plans EPA-QA/R-5* (EPA/240/B-01/003, March 2001). A copy of this document can be found electronically at:
<http://www.epa.gov/quality/qs-docs/r5-final.pdf>;
 - (ii) *Guidance for Quality Assurance Project Plans EPA-QA/G-5*, (EPA/600/R-98/018, February, 1998). A copy of this document can be found electronically at:
<http://www.epa.gov/r10earth/offices/oea/epaqag5.pdf> ;
 - (iii) *Urban Storm BMP Performance Monitoring*, (EPA-821-B-02-001, April 2002). A copy of this document can be found electronically at:
<http://www.epa.gov/npdes/pubs/montcomplete.pdf>

The QAP should be prepared in the format specified in these documents.

- c) At a minimum, the QAP must include the following:
 - (i) Organization chart reflecting responsibilities of key Permittee staff;
 - (ii) Details on the number of samples, type of sample containers, preservation of samples, holding times, analytical methods, analytical detection and quantitation limits for each target compound, type and number of quality assurance field samples, precision and accuracy requirements, sample representativeness and completeness, sample preparation requirements, sample shipping methods, and laboratory data delivery requirements;
 - (iii) Data quality objectives;

- (iv) Map(s) and associated documentation reflecting the location of each sampling point and physical description including street address or latitude/longitude;
 - (v) Qualification and training of personnel;
 - (vi) Name(s), address(es) and telephone number(s) of the laboratories, used by or proposed to be used by the Permittees;
 - (vii) Data management;
 - (viii) Data review, validation and verification; and
 - (ix) Data reconciliation.
- d) The Permittees must amend the QAP whenever there is a modification in sample collection, sample analysis, or other procedure addressed by the QAP. The amended QAP must be submitted to EPA as part of the next Annual Report.
- e) Copies of any current QAP must be maintained by the Permittees and made available to EPA and/or IDEQ upon request.
6. **Additional Monitoring by Permittees.** If the Permittees monitor more frequently, or in more locations, than required by this Permit, the results of any such additional monitoring must be included and summarized with other data submitted to EPA and IDEQ as required in Part IV.C.
7. **Storm Water Outfall Monitoring**
- a) No later than September 30, 2015, the Permittees must update the existing *Boise NPDES Municipal Storm Water Permit Monitoring Plan* to be consistent with the monitoring and evaluation program objectives and plan as described in Part IV.A.2. At a minimum, the plan must describe five outfall sample locations, and any additional or alternative locations, as defined by the Permittees. The outfalls selected by the Permittees to be monitored must be identified as representative of all major land uses occurring within the Permit area.
 - b) No later than September 30, 2014, the Permittees must begin monitoring discharges from the identified five storm water outfalls during wet weather events at least three times per year. The specific minimum monitoring requirements are outlined in Table IV.A, but may be augmented based on the Permittees' updated stormwater monitoring and evaluation plan required by Part IV.A.2. The Permittees must include any additional parameters to be sampled in an updated Table IV.A within the final updated stormwater monitoring and evaluation plan submitted to EPA with the 2nd Annual Report.

Table IV.A – Outfall Monitoring Requirements^{1, 2}
PARAMETER SAMPLING
Ammonia
Total Kjeldahl Nitrogen (TKN) (mg/l)
Nitrate + Nitrite
Total Phosphorus (mg/l)
Dissolved Orthophosphate (mg/l)
<i>E. coli</i>
Biological Oxygen Demand (BOD5) (mg/l)
Chemical Oxygen Demand (COD) (mg/l)
Total Suspended Solids (TSS) (mg/l)
Total Dissolved Solids (TDS) (mg/l)
Dissolved Oxygen
Turbidity (NTU)
Temperature
pH (S.U)
Flow/Discharge, Volume, in cubic feet
Arsenic – Total
Cadmium- Total and Dissolved
Copper – Dissolved
Lead – Total and Dissolved
Mercury – Total
Zinc – Dissolved
Hardness (as CaCO₃) (mg/l)
<p>¹ Five or more outfall locations will be identified in the Permittees' updated stormwater monitoring and evaluation plan</p> <p>² A minimum of <i>three (3) samples</i> must be collected during wet weather storm events in each reporting year, assuming the presence of storm events sufficient to produce a discharge.</p>

8. **Water Quality Monitoring and/or Fish Tissue Sampling.** At the Permittees' option and to augment the storm water discharge data collection required in Part IV.A.7 above, one or more of the Permittees may conduct, or contract with others to conduct, water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed.
- a) If the Permittees elect to conduct in-stream water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed, the Permittees must revise the stormwater monitoring and evaluation plan and QAP to describe the monitoring and/or sampling effort(s) per Part IV.A.2 and IV.A.5, no later September 30, 2014.
 - b) The documentation of the Permittees' intended in-stream water quality monitoring and/or fish tissue sampling activities must be included in the final updated stormwater monitoring and evaluation plan submitted with the 2nd Year Annual Report as required in Part IV.A.2.b.
 - c) The Permittees are encouraged to engage in cooperative efforts with other organizations to collect reliable methylmercury fish tissue data within a specific geographic area of the Lower Boise River Watershed. The objective of the cooperative effort is to determine if fish tissue concentrations of methylmercury in the Lower Boise River are compliant with Idaho's methylmercury fish tissue criterion of 0.3 mg/kg.
 - (i) In particular, the Permittees are encouraged to cooperate with other organizations to collect data through implementation of the Methylmercury Fish Tissue Sampling requirements specified in NPDES Permits # ID-002044-3 and ID-002398-1 as issued to the City of Boise. Beginning with the 2nd Year Annual Report, the Permittees' may (individually or collectively) submit documentation in each Annual Report which describes their specific involvement over the prior reporting period, and may reference fish tissue sampling plans and data reports as developed or published by others through the cooperative watershed effort.
9. **Evaluate the Effectiveness of Required Structural Controls.** Within two years of the effective date of this Permit, the Permittees must select and begin to evaluate at least two different types of permanent structural storm water management controls currently mandated by the Permittees at new development or redevelopment sites. For each selected control, this evaluation must determine whether the control is effectively treating or preventing the discharge of one or more of the pollutants of concern into waterbodies listed in Table II.C. The results of this evaluation, and any recommendations for improved treatment performance, must be submitted to EPA in subsequent Annual Reports as the evaluation projects are implemented and completed.
10. **Evaluate the Effectiveness of Green Infrastructure/Low Impact Development Pilot Projects.** The Permittees must evaluate the performance and effectiveness of the three pilot projects required in Part II.B.2.c of this Permit, or contract with another entity to conduct such evaluations. An evaluation summary of the LID technique or control and any recommendations

of improved treatment performance must be submitted in subsequent Annual Reports as the evaluation projects are implemented and completed.

11. **Dry Weather Discharge Screening.** The Permittees must implement a dry weather screening program, or contract with another entity to implement such a program, as required in Part II.B.5.d.

B. Recordkeeping

1. **Retention of Records.** The Permittees must retain records and copies of all information (e.g., all monitoring, calibration, and maintenance records; all original strip chart recordings for any continuous monitoring instrumentation; copies of all reports required by this Permit; storm water discharge monitoring reports; a copy of the NPDES permit; and records of all data or information used in the development and implementation of the SWMP and to complete the application for this Permit;) for a period of at least five years from the date of the sample, measurement, report or application, or for the term of this Permit, whichever is longer. This period may be extended at the request of the EPA at any time.
2. **Availability of Records.** The Permittees must submit the records referred to in Part IV.B.1 to EPA and IDEQ only when such information is requested. At a minimum, the Permittees must retain all records comprising the SWMP required by this Permit (including a copy of the Permit language and all Annual Reports) in a location and format that are accessible to EPA and IDEQ. The Permittees must make all records described above available to the public if requested to do so in writing. The public must be able to view the records during normal business hours. The Permittees may charge the public a reasonable fee for copying requests.

C. Reporting Requirements

1. **Storm Water Discharge Monitoring Report.** Beginning with the 2nd Year Annual Report, and in subsequent Annual Reports, all storm water discharge monitoring data collected to date must be submitted as part of the Annual Report. At a minimum, this Storm Water Discharge Monitoring Report must include:
 - a) Dates of sample collection and analyses;
 - b) Results of sample analyses;
 - c) Location of sample collection. and
 - d) Summary discussion and interpretation of the data collected, including a discussion of quality assurance issues and comparison to previously collected information, as appropriate.
2. **Water Quality Monitoring and/or Fish Tissue Sampling Report(s).** If the Permittees elect to conduct water quality monitoring and/or fish tissue sampling as specified in Part IV.A.8, all relevant monitoring data collected to date must

be submitted as part of each Annual Report beginning with the 2nd Year Annual Report. Summary data reports as prepared by other organizations with whom the Permittee(s) cooperate may be submitted to fulfill this requirement. At a minimum, this Water Quality Monitoring and/or Fish Tissue Sampling Report must include:

- a) Dates of sample collection and analyses;
- b) Results of sample analyses;
- c) Locations of sample collection; and
- d) Summary discussion and interpretation of the data collected, including discussion of quality assurance issues and comparison to previously collected information, as appropriate.

3. Annual Report.

- a) No later than January 30th of each year beginning in 2014, and annually thereafter, each Permittee must submit an Annual Report to EPA and IDEQ. The reporting period for the 1st Year Annual Report will be from February 1, 2013, through September 30, 2013. Reporting periods for subsequent Annual Reports are specified in Table IV.C. Copies of all Annual Reports, including each Permittee's SWMP documentation, must be available to the public, through a Permittee-maintained website, and/or through other easily accessible means.

Table IV.C - Annual Report Deadlines		
Annual Report	Reporting Period	Due Date
1 st Year Annual Report	February 1, 2013–September 30, 2013	January 30, 2014
2 nd Year Annual Report	October 1, 2013-September 30, 2014	January 30, 2015
3 rd Year Annual Report	October 1, 2014-September 30, 2015	January 30, 2016
4 th Year Annual Report	October 1, 2015-September 30, 2016	January 30, 2017
5 th Year Annual Report	October 1, 2016-December 31, 2017	January 30, 2018

- b) Preparation and submittal of the Annual Reports must be coordinated by Ada County Highway District. Each Permittee is responsible for content of their organization's SWMP documentation and Annual Report(s) relating to SWMP implementation for portions of the MS4s for which they are responsible.
- c) The following information must be submitted in each Annual Report:

- (i) A updated and current document describing the SWMP as implemented by the specific Permittee, in accordance with Part II.A.1.b;
 - (ii) A narrative assessment of the Permittee's compliance with this Permit, describing the status of implementing the control measures in Parts II and IV. The status of each control measure must be addressed, even if activity has previously been completed, has not yet been implemented, does not apply to the Permittee's jurisdiction or operation, or is conducted on the Permittee's behalf by another entity;
 - (iii) Discussion of any information collected and analyzed during the reporting period, including but not limited to storm water monitoring data not included with the Storm Water Discharge Monitoring Report; dry weather monitoring results; Green Infrastructure/LID pilot project evaluation results, structural control evaluation results, and any other information collected or used by the Permittee(s) to assess the success of the SWMP controls at improving receiving water quality to the maximum extent practicable;
 - (iv) A summary of the number and nature of public education programs; the number and nature of complaints received by the Permittee(s), and follow-up actions taken; and the number and nature of inspections, formal enforcement actions, or other similar activities as performed by the Permittee(s) during the reporting period;
 - (v) Electronic copies of new or updated education materials, ordinances (or other regulatory mechanisms), inventories, guidance materials, or other products produced as required by this Permit during the reporting period;
 - (vi) A description and schedule of the Permittee's implementation of additional controls or practices deemed necessary by the Permittee, based on monitoring or other information, to ensure compliance with applicable water quality standards;
 - (vii) Notice if the Permittee is relying on another entity to satisfy any of the Permit obligations, if applicable; and
 - (viii) Annual expenditures for the reporting period, and estimated budget for the reporting period following each Annual Report.
- d) If, after the effective date of this Permit, EPA provides the Permittees with an alternative Annual Report format, the Permittees may use the alternative format in lieu of the required elements of Part IV.C.3.c.

D. Addresses

Reports and other documents required by this Permit must be signed in accordance with Part VI.E and submitted to each of the following addresses:

IDEQ: Idaho Department of Environmental Quality
Boise Regional Office
Attn: Water Program Manager
1410 North Hilton
Boise, ID 83854

EPA: United States Environmental Protection Agency
Attention: Storm Water MS4 Compliance Program
NPDES Compliance Unit
1200 6th Avenue, Suite 900 (OCE-133)
Seattle, WA 98101

Any documents and/or submittals requiring formal EPA approval must also be submitted to the following address:

United States Environmental Protection Agency
Attention: Storm Water MS4 Permit Program
NPDES Permits Unit
1200 6th Avenue, Suite 900 (OWW-130)
Seattle, WA 98101

V. Compliance Responsibilities.

A. Duty to Comply. The Permittees must comply with all conditions of this Permit. Any Permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, for Permit termination, revocation and reissuance, or modification, or for denial of a Permit renewal application.

B. Penalties for Violations of Permit Conditions

1. Civil and Administrative Penalties. Pursuant to 40 CFR Part 19 and the Act, any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently \$37,500 per day for each violation).

2. Administrative Penalties. Any person may be assessed an administrative penalty by the Administrator for violating Section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of this Act. Pursuant to 40 CFR Part 19

and the Act, administrative penalties for Class I violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(A) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently \$16,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$37,500). Pursuant to 40 CFR Part 19 and the Act, penalties for Class II violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(B) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently \$16,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$177,500).

3. Criminal Penalties

- a) **Negligent Violations.** The Act provides that any person who negligently violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of \$2,500 to \$25,000 per day of violation, or imprisonment of not more than one year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than \$50,000 per day of violation, or by imprisonment of not more than two years, or both.
- b) **Knowing Violations.** Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of \$5,000 to \$50,000 per day of violation, or imprisonment for not more than three years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than \$100,000 per day of violation, or imprisonment of not more than six years, or both.
- c) **Knowing Endangerment.** Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than \$500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the Act, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than \$1,000,000 and can be fined up to \$2,000,000 for second or subsequent convictions.
- d) **False Statements.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Permit shall, upon conviction, be

punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than four years, or both. The Act further provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this Permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

C. Need to Halt or Reduce Activity not a Defense. It shall not be a defense for the Permittees in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with this Permit.

D. Duty to Mitigate. The Permittees must take all reasonable steps to minimize or prevent any discharge or disposal in violation of this Permit that has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance. The Permittees must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Permittees to achieve compliance with the conditions of this Permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the Permittees only when the operation is necessary to achieve compliance with the conditions of the Permit.

F. Toxic Pollutants. The Permittees must comply with effluent standards or prohibitions established under Section 307(a) of the Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the Permit has not yet been modified to incorporate the requirement.

G. Planned Changes. The Permittee(s) must give notice to the Director and IDEQ as soon as possible of any planned physical alterations or additions to the permitted facility whenever:

1. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as determined in 40 CFR §122.29(b);
or
2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are not subject to effluent limitations in the Permit.

H. Anticipated Noncompliance. The Permittee(s) must give advance notice to the Director and IDEQ of any planned changes in the permitted facility or activity that may result in noncompliance with this Permit.

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The Permittee(s) must report the following occurrences of noncompliance by telephone within 24 hours from the time the Permittee(s) becomes aware of the circumstances:

- a) any noncompliance that may endanger health or the environment;
- b) any unanticipated bypass that exceeds any effluent limitation in the permit (See Part IV.F., “Bypass of Treatment Facilities”);
- c) any upset that exceeds any effluent limitation in the permit (See Part IV.G., “Upset Conditions”); or
- d) any overflow prior to the stormwater treatment facility over which the Permittee(s) has ownership or has operational control. An overflow is any spill, release or diversion of municipal sewage including:
 - (1) an overflow that results in a discharge to waters of the United States; and
 - (2) an overflow of wastewater, including a wastewater backup into a building (other than a backup caused solely by a blockage or other malfunction in a privately owned sewer or building lateral) that does not reach waters of the United States.

2. The Permittee(s) must also provide a written submission within five days of the time that the Permittee(s) becomes aware of any event required to be reported under subpart 1 above. The written submission must contain:

- a) a description of the noncompliance and its cause;
- b) the period of noncompliance, including exact dates and times;
- c) the estimated time noncompliance is expected to continue if it has not been corrected; and
- d) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.
- e) if the noncompliance involves an overflow, the written submission must contain:
 - (1) The location of the overflow;

- (2) The receiving water (if there is one);
- (3) An estimate of the volume of the overflow;
- (4) A description of the sewer system component from which the release occurred (e.g., manhole, constructed overflow pipe, crack in pipe);
- (5) The estimated date and time when the overflow began and stopped or will be stopped;
- (6) The cause or suspected cause of the overflow;
- (7) Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the overflow and a schedule of major milestones for those steps;
- (8) An estimate of the number of persons who came into contact with wastewater from the overflow; and
- (9) Steps taken or planned to mitigate the impact(s) of the overflow and a schedule of major milestones for those steps.

3. The Director of the Office of Compliance and Enforcement may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the NPDES Compliance Hotline in Seattle, Washington, by telephone, (206) 553-1846.

4. Reports must be submitted to the addresses in Part IV.D (“Addresses”).

J. Bypass of Treatment Facilities

1. **Bypass not exceeding limitations.** The Permittee(s) may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs 2 and 3 of this Part.

2. Notice.

a) **Anticipated bypass.** If the Permittee(s) knows in advance of the need for a bypass, it must submit prior written notice, if possible at least 10 days before the date of the bypass.

b) **Unanticipated bypass.** The Permittee(s) must submit notice of an unanticipated bypass as required under Part III.G (“Twenty-four Hour Notice of Noncompliance Reporting”).

3. Prohibition of bypass.

a) Bypass is prohibited, and the Director of the Office of Compliance and Enforcement may take enforcement action against the Permittee(s) for a bypass, unless:

(1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and

(3) The Permittee(s) submitted notices as required under paragraph 2 of this Part.

b) The Director of the Office of Compliance and Enforcement may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph 3.a. of this Part.

K. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the Permittee(s) meets the requirements of paragraph 2 of this Part. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

2. Conditions necessary for a demonstration of upset. To establish the affirmative defense of upset, the Permittee(s) must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

- a) An upset occurred and that the Permittee(s) can identify the cause(s) of the upset;
- b) The permitted facility was at the time being properly operated;
- c) The Permittee(s) submitted notice of the upset as required under Part V.I, “*Twenty-four Hour Notice of Noncompliance Reporting*,” and
- d) The Permittee(s) complied with any remedial measures required under Part V.D, “*Duty to Mitigate*.”

3. Burden of proof. In any enforcement proceeding, the Permittee(s) seeking to establish the occurrence of an upset has the burden of proof.

VI. General Provisions

A. Permit Actions.

1. This Permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR §§ 122.62, 122.64, or 124.5. The filing of a request by the Permittee(s) for a Permit modification, revocation and reissuance, termination, or a notification of planned changes or anticipated noncompliance, does not stay any Permit condition.

2. Permit coverage may be terminated, in accordance with the provisions of 40 CFR §§122.64 and 124.5, for a single Permittee without terminating coverage for the other Permittees subject to this Permit.

B. Duty to Reapply. If the Permittees intend to continue an activity regulated by this Permit after the expiration date of this Permit, the Permittees must apply for and obtain a

new permit. In accordance with 40 CFR §122.21(d), and unless permission for the application to be submitted at a later date has been granted by the Director, the Permittees must submit a new application at least 180 days before the expiration date of this Permit, or alternatively in conjunction with the 4th Year Annual Report. The reapplication package must contain the information required by 40 CFR §122.21(f), which includes: name and mailing address(es) of the Permittees(s) that operate the MS4(s), and names and titles of the primary administrative and technical contacts for the municipal Permittees(s). In addition, the Permittees must identify any previously unidentified water bodies that receive discharges from the MS4(s); a summary of any known water quality impacts on the newly identified receiving waters; a description of any changes to the number of applicants; and any changes or modifications to the Storm Water Management Program as implemented by the Permittees. The re-application package may incorporate by reference the 4th Year Annual Report when the reapplication requirements have been addressed within that report.

C. Duty to Provide Information. The Permittees must furnish to the Director and IDEQ, within the time specified in the request, any information that the Director or IDEQ may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Permit, or to determine compliance with this Permit. The Permittees must also furnish to the Director or IDEQ, upon request, copies of records required to be kept by this Permit.

D. Other Information. When the Permittees become aware that it failed to submit any relevant facts in a Permit application, or that it submitted incorrect information in a Permit application or any report to the Director or IDEQ, the Permittees must promptly submit the omitted facts or corrected information.

E. Signatory Requirements. All applications, reports or information submitted to the Director and IDEQ must be signed and certified as follows.

1. All Permit applications must be signed as follows:
 - a) For a corporation: by a responsible corporate officer.
 - b) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively.
 - c) For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official.
2. All reports required by the Permit and other information requested by the Director or the IDEQ must be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
 - a) The authorization is made in writing by a person described above;
 - b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or

position having overall responsibility for environmental matters for the organization; and

- c) The written authorization is submitted to the Director and IDEQ.
3. **Changes to Authorization.** If an authorization under Part VI.E.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part VI.E.2 must be submitted to the Director and IDEQ prior to or together with any reports, information, or applications to be signed by an authorized representative.
4. **Certification.** Any person signing a document under this Part must make the following certification:

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

F. Availability of Reports. In accordance with 40 CFR Part 2, information submitted to EPA pursuant to this Permit may be claimed as confidential by the Permittees. In accordance with the Act, permit applications, permits and effluent data are not considered confidential. Any confidentiality claim must be asserted at the time of submission by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice to the Permittees. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR Part 2, Subpart B (Public Information) and 41 Fed. Reg. 36902 through 36924 (September 1, 1976), as amended.

G. Inspection and Entry. The Permittees must allow the Director, IDEQ, or an authorized representative (including an authorized contractor acting as a representative of the Director), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the Permittees' premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring Permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

H. Property Rights. The issuance of this Permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or property or invasion of other private rights, nor any infringement of state or local laws or regulations.

I. Transfers. This Permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the Permit to change the name of the Permittees and incorporate such other requirements as may be necessary under the Act. (See 40 CFR 122.61; in some cases, modification or revocation and reissuance is mandatory.)

J. State/Tribal Environmental Laws

1. Nothing in this Permit shall be construed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties established pursuant to any applicable State/Tribal law or regulation under authority preserved by Section 510 of the Act.
2. No condition of this Permit releases the Permittees from any responsibility or requirements under other environmental statutes or regulations.

K. Oil and Hazardous Substance Liability Nothing in this Permit shall be constructed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties to which the Permittees is or may be subject under Section 311 of the CWA or Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

L. Severability The provisions of this Permit are severable, and if any provision of this permit, or the application of any provision of this Permit to any circumstance, is held invalid, the application of such provision to the circumstances, and the remainder of this Permit shall not be affected thereby.

VII. Definitions and Acronyms

All definitions contained in Section 502 of the Act and 40 CFR Part 122 apply to this Permit and are incorporated herein by reference. For convenience, simplified explanations of some regulatory/statutory definitions have been provided but, in the event of a conflict, the definition found in the statute or regulation takes precedence.

“Administrator” means the Administrator of the EPA, or an authorized representative.

“Animal facility” see “commercial animal facility.”

“Annual Report” means the periodic self –assessment submitted by the Permittee(s) to document incremental progress towards meeting the storm water management requirements and implementation schedules as required by this Permit. See Part IV.C.

“Best Management Practices (BMPs)” means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. See 40 CFR § 122.2. BMP refers to operational activities, physical controls or educational measures that are applied to reduce the discharge of pollutants and minimize potential impacts upon receiving waters, and accordingly, refers to both structural and nonstructural practices that have direct impacts on the release, transport, or discharge of pollutants. See also “storm water control measure (SCM).”

“Bioretention” is the water quality and water quantity storm water management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from storm water runoff.

“Canopy Interception” is the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.

“CGP” and “Construction General Permit” means the current available version of EPA’s *NPDES General Permit for Storm Water Discharges for Construction Activities in Idaho*, Permit No. IDR12-0000. EPA’s CGP is posted on EPA’s website at www.epa.gov/npdes/stormwater/cgp.

“Commercial Animal Facility” as used in this Permit, means a business that boards, breeds, or grooms animals including but not limited to dogs, cats, rabbits or horses.

“Common Plan of Development” is a contiguous construction project or projects where multiple separate and distinct construction activities may be taking place at different times on different schedules but under one plan. The “plan” is broadly defined as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot; included in this definition are most subdivisions and industrial parks.

“Construction activity” includes, but is not limited to, clearing, grading, excavation, and other site preparation work related to the construction of residential buildings and non-residential buildings, and heavy construction (e.g., highways, streets, bridges, tunnels, pipelines, transmission lines and industrial non-building structures).

“Control Measure” as used in this Permit, refers to any action, activity, Best Management Practice or other method used to prevent or reduce the discharge of pollutants in stormwater to waters of the United States.

“CWA” or “The Act” means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended by Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et seq.

“Director” means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

“Discharge” when used without a qualifier, refers to “discharge of a pollutant” as defined at 40 CFR §122.2.

“Discharge of a pollutant” means (a) any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.”

“Discharge of Storm Water Associated with Construction Activity” as used in this Permit, refers to a discharge of pollutants in storm water runoff from areas where soil disturbing activities (*e.g.*, clearing, grading, or excavation), construction materials or equipment storage or maintenance (*e.g.*, fill piles, borrow areas, concrete truck washout, fueling) or other industrial storm water directly related to the construction process are located, and which are required to be managed under an NPDES permit. See the regulatory definitions of storm water discharge associated with large and small construction activity at 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15), respectively

“Discharge of Storm Water Associated with Industrial Activity” as used in this Permit, refers to the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant included in the regulatory definition of storm water discharge associated with industrial activity at 40 CFR §122.26(b)(14).

“Discharge-related Activities” include: activities which cause, contribute to, or result in storm water point source pollutant discharges and measures to control storm water discharges, including the siting, construction, and operation of best management practices to control, reduce or prevent storm water pollution.

“Disconnect” for the purposes of this permit, means the change from a direct discharge into receiving waters to one in which the discharged water flows across a vegetated surface, through a constructed water or wetlands feature, through a vegetated swale, or other attenuation or infiltration device before reaching the receiving water.

“Engineered Infiltration” is an underground device or system designed to accept storm water and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the infiltration rate.

“Erosion” means the process of carrying away soil particles by the action of water.

“Evaporation” means rainfall that is changed or converted into a vapor.

“Evapotranspiration” means the sum of evaporation and transpiration of water from the earth’s surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration from plants.

“Extended Filtration” is a structural storm water device which filters storm water runoff through a soil media and collects it in an underdrain which slowly releases it after the storm is over.

“EPA” means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

“Entity” means a governmental body, or a public or private organization.

“Existing Permanent Controls,” in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis and that were installed prior to the effective date of this Permit.

“Facility or Activity” generally means any NPDES “point source” or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

“Fish Tissue Sampling” see “Methylmercury Fish Tissue Sampling”

“Green infrastructure” means runoff management approaches and technologies that utilize, enhance and/or mimic the natural hydrologic cycle processes of infiltration, evapotranspiration and reuse.

“Hydromodification” means changes to the storm water runoff characteristics of a watershed caused by changes in land use.

“IDEQ” means the Idaho Department of Environmental Quality or its authorized representative.

“Illicit Connection” means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

“Illicit Discharge” is defined at 40 CFR §122.26(b)(2) and means any discharge to a municipal separate storm sewer that is not entirely composed of storm water, except discharges authorized under an NPDES permit (other than the NPDES Permit for discharges from the MS4) and discharges resulting from fire fighting activities.

“Impaired Water” (or “Water Quality Impaired Water”) for purposes of this Permit means any water body identified by the State of Idaho or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards. Impaired waters include both waters with approved or established Total Maximum Daily Loads (TMDLs), and those for which a TMDL has not yet been approved or established.

“Industrial Activity” as used in this Permit refers to the eleven categories of industrial activities included in the definition of discharges of “storm water associated with industrial activity” at 40 CFR §122.26(b)(14).

“Industrial Storm Water” as used in this Permit refers to storm water runoff associated with the definition of “discharges of storm water associated with industrial activity”.

“Infiltration” is the process by which storm water penetrates into soil.

“Low Impact Development” or “LID” means storm water management and land development techniques, controls and strategies applied at the parcel and subdivision scale that emphasize conservation and use of on-site natural features integrated with engineered, small scale hydrologic controls to more closely mimic pre-development hydrologic functions.

“Major outfall” is defined in 40 CFR §122.26(b)(5) and in general, means a municipal storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more.

“MEP” or "maximum extent practicable," means the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges that was established by Section 402(p) of the Clean Water Act, 33 U.S.C §1342(p).

“Measurable Goal” means a quantitative measure of progress in implementing a component of a storm water management program.

“Methylmercury Fish Tissue Sampling” and “Methylmercury Fish Tissue Sampling Requirements” means the IDEQ-recommended cooperative data collection effort for the Lower Boise River Watershed. In particular, Methylmercury Fish Tissue Sampling requirements are otherwise specified in NPDES Permits # ID-002044-3 and ID-002398-1, as issued by EPA to the City of Boise and available online at <http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Current+ID1319>

“Minimize” means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry or municipal practices.

“MS4” means "municipal separate storm sewer system," and is used to refer to either a Large, Medium, or Small Municipal Separate Storm Sewer System as defined in 40 CFR 122.26(b). The term, as used within the context of this Permit, refers to those portions of the municipal separate storm sewer systems within the corporate limits of the City of Boise and City of Garden City that are owned and/or operated by the Permittees, namely: Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3 and/or the Idaho Transportation Department District #3.

“Municipality” means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA.

“Municipal Separate Storm Sewer” is defined in 40 CFR §122.26(b) and means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to

State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR §122.2.

“National Pollutant Discharge Elimination System” or “NPDES” means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 402, 318 and 405 of the CWA. The term includes an ‘approved program.’

“New Permanent Controls,” in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis that are installed after the effective date of this permit.

“Outfall” is defined at 40 CFR §122.26(b)(9) means a point source (see definition below) at the point where a municipal separate storm sewer discharges to waters of the United States, and does not include open conveyances connecting two municipal separate storm sewers or pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

“Owner or operator” means the owner or operator of any “facility or activity” subject to regulation under the NPDES program.

“Permanent storm water management controls” see “post-construction storm water management controls.”

“Permitting Authority” means the U.S. Environmental Protection Agency (EPA)

“Point Source” is defined at 40 CFR §122.2 and means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

"Pollutant" is defined at 40 CFR §122.2. A partial listing from this definition includes: dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial or municipal waste.

“Pollutant(s) of concern” includes any pollutant identified by IDEQ as a cause of impairment of any water body that will receive a discharge from a MS4 authorized under this Permit. See Table II.C.

“Post- construction storm water management controls” or “permanent storm water management controls” means those controls designed to treat or control runoff on a permanent basis once construction is complete. See also “new permanent controls” and “existing permanent controls.”

“QA/QC” means quality assurance/quality control.

“QAP” means Quality Assurance Plan.

“Rainfall and Rainwater Harvesting” is the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.

“Redevelopment” for the purposes of this Permit, means the alteration, renewal or restoration of any developed land or property that results in land disturbance of 5,000 square feet or more, and that has one of the following characteristics: land that currently has an existing structure, such as buildings or houses; or land that is currently covered with an impervious surface, such as a parking lot or roof; or land that is currently degraded and is covered with sand, gravel, stones, or other non-vegetative covering.

“Regional Administrator” means the Regional Administrator of Region 10 of the EPA, or the authorized representative of the Regional Administrator.

“Repair of Public Streets, Roads and Parking Lots” means repair work on Permittee-owned or Permittee-managed streets and parking lots that involves land disturbance, including asphalt removal or regrading of 5,000 square feet or more. This definition excludes the following activities: pot hole and square cut patching; overlaying existing asphalt or concrete paving with asphalt or concrete without expanding the area of coverage; shoulder grading; reshaping or regrading drainage ditches; crack or chip sealing; and vegetative maintenance.

“Runoff Reduction Techniques” means the collective assortment of storm water practices that reduce the volume of storm water from discharging off site.

“Storm Sewershed” means, for the purposes of this Permit, all the land area that is drained by a network of municipal separate storm sewer system conveyances to a single point of discharge into a water of the United States.

“Significant contributors of pollutants” means any discharge that causes or could cause or contribute to a violation of surface water quality standards.

“Small Construction Activity” – is defined at 40 CFR §122.26(b)(15) and incorporated here by reference. A small construction activity includes clearing, grading, and excavating resulting in a land disturbance that will disturb equal to or greater than one (1) acre and less than five (5) acres of land or will disturb less than one (1) acre of total land area but is part of a larger common plan of development or sale that will ultimately disturb equal to or greater than one (1) acre and less than five (5) acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the site.

“Snow management” means the plowing, relocation and collection of snow.

“Soil amendments” are components added to in situ or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes

various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.

“Source control” storm water management means practices that control storm water *before* pollutants have been introduced into storm water

“Storm event” or “measurable storm event” for the purposes of this Permit means a precipitation event that results in an actual discharge from the outfall and which follows the preceding measurable storm event by at least 48 hours (2 days).

“Storm water” and “storm water runoff” as used in this Permit means storm water runoff, snow melt runoff, and surface runoff and drainage, and is defined at 40 CFR §122.26(b)(13). “Storm water” means that portion of precipitation that does not naturally percolate into the ground or evaporate, but flows via overland flow, interflow, channels, or pipes into a defined surface water channel or a constructed infiltration facility.

“Storm Water Control Measure” (SCM) or “storm water control device,” means physical, structural, and/or managerial measures that, when used singly or in combination, reduce the downstream quality and quantity impacts of storm water. Also, SCM means a permit condition used in place of or in conjunction with effluent limitations to prevent or control the discharge of pollutants. This may include a schedule of activities, prohibition of practices, maintenance procedures, or other management practices. SCMs may include, but are not limited to, treatment requirements; operating procedures; practices to control plant site runoff, spillage, leaks, sludge, or waste disposal; or drainage from raw material storage. See “best management practices (BMPs).”

“Storm Water Facility” means a constructed component of a storm water drainage system, designed or constructed to perform a particular function or multiple functions. Storm water facilities include, but are not limited to, pipes, swales, ditches, culverts, street gutters, detention basins, retention basins, constructed wetlands, infiltration devices, catch basins, oil/water separators, sediment basins, and modular pavement.

“Storm Water Management Practice” or “Storm Water Management Control” means practices that manage storm water, including structural and vegetative components of a storm water system.

“Storm Water Management Project” means a project that takes into account the effects on the water quality of the receiving waters and whether a structural storm water control device can be retrofitted to control water quality.

“Storm Water Management Program (SWMP)” refers to a comprehensive program to manage the quality of storm water discharged from the municipal separate storm sewer system. For the purposes of this Permit, the SWMP consists of the actions and activities conducted by the Permittees as required by this Permit and described in the Permittees’ SWMP documentation. A “SWMP document” is the written summary describing the unique and/or cooperative means by which an individual Permittee or entity implements the specific storm water management controls Permittee within their jurisdiction.

“Storm Water Pollution Prevention Plan (SWPPP)” means a site specific plan designed to describe the control of soil, raw materials, or other substances to prevent pollutants in storm water runoff; a SWPPP is generally developed for a construction site, or an industrial facility. For the purposes of this permit, a SWPPP means a written document that identifies potential sources of pollution, describes practices to reduce pollutants in storm water discharges from the site, and identifies procedures or controls that the operator will implement to reduce impacts to water quality and comply with applicable Permit requirements.

“Structural flood control device” means a device designed and installed for the purpose of storm drainage during storm events.

”Subwatershed” for the purposes of this Permit means a smaller geographic section of a larger watershed unit with a drainage area between 2 to 15 square miles and whose boundaries include all the land area draining to a point where two second order streams combine to form a third order stream. A subwatershed may be located entirely within the same political jurisdiction.

“TMDL” means Total Maximum Daily Load, an analysis of pollutant loading to a body of water detailing the sum of the individual waste load allocations for point sources and load allocations for non-point sources and natural background. See 40 CFR §130.2.

“Treatment control” storm water management means practices that ‘treat’ storm water after pollutants have been incorporated into the storm water.

“Urban Agriculture” and “Urban Agricultural Activities” means the growing, processing, and distribution of food and other products through intensive plant cultivation and animal husbandry in and around cities. For the purposes of this Permit, the term includes activities allowed and/or acknowledged by the Permittees through a local comprehensive plan ordinance, or other regulatory mechanism. For example, see: *Blueprint Boise* online at http://www.cityofboise.org/BluePrintBoise/pdf/Blueprint%20Boise/0_Blueprint_All.pdf, and/or *City of Boise Urban Agriculture ordinance amendment, ZOA11-00006*.

“Waters of the United States,” as defined in 40 CFR 122.2, means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters, including interstate "wetlands";
3. All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - a. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

- c. Which are used or could be used for industrial purposes by industries in interstate commerce;
4. All impoundments of waters otherwise defined as waters of the United States under this definition;
5. Tributaries of waters identified in paragraphs 1 through 4 of this definition;
6. The territorial sea; and
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs 1 through 6 of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds for steam electric generation stations per 40 CFR Part 423) which also meet the criteria of this definition are not waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

“Watershed” is defined as all the land area that is drained by a waterbody and its tributaries.

“Wetlands” means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Exhibit 4

Washington, D.C. – District of Columbia MS4 Permit (Permit No.
DC0000221)

This page intentionally left blank

PERMIT FOR THE DISTRICT OF COLUMBIA
MUNICIPAL SEPARATE STORM SEWER SYSTEM

TABLE OF CONTENTS

1. DISCHARGES AUTHORIZED UNDER THIS PERMIT
 - 1.1 Permit Area
 - 1.2 Authorized Discharges
 - 1.3 Limitations on Coverage
 - 1.3.1 Non-stormwater Discharges
 - 1.3.2 Waivers and Exemptions
 - 1.4 Discharge Limitations

2. LEGAL AUTHORITY, RESOURCES, AND STORMWATER PROGRAM ADMINISTRATION
 - 2.1 Legal Authority
 - 2.2 Fiscal Resources
 - 2.3 Stormwater Management Program Administration/Permittee Responsibilities

3. STORMWATER MANAGEMENT PROGRAM (SWMP) PLAN
 - Table 1: Elements Requiring EPA Review and Approval
 - Table 2: Legal Authority for Selected Required Stormwater Program Elements

4. IMPLEMENTATION OF STORMWATER CONTROL MEASURES
 - 4.1 Standard for Long-Term Stormwater Management
 - 4.1.1 Standard for Stormwater Discharges from Development
 - 4.1.2 Code and Policy Consistency, Site Plan Review, Verification and Tracking
 - 4.1.3 Off-Site Mitigation and/or Fee-in-Lieu
 - 4.1.4 Green Landscaping Incentives Program
 - 4.1.5 Retrofit Program for Existing Discharges
 - 4.1.6 Tree Canopy
 - 4.1.7 Green Roof Projects
 - 4.2 Operation and Maintenance of Retention Practices
 - 4.2.1 District Owned and Operated Practices
 - 4.2.2 Non-District Owned and Operated Practices
 - 4.2.3 Stormwater Management Guidebook and Training
 - 4.3 Management of District Government Areas
 - 4.3.1 Sanitary Sewage System Maintenance Overflow and Spill Prevention Response
 - 4.3.2 Public Construction Activities Management.
 - 4.3.3 Vehicle Maintenance/Material Storage Facilities/Municipal Operations
 - 4.3.4 Landscape and Recreational Facilities Management, Pesticide, Herbicide, Fertilizer and Landscape Irrigation
 - 4.3.5 Storm Drain System Operation and Management and Solids and Floatables Reduction

- 4.3.6 Streets, Alleys and Roadways
 - Table 3: Street Sweeping
 - 4.3.7 Infrastructure Maintenance/Pollution Source Control Maintenance
 - 4.3.8 Public Industrial Activities Management/Municipal and Hazardous Facilities
 - 4.3.9 Emergency Procedures
 - 4.3.10 Municipal Official Training
 - 4.4 Management of Commercial and Institutional Areas
 - 4.4.1 Inventory of Critical Sources and Source Controls
 - 4.4.2. Inspection of Critical Sources
 - 4.4.3. Compliance Assurance
 - 4.5 Management of Industrial Facilities and Spill Prevention
 - 4.6 Management of Construction Activities
 - 4.7 Management of Illicit Discharges and Improper Disposal
 - 4.8 Flood Control Projects
 - 4.9 Public Education and Participation
 - 4.9.1. Education and Outreach
 - 4.9.2. Measurement of Impacts
 - 4.9.3. Recordkeeping
 - 4.9.4. Public Involvement and Participation
 - 4.10. Total Maximum Daily Load (TMDL) Wasteload Allocation (WLA) Planning and Implementation
 - 4.10.1 Anacostia River Watershed Trash TMDL Implementation
 - 4.10.2 Hickey Run TMDL Implementation
 - 4.10.3 Consolidated TMDL Implementation Plan
 - 4.10.4 Adjustments to TMDL Implementation Strategies
 - 4.11 Additional Pollutant Sources
5. MONITORING AND ASSESSMENT OF CONTROLS
- 5.1 Revised Monitoring Program
 - 5.1.1 Design of the Revised Monitoring Program
 - Table 4: Monitoring Parameters
 - 5.1.2 Utilization of the Revised Monitoring Program
 - 5.2. Interim Monitoring
 - 5.2.1. Wet Weather Discharge Monitoring
 - Table 5: Monitoring Stations
 - 5.2.2 Storm Event Data
 - 5.2.3 Sample Type, Collection, and Analysis
 - 5.2.4 Sampling Waiver
 - 5.3 Dry Weather Monitoring
 - 5.3.1 Dry Weather Screening Program
 - 5.3.2 Screening Procedures
 - 5.3.3 Follow-up on Dry Weather Screening Results
 - 5.4 Area and/or Source Identification Program
 - 5.5 Flow Measurements

- 5.6 Monitoring and Analysis Procedures
- 5.7 Reporting of Monitoring Results
- 5.8 Additional Monitoring by the permittee
- 5.9 Retention of Monitoring Information
- 5.10 Record Contents

- 6. REPORTING REQUIREMENTS
 - Table 6: Reporting Requirements
 - 6.1 Discharge Monitoring Reports
 - 6.2 Annual Reporting
 - 6.2.1 Annual Report
 - 6.2.2 Annual Report Meeting
 - 6.2.3 Annual Report Revisions
 - 6.2.4 Signature and Certification
 - 6.2.5 EPA Approval
 - 6.3 MS4 Permit Application

- 7. STORMWATER MODEL

- 8. STANDARD PERMIT CONDITIONS FOR NPDES PERMITS
 - 8.1 Duty to Comply
 - 8.2 Inspection and Entry
 - 8.3 Civil and Criminal Penalties for Violations of Permit Conditions
 - 8.4 Duty to Mitigate
 - 8.5 Permit Actions
 - 8.6 Retention of Records
 - 8.7 Signatory Requirements
 - 8.8 Oil and Hazardous Substances Liability
 - 8.9 District Laws, Regulations and Ordinances
 - 8.10 Property Rights
 - 8.11 Severability
 - 8.12 Transfer of Permit
 - 8.13 Construction Authorization
 - 8.14 Historic Preservation
 - 8.15 Endangered Species
 - 8.16 Toxic Pollutants
 - 8.17 Bypass
 - 8.17.1 Bypass not exceeding limitations
 - 8.17.2 Notice
 - 8.17.3 Prohibition of bypass
 - 8.18 Upset
 - 8.19 Reopener Clause for Permits
 - 8.20 Duty to Reapply

- 9. PERMIT DEFINITIONS

1. **DISCHARGES AUTHORIZED UNDER THIS PERMIT**

1.1 Permit Area

This permit covers all areas within the jurisdictional boundary of the District of Columbia served by, or otherwise contributing to discharges from, the Municipal Separate Storm Sewer System (MS4) owned or operated by the District of Columbia. This permit also covers all areas served by or contributing to discharges from MS4s owned or operated by other entities within the jurisdictional boundaries of the District of Columbia unless those areas have separate NPDES MS4 permit coverage or are specifically excluded herein from authorization under the District's stormwater program. Hereinafter these areas collectively are referred to as "MS4 Permit Area".

1.2 Authorized Discharges

This permit authorizes all stormwater point source discharges to waters of the United States from the District of Columbia's MS4 that comply with the requirements of this permit. This permit also authorizes the discharge of stormwater commingled with flows contributed by process wastewater, non-process wastewater, or stormwater associated with industrial activity provided such discharges are authorized under separate NPDES permits.

This permit authorizes the following non-stormwater discharges to the MS4 when appropriate stormwater activities and controls required through this permit have been applied and which are: (1) discharges resulting from clear water flows, roof drainage, dechlorinated water line flushing, landscape irrigation, ornamental fountains, diverted stream flows, rising ground waters, uncontaminated ground water infiltration to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation waters, springs, footing drains, lawn watering, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, wash water, fire fighting activities, and similar types of activities; and (2) which are managed so that water quality is not further impaired and that the requirements of the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and EPA regulations are met.

1.3 Limitations to Coverage

1.3.1 Non-stormwater Discharges

The permittee, as defined herein, shall effectively prohibit non-stormwater discharges into the MS4, except to the extent such discharges are regulated with an NPDES permit.

1.3.2 Waivers and Exemptions

This permit does not authorize the discharge of any pollutant from the MS4 which arises from or is based on any existing waivers and exemptions that may otherwise apply and are not consistent with the Federal Clean Water Act and other pertinent guidance, policies, and regulations. This narrative prohibition on the applicability of such waivers and exemptions extends to any activity that would otherwise be authorized under District law, regulations or

ordinance but which impedes the reduction or control of pollutants through the use of stormwater control measures and/or prevents compliance with the narrative /numeric effluent limits of this permit. Any such discharge not otherwise authorized may constitute a violation of this permit.

1.4 Discharge Limitations

The permittee must manage, implement and enforce a stormwater management program (SWMP) in accordance with the Clean Water Act and corresponding stormwater NPDES regulations, 40 C.F.R. Part 122, to meet the following requirements:

1.4.1. Effectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with existing District of Columbia Water Quality Standards (DCWQS);

1.4.2. Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body, consistent with 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.44(k)(2) and (3); and

1.4.3. Comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit.

Compliance with the provisions contained in Parts 2 through 8 of this permit, including milestones and final dates for attainment of applicable WLAs, shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term.

2. **LEGAL AUTHORITY, RESOURCES AND STORMWATER PROGRAM ADMINISTRATION**

2.1 Legal Authority

2.1.1 The permittee shall use its existing legal authority to control discharges to and from the Municipal Separate Storm Sewer System in order to prevent or reduce the discharge of pollutants to achieve water quality objectives, including but not limited to applicable water quality standards. To the extent deficiencies can be addressed through regulation or other Executive Branch action, the permittee shall remedy such deficiencies within 120 days. Deficiencies that can only be addressed through legislative action shall be remedied within 2 years of the effective date of this permit, except where otherwise stipulated, in accordance with the District's legislative process. Any changes to or deficiencies in the legal authority shall be explained in each Annual Report.

2.1.2 No later than 18 months following the effective date of this permit, the permittee shall update and implement Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution) ("updated DC Stormwater Regulations"), to address the control of stormwater throughout the MS4 Permit Area. Such regulations shall be consistent with this

permit, and shall be at least as protective of water quality as the federal Clean Water Act and its implementing regulations require.

2.1.3 The permittee shall ensure that the above legal authority in no way restricts its ability to enter into inter-jurisdictional agreements with other District agencies and/or other jurisdictions affected through this permit.

2.1.4 Review and revise, where applicable, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the following standards: (1) standards resulting from issuance of District stormwater regulations required by Section 2.1, paragraph 1 herein; and (2) performance standards required by this permit.

2.2 Fiscal Resources

The permittee, including all agencies and departments of the District as specified in section 2.3 below, shall provide adequate finances, staff, equipment and support capabilities to implement the existing Stormwater Management Program (SWMP) and the provisions of this permit. For the core program the permittee shall provide a dedicated funding source. Each annual report under Part 6 of this permit shall include a demonstration of adequate fiscal capacity to meet the requirements of this permit.

2.3 Stormwater Management Program Administration/Permittee Responsibilities

2.3.1 The Government of the District of Columbia is the permittee, and all activities of all agencies, departments, offices and authorities of the District must comply with the requirements of this permit. The permittee has designated the District Department of the Environment (DDOE) as the agency responsible for managing the MS4 Stormwater Management Program and all activities necessary to comply with the requirements of this permit and the Comprehensive Stormwater Management Enhancement Amendment Act of 2008 by coordinating and facilitating a collaborative effort among other city agencies and departments including but not limited to departments designated as “Stormwater Agencies” by the Comprehensive Stormwater Management Enhancement Amendment Act of 2008:

District Department of Transportation (DDOT);
Department of Public Works (DPW);
Office of Planning (OP);
Office of Public Education Facilities Modernization (OPEFM);
Department of Real Estate Services (DRES);
Department of Parks and Recreation; and
DC Water and Sewer Authority (also known as and hereinafter referred to as DC Water).

Each named entity is responsible for complying with those elements of the permit within its jurisdictional scope and authorities.

2.3.2 DDOE shall coordinate, and all agencies, offices, departments and authorities shall implement provisions of the existing MS4 Task Force Memorandum of Understanding (MOU) dated 2000, updated matrix of responsibilities (January 2008), and any subsequent updates; the MOU between DDOE and DC Water (2012) and any subsequent updates; and other institutional agreements to coordinate compliance activities among agency partners to implement the provisions of this permit. DDOE's major responsibilities under these MOUs and institutional agreements shall include:

1. Convening regular meetings and communication with MS4 Task Force agencies and other committees established to implement this permit to budget, assign and implement projects, and monitor, inspect and enforce all activities required by the MS4 permit.
2. Providing technical and administrative support for the MS4 Task Force and other committees established to implement this permit
3. Evaluating, assessing, and synthesizing results of the monitoring and assessment programs and the effectiveness of the implementation of management practices and coordinating necessary adjustments to the stormwater management program in order to ensure compliance.
4. Coordinating the completion and submission of all deliverables required by the MS4 Permit.
5. Projecting revenue needs to meet MS4 Permit requirements, overseeing the District's stormwater fees to fulfill revenue needs, and coordinating with DC Water to ensure the District's stormwater fee is collected.
6. Making available to the public and other interested and affected parties, the opportunity to comment on the MS4 stormwater management program.

2.3.3 Within 180 days of permit issuance, the permittee shall complete an assessment of additional governmental agencies and departments, non-governmental organizations, watershed groups or other community organizations in the District and adjacent states to partner with to administer required elements of the permit. Intra- and inter-agency agreements between relevant governmental and nongovernmental organizations shall be established to ensure successful coordination and implementation of stormwater management activities in accordance with the requirements of this permit. Additional government and nongovernmental organizations and programs to consider include; land use planning, brownfields redevelopment, fire department, building and safety, public health, parks and recreation, and federal departments and agencies, including but not limited to, the National Park Service, Department of Agriculture, Department of Defense, and General Services Administration, responsible for facilities in the District.

3. STORMWATER MANAGEMENT PROGRAM (SWMP) PLAN

The permittee shall continue to implement, assess and upgrade all of the controls,

procedures and management practices, described in this permit, and in the SWMP dated February 19, 2009, and any subsequent updates. This Program has been determined to reduce the discharge of pollutants to the maximum extent practicable. The Stormwater Management Program is comprised of all requirements in this permit. All existing and new strategies, elements, initiatives, schedules or programs required by this permit must be documented in the SWMP Plan, which shall be the consolidated document of all stormwater program elements. Updates to the plan shall be consistent with all compliance deadlines in this permit. A current plan shall be posted on the permittee's website at an easily accessible location at all times.

New Stormwater Management Program strategies, elements, initiatives and plans required to be submitted to EPA for review and approval are included in Table 1.

TABLE 1
Elements Requiring EPA Review and/or Approval

Element	Submittal Date (from effective date of this permit)
Anacostia River Watershed Trash Reduction Calculation Methodology (4.10)	1 year
Catch Basin Operation and Maintenance Plan (4.3.5.1)	18 months
Outfall Repair Schedule (4.3.5.3)	18 months
Off-site Mitigation/Payment-in-Lieu Program (4.1.3)	18 months
Retrofit Program (4.1.5)	2 years
Consolidated TMDL Implementation Plan (4.10.3)	2 years
Revised Monitoring Program (5.1)	2 years
Revised Stormwater Management Program Plan (3)	4 years

No later than 3 years from the issuance date of this permit the permittee shall public notice a fully updated Plan including all of the elements required in this permit. No later than 4 years from the issuance date of this permit the permittee shall submit to EPA the fully updated plan for review and approval, as part of the application for permit renewal.

The measures required herein are terms of this permit. These permit requirements do not prohibit the use of 319(h) funds for other related activities that go beyond the requirements of this permit, nor do they prohibit other sources of funding and/or other programs where legal or contractual requirements preclude direct use for stormwater permitting activities.

TABLE 2
Legal Authority for Selected Required Program Stormwater Elements

Required Program Application Element	Regulatory References
Adequate Legal Authority	40 C.F.R. § 122.26(d)(2)(I)(C)-(F)

Green technology stormwater management practices, which incorporate technologies and practices across District activities.	Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution)
Existing Structural and Source Controls	40 C.F.R. § 122.26(d)(2)(iv)(A)(1)
Roadways	40 C.F.R. § 122.26(d)(2)(iv)(A)(3)
Pesticides, Herbicides, and Fertilizers Application	40 C.F.R. § 122.26(d)(2)(iv)(A)(6)
Municipal Waste Sites	40 C.F.R. § 122.26(d)(2)(iv)(A)(5)
Spill Prevention and Response	40 C.F.R. § 122.26(d)(2)(iv)(B)(4)
Infiltration of Seepage	40 C.F.R. § 122.26(d)(2)(iv)(B)(7)
Stormwater Management Program for Commercial and Residential Areas	40 C.F.R. § 122.26(d)(2)(iv)(A)
Manage Critical Source Areas	40 C.F.R. § 122.26(d)(iii)(B)(6)
Stormwater Management for Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)
Industrial and High Risk Runoff	40 C.F.R. § 122.26(d)(2)(iv)(C), (iv)(A)(5)
Identify Priority Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)(1)
Illicit Discharges and Improper Disposal	40 C.F.R. § 122.26(d)(2)(iv)(B)(1)-(5), (iv)(B)(7)
Flood Control Projects	40 C.F.R. § 122.26(d)(2)(iv)(A)(4)
Public Education and Participation	40 C.F.R. § 122.26(d)(2)(iv)(A)(6), (iv)(B)(5), (iv)(B)(6)

Monitoring and Assessment and Reporting	40 C.F.R. § 122.26(d)(2)(iv)(D)(v)
Monitoring Program	40 C.F.R. § 122.26(d)(2)(iv)(B)(2), (iii), iv(A), (iv)(C)(2)
Characterization Data	40 C.F.R. § 122.26(d)(2)(iii)(B)-(D), 40 C.F.R. § 122.21(g)(7)
Reporting	40 C.F.R. § 122.41(l)

4. IMPLEMENTATION OF STORMWATER CONTROL MEASURES

4.1 Standard for Long-Term Stormwater Management

The permittee shall continue to develop, implement, and enforce a program in accordance with this permit and the permittee's updated SWMP Plan that integrates stormwater management practices at the site, neighborhood and watershed levels that shall be designed to mimic pre-development site hydrology through the use of on-site stormwater retention measures (e.g., harvest and use, infiltration and evapotranspiration), through policies, regulations, ordinances and incentive programs

4.1.1 Standard for Stormwater Discharges from Development

No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement one or more enforceable mechanism(s) that will adopt and implement the following performance standard for all projects undertaking development that disturbs land greater than or equal to 5,000 square feet:

Require the design, construction and maintenance of stormwater controls to achieve on-site retention of 1.2" of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting and use for all development greater than or equal to 5,000 square feet.

The permittee may allow a portion of the 1.2" volume to be compensated for in a program consistent with the terms and requirements of Part 4.1.3.

4.1.2 Code and Policy Consistency, Site Plan Review, Verification and Tracking

By the end of this permit term the permittee must review and revise, as applicable, stormwater, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the retention performance standard required in

Section 4.1.1. The permittee must also establish/update and maintain a formal process for site plan reviews and a post-construction verification process (e.g., inspections, submittal of as-builts) to ensure that standards are appropriately implemented. The permittee must also track the on-site retention performance of each project subject to this regulatory requirement.

4.1.3 Off-Site Mitigation and/or Fee-in Lieu for all Facilities

Within 18 months of the effective date of this permit the permittee shall develop, public notice, and submit to EPA for review and comment an off-site mitigation and/or fee-in-lieu program to be utilized when projects will not meet stormwater management performance standard as defined in Section 4.1.1. The permittee has the option of implementing an off-site mitigation program, a fee-in-lieu program, or both. Any allowance for adjustments to the retention standard shall be defined in the permittee's regulations. The program shall include at a minimum:

1. Establishment of baseline requirements for on-site retention and for mitigation projects. On-site volume plus off-site volume (or fee-in-lieu equivalent or other relevant credits) must equal no less than the relevant volume in Section 4.1.1;
2. Specific criteria for determining when compliance with the performance standard requirement for on-site retention cannot technically be met based on physical site constraints, or a rationale for why this is not necessary;
3. For a fee-in-lieu program, establishment of a system or process to assign monetary values at least equivalent to the cost of implementation of controls to account for the difference in the performance standard, and the alternative reduced value calculated; and
4. The necessary tracking and accounting systems to implement this section, including policies and mechanisms to ensure and verify that the required stormwater practices on the original site and appropriate required off-site practices stay in place and are adequately maintained.

The program may also include incentives for achieving other important environmental objectives such as ongoing measurable carbon sequestration, energy savings, air quality reductions in green house gases, or other environmental benefits for which the program can develop methods for quantifying and documenting those outcomes. Controls implemented to achieve those outcomes are subject to the same level of site plan review, inspection, and operation and maintenance requirements as stormwater controls.

District-owned transportation right-of-way projects are subject to a similarly stringent process for determining an alternate performance volume, but for the duration of this permit term need not conduct off-site mitigation or pay into a fee-in-lieu program to compensate for the difference.

4.1.4 Green Landscaping Incentives Program

No later than one year following permit issuance, the permittee shall develop an incentive program to increase the quantity and quality of planted areas in the District while allowing flexibility for developers and designers to meet development standards. The Incentive Program

shall use such methods as a scoring system to encourage green technology practices such as larger plants, permeable paving, green roofs, vegetated walls, preservation of existing trees, and layering of vegetation along streets and other areas visible to the public.

4.1.5 Retrofit Program for Existing Discharges

4.1.5.1 Within two years of the effective date of this permit the permittee shall develop, public notice, and submit to EPA for review and approval a program that establishes performance metrics for retrofit projects. The permittee shall fully implement the program upon EPA approval. The starting point for the performance metrics shall be the standard in Section 4.1.1. Performance metrics may be established generally for all retrofit projects, or for categories of projects, e.g., roads, sidewalks, parking lots, campuses. Specific site conditions may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1, and a similar calculator or algorithm process may be used in conjunction with a specific site analysis.

4.1.5.2 The permittee, with facilitation assistance from EPA Region III, will also work with major Federal landholders, such as the General Services Administration and the Department of Defense, with the objective of identifying retrofit opportunities, documenting federal commitments, and tracking pollutant reductions from relevant federal actions.

4.1.5.3 For each retrofit project estimate the potential pollutant load and volume reductions achieved through the DC Retrofit program by major waterbody (Rock Creek, Potomac, Anacostia) for the following pollutants: Bacteria (E. coli), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash. These estimates shall be included in the annual report following implementation of the project.

4.1.5.4 The DC Retrofit Program shall implement retrofits for stormwater discharges from a minimum of 18,000,000 square feet of impervious surfaces during the permit term. A minimum of 1,500,000 square feet of this objective must be in transportation rights-of-way.

4.1.5.5 No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement an enforceable mechanism that will adopt and implement stormwater retention requirements for properties where less than 5,000 square feet of soil is being disturbed but where the buildings or structures have a footprint that is greater than or equal to 5,000 square feet and are undergoing substantial improvement. Substantial improvement, as consistent with District regulations at 12J DCMR § 202, is any repair, alteration, addition, or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is started. The characteristics of these types of projects may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1.

4.1.5.6 The permittee shall ensure that every major renovation/rehabilitation project for District-owned properties within the inventory of DRES and OPEFM (e.g., schools and school administration buildings) includes on-site stormwater retention measures, including but not

limited to green roofs, stormwater harvest/reuse, and/or other practices that can achieve the retention performance standard.

4.1.6 Tree Canopy

4.1.6.1 No later than one year following issuance of this permit, the permittee shall develop and public notice a strategy to reduce the discharge of stormwater pollutants by expanding tree canopy throughout the city. The strategy shall identify locations throughout the District where tree plantings and expanded tree boxes are technically feasible and commit to specific schedules for implementation at locations throughout the District, with highest priority given to projects that offer the greatest stormwater retention potential. The strategy shall also include the necessary elements to achieve the requirements of Section 4.1.6.2.

4.1.6.2 The permittee shall achieve a minimum net annual tree planting rate of 4,150 plantings annually within the District MS4 area, with the objective of a District-wide urban tree canopy coverage of 40% by 2035. The annual total tree planting shall be calculated as a net increase, such that annual mortality is also included in the estimate. The permittee shall ensure that trees are planted and maintained, including requirements for adequately designed and sized tree boxes, to achieve optimal stormwater retention and tree survival rate. Trees shall be planted in accordance with the Planting Specifications issued by the International Society of Arboriculture as appropriate to the site conditions.

4.1.6.3 The permittee shall annually document the total trees planted and make an annual estimate of the volume of stormwater that is being removed from the MS4 (and combined system, as relevant) in a typical year of rainfall as a result of the maturing tree canopy over the life of the MS4 permit. Also report annually on the status of achieving 40% canopy District-wide.

4.1.7 Green Roof Projects

4.1.7.1 Complete a structural assessment of all District properties maintained by DRES and slated for redevelopment to determine current roof conditions and the feasibility for green roof installation. These assessments shall be performed on an ongoing basis for all properties as they are considered for redevelopment. Based on the structural assessment and other factors, identify all District-owned properties where green roof projects are technically feasible and commit to specific schedules for implementing these projects. Highest priority shall be given to projects that offer the greatest stormwater capture potential.

4.1.7.2 The permittee shall install at a minimum 350,000 square feet of green roofs on District properties during the term of the permit (including schools and school administration buildings).

4.1.7.3 Document the square footage of green roof coverage in the District, whether publicly or privately owned, report any incentive programs implemented during the permit term, and estimate the volume of stormwater that is being removed from the MS4 (and combined

system, as relevant) in a typical year of rainfall as a result of the combined total green roof facilities in the District.

4.2 Operation and Maintenance of Stormwater Capture Practices

4.2.1 District Owned and Operated Practices.

Within two years of the effective date of this permit, develop and implement operation and maintenance protocols and guidance for District-owned and operated on-site retention practices (development and retrofits) to include maintenance needs, inspection frequencies, estimated maintenance frequencies, and a tracking system to document relevant information. Provide training to all relevant municipal employees and contractors, with regular refreshers, as necessary.

4.2.2 Non-District Owned and Operated Practices.

In conjunction with updating of relevant ordinances and policies, develop accountability mechanisms to ensure maintenance of stormwater control measures on non-District property. Those mechanisms may include combinations of deed restrictions, ordinances, maintenance agreements, or other policies deemed appropriate by the permittee. The permittee must also include a long-term verification process of O&M, which may include municipal inspections, 3rd party inspections, owner/operator certification on a frequency deemed appropriate by the permittee, and/or other mechanisms. The permittee must continue to maintain an electronic inventory of practices on private property to include this information.

4.2.3 Stormwater Management Guidebook and Training

4.2.3.1 No later than 18 months from the permit issuance date, the permittee shall finalize a Stormwater Management Guidebook to be available for wide-spread use by land use planners and developers. The Stormwater Management Guidebook shall provide regular updates, as applicable, in a format that facilitates such regular updates, and shall include objectives and specifications for integration of stormwater management technologies, including on site retention practices, in the areas of:

- a. Site Assessment.
- b. Site Planning and Layout.
- c. Vegetative Protection, Revegetation, and Maintenance.
- d. Techniques to Minimize Land Disturbance.
- e. Techniques to Implement Measures at Various Scales.
- f. Integrated Water Resources Management Practices.
- g. Designing to meet the required performance standard(s).
- h. Flow Modeling Guidance.
- i. Hydrologic Analysis.
- j. Construction Considerations.
- k. Operation and Maintenance

4.2.3.2 The permittee shall continue to provide key industry, regulatory, and other stakeholders with information regarding objectives and specifications of green infrastructure practices contained in the Stormwater Management Guidebook through a training program. The Stormwater Management training program will include at a minimum the following:

- a. Stormwater management/green technology practices targeted sessions and materials for builders, design professionals, regulators, resource agencies, and stakeholders.
- b. Materials and data from stormwater management/green technology practices pilot projects and demonstration projects including case studies.
- c. Design and construction methods for integration of stormwater management/green technology practices measures at various project scales.
- d. Guidance on performance and cost of various types of stormwater management/green technology practices measures in the District.

4.3 Management of for District Government Areas

Procedures to reduce the discharge of pollutants in stormwater runoff shall include, but not be limited to:

4.3.1 Sanitary Sewage System Maintenance Overflow and Spill Prevention Response

The permittee shall implement an effective response protocol for overflows of the sanitary sewer system into the MS4. The response protocol shall clearly identify agencies responsible and telephone numbers and e-mail for any contact and shall contain at a minimum, procedures for:

1. Investigating any complaints received within 24 hours of the incident report.
2. Responding within two hours to overflows for containment.
3. Notifying appropriate sewer and public health agencies within 24 hours when the sanitary sewer overflows to the MS4.
4. Notifying the public in a timely and effective manner when SSO discharges to the MS4 may adversely affect public health.

This provision in no way authorizes sanitary sewer overflow discharges either directly or via the MS4.

4.3.2 Public Construction Activities Management

The permittee shall implement and comply with the Development and Redevelopment and the Construction requirements in Part 4.6 of this permit at all permittee-owned or operated public construction projects.

The permittee shall obtain discharge authorization under the applicable EPA Construction General permit for construction activities and comply with provisions therein.

4.3.3 Vehicle Maintenance/Material Storage Facilities/ Municipal Operations.

The permittee shall implement stormwater pollution prevention measures at all permittee-owned, leased facilities and job sites including but not limited to vehicle/ equipment maintenance facilities, and material storage facilities.

For vehicle and equipment wash areas and municipal facilities constructed, redeveloped, or replaced, the permittee shall eliminate discharges of wash waters from vehicle and equipment washing into the MS4 by implementing any of the following measures at existing facilities with vehicle or equipment wash areas:

1. Self-contain, and haul off-site for disposal;
2. Equip with a clarifier; or
3. Equip with an alternative pre-treatment device.

4.3.4 Landscape and Recreational Facilities Management, Pesticide, Herbicide, Fertilizer and Landscape Irrigation

4.3.4.1 The permittee shall further reduce pollutants and pollutant discharges associated with the storage and application of pesticides, fertilizers, herbicides, the use of other toxic substances and landscape irrigation according to an integrated pest management program (IPM). The IPM shall be an ecosystem based strategy that focuses on long-term prevention of pests or their damage through a combination of techniques such as biological control, habitat manipulation, modification of cultural practices, use of resistant varieties, and use of low or no chemical and irrigation input landscapes, in accordance with the provisions of this permit, procedures and practices described in the SWMP and regulations.

The permittee shall further utilize IPM controls to reduce pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied by employees or contractors, to public rights-of-way, parks, and other District property to ensure that:

- a. Pesticides are used only if monitoring indicates they are needed according to established guidelines;
- b. Fertilizers are used only when soil tests indicate that they are necessary, and only in minimum amounts and for needed purposes (e.g., seed germination).
- c. Treatments are made with the purpose of removing only the target organism;
- d. Pest controls are selected and applied in a manner that minimizes risks to human health, beneficial, non-target organisms, and the environment;
- e. No pesticides or fertilizers are applied to an area immediately prior to an expected rain event, or during or immediately following a rain event, or when water is flowing off the area;

- f. No banned or unregistered pesticides are stored or applied;
- g. All staff applying pesticides are certified or are under the direct supervision of a pesticide applicator certified in the appropriate category;
- h. Procedures are implemented to encourage the retention and planting of native and/or non-invasive, naturalized vegetation to reduce water, pesticide and fertilizer needs;
- i. Pesticides and fertilizers are stored indoors or under cover on paved surfaces or enclosed in secondary containment and storage areas inspected regularly to reduce the potential for spills; and
- j. Landscapes that maximize on-site retention of stormwater, while minimizing mowing, chemical inputs and irrigation are given preference for all new landscape installation.

4.3.4.2 The permittee shall coordinate internally among departments for the purpose of ensuring that pesticide and fertilizer use within its jurisdiction does not threaten water quality.

4.3.4.3 The permittee shall partner with other organizations to ensure that pesticide and fertilizer use within their jurisdiction does not threaten water quality.

4.3.4.4 The permittee shall continue to conduct education and outreach, as well as provide incentives, to curtail the use of turf-grass fertilizers for the purpose of reducing nitrogen and phosphorous discharges to surface waters. The program shall incentivize the use of vegetative landscapes other than turf grass and other measures to restrict the use of turf grass fertilizers.

4.3.4.5 The permittee shall use GIS layers of public land and sewersheds, as well as background data, to identify priority areas for a targeted strategy to reduce the sources of pesticides, herbicides, and fertilizers that contaminate the stormwater runoff, and report progress toward completing the screening characterization in the next Updated SWMP.

4.3.4.6 The permittee shall include in each Annual Report a report on the implementation of the above application procedures, a history of the improvements in the control of these materials, and an explanation on how these procedures will meet the requirements of this permit.

4.3.5 Storm Drain System Operation and Management and Solids and Floatables Reduction

4.3.5.1 Within 18 months of the effective date of this permit, the permittee shall complete, public notice and submit to EPA for review and approval a plan for optimal catch basin inspections, cleaning and repairs. The permittee shall fully implement the plan upon EPA approval.

4.3.5.2 Until such time as the catch basin maintenance study has been completed and approved, the permittee shall ensure that each catch basin within the DC MS4 Permit Area is cleaned at least once annually during the life of the permit. The permittee shall continue to use strategies for coordinated catch basin cleaning and street-sweeping that will optimize reduction of stormwater pollutants.

4.3.5.3 Within 18 months of the effective date of this permit, and consistent with the 2006 Outfall Survey, the permittee shall complete, public notice and submit to EPA for review and approval an outfall repair schedule to ensure that approximately 10% of all outfalls needing repair are repaired annually, with the overall objective of having all outfalls in good repair by 2022. This schedule may be combined with the catch basin maintenance study outlined in 4.3.5.1. The repair schedule shall be fully implemented upon EPA approval.

4.3.5.4 The permittee shall comply with the Anacostia River Trash TMDL implementation provisions in Part 4.10 of this permit and apply the technologies and other activities developed in the Anacostia River Watershed Trash TMDL throughout the entire MS4 Permit Area. The permittee shall continue to report the progress of trash reduction in the Consolidated Annual Report.

4.3.6 Streets, Alleys and Roadways

4.3.6.1 Street sweeping shall be conducted on no less than 641 acres of roadway in the MS4 area annually in accordance with the following schedule:

TABLE 3
Street Sweeping

Area/Street Classification	Frequency
Arterials-heavily developed commercial and central business districts with considerable vehicular and pedestrian traffic	At least nine (9) times per year
Industrial areas	At least six (6) times per year
Residential-residential areas with limited throughway and pedestrian traffic AND neighborhood streets which are used for local purposes only	At least four (4) times per year
Central Business District/Commercial-neighborhood business districts and main streets with moderate vehicular and pedestrian traffic	At least one (1) time every two weeks

Environmental hot spots in the Anacostia River Watershed	At least two (2) times per month March through October
--	---

4.3.6.2 Standard road repair practices shall include limiting the amount of soil disturbance to the immediate area under repair. Stormwater conveyances which are denuded shall be resodded, reseeded and mulched, or otherwise stabilized for rapid revegetation, and these areas should have effective erosion control until stabilized.

4.3.6.3 The permittee shall continue to evaluate and update the use, application and removal of anti-icers, chemical deicers, salt, sand, and/or sand/deicer mixtures in an effort to minimize the impact of these materials on water quality. The permittee shall investigate and implement techniques available for reducing pollution from deicing salts in snowmelt runoff and runoff from salt storage facilities. The permittee shall evaluate and implement the use of porous/permeable surfaces that require less use of deicing materials and activities. This evaluation shall be made a part of an overall investigation of ways to meet the requirements of the Clean Water Act and reported in each Annual Report.

4.3.6.4 The permittee shall continue to implement and update a program to ensure that excessive quantities of snow and ice control materials do not enter the District’s water bodies. The permittee shall report its progress in implementing the program in each Annual Report. Except during a declared Snow Emergency when the permittee determines that the foremost concern of snow removal activities is public health and safety, it shall avoid snow dumping or storage in areas adjacent to water bodies, wetlands, and areas near public or private drinking water wells which would ultimately reenter the MS4.

4.3.7 Infrastructure Maintenance/Pollution Source Control Maintenance

The permittee shall continue to implement an operation and maintenance program that incorporates good housekeeping components at all municipal facilities located in the DC MS4 Permit Area, including but not limited to; municipal waste water treatment facility, potable drinking water facility, municipal fleet operations, maintenance garages, parks and recreation, street and infrastructure maintenance, and grounds maintenance operations, libraries and schools. The permittee shall document the program in the Annual Report, as required at Section 6.2 herein. The permittee shall, at a minimum:

1. Continue to implement maintenance standards at all municipal facilities that will protect the physical, chemical and biological integrity of receiving waters.
2. Continue to implement an inspection schedule in which to perform inspections to determine if maintenance standards are being met. Inspections shall be performed no less than once per calendar year and shall provide guidance in Stormwater Pollution Prevention Plan development and implementation, where needed.

3. Continue to implement procedures for record keeping and tracking inspections and maintenance at all municipal facilities.
4. Continue to implement an inspection and maintenance program for all permittee-owned management practices, including post-construction measures.
5. Continue to ensure proper operation of all treatment management practices and maintain them as necessary for proper operation, including all post-construction measures.
6. Ensure that any residual water following infrastructure maintenance shall be self-contained and disposed of legally in accordance with the Clean Water Act.

4.3.8 Public Industrial Activities Management/Municipal and Hazardous Facilities

For any municipal activity associated with industrial activity, as defined by 40 C.F.R. § 122.26, which discharges stormwater to, from and through the DC MS4, the permittee shall obtain separate coverage under either: (1) the EPA Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) (As modified May 27, 2009); or (2) an individual permit.

4.3.9 Emergency Procedures

The permittee may conduct repairs of essential public service systems and infrastructure in emergency situations. An emergency includes only those situations included as conditions necessary for demonstration of an upset at 40 C.F.R. 122.41(n). For each claimed emergency, the permittee shall submit to the Permitting Authority a statement of the occurrence of the emergency, an explanation of the circumstances, and the measures that were implemented to reduce the threat to water quality, no later than required by applicable Clean Water Act regulations.

4.3.10 Municipal Official Training

The permittee shall continue to implement an on-going training program for those employees specified below, and any other employees whose job functions may impact stormwater program implementation. The training program shall address the importance of protecting water quality, the requirements of this permit, design, performance, operation and maintenance standards, inspection procedures, selecting appropriate management practices, ways to perform their job activities to prevent or minimize impacts to receiving waters, and procedures for tracking, inspecting and reporting, including potential illicit discharges. The permittee shall provide follow-up and refresher training at a minimum of once every twelve months, and shall include any changes in procedures, techniques or requirements.

The training program shall include, but is not limited to, those employees who work in the following areas:

1. Municipal Planning
 2. Site plan review
 3. Design
 4. Construction
 5. Transportation planning and engineering
 6. Street/sewer and right-of-way construction and maintenance
 7. Water and sewer departments
 8. Parks and recreation department
 9. Municipal water treatment and waste water treatment
 10. Fleet maintenance
 11. Fire and police departments
 12. Building maintenance and janitorial
 13. Garage and mechanic crew
 14. Contractors and subcontractors who may be contracted to work in the above described
 15. areas
 16. Personnel responsible for answering questions about the permittee's stormwater program,
 17. including persons who may take phone calls about the program
 18. Any other department of the permittee that may impact stormwater runoff
- 4.4 Management of Commercial and Institutional Areas

The permittee shall establish and implement policies and procedures to reduce the discharge of pollutants in stormwater runoff from all commercial and institutional (including federal) areas covered by this permit.

The permittee shall ensure maintenance of all stormwater management controls in commercial and institutional land areas in accordance with the following provisions:

1. Tracking all controls;
2. Inspecting all controls on a regular basis, according to an inspection schedule;
3. Ensure compliance with the MS4 permit and municipal ordinances at commercial and institutional facilities.

4.4.1 Inventory of Critical Sources and Source Controls

4.4.1.1 The permittee shall continue to maintain a watershed-based inventory or database of all facilities within its jurisdiction that are critical sources of stormwater pollution. Critical sources to be tracked shall include the following:

- a. Automotive service facilities, *e.g.*, service, fueling and salvage facilities;
- b. Industrial activities, as defined at 40 C.F.R. §§ 122.26(b)(14); and
- c. Construction sites exceeding one acre, or sites under one acre that are part of a larger common plan of development.
- d. Dry cleaners

- e. Any other facility the permittee has identified as a Critical Source

4.4.1.2 The permittee shall include the following minimum fields of information for each industrial and commercial facility identified as a critical source:

- a. Name of facility and name of owner/ operator;
- b. Address of facility;
- c. Size of facility; and
- d. Activities conducted at the facility that could impact stormwater.
- e. Practices and/or measures to control pollutants.
- f. Inspection and maintenance schedules, dates and findings.

4.4.1.3 The permittee shall update its inventory of critical sources at least annually. The update may be accomplished through collection of new information obtained through field activities or through other readily available inter and intra-agency informational databases (*e.g.*, business licenses, pretreatment permits, sanitary sewer hook-up permits, and similar information).

4.4.2 Inspection of Critical Sources

The permittee shall continue to inspect all commercial facilities identified in Part 4.4.1. herein and any others found to be critical sources twice during the five-year term of the permit. A minimum interval of six months between the first and the second mandatory compliance inspection is required, unless a follow-up inspection to ensure compliance must occur sooner.

4.4.3 Compliance Assurance.

At each facility identified as a critical source, the permittee's inspector(s) shall verify that the operator is implementing a control strategy necessary to protect water quality. Where the permittee determines that existing measures are not adequate to protect water quality, the permittee shall require additional site-specific controls sufficient to protect water quality.

4.5 Management of Industrial Facilities and Spill Prevention

4.5.1 The permittee shall continue to implement a program to monitor and control pollutants in stormwater discharged from Industrial Facilities located within the MS4 Permit Area, as defined herein, pursuant to the requirements in 40 C.F.R. § 122.26(d)(2)(iv)(C). These facilities shall include, but are not limited to:

- a. Private Solid Waste Transfer Stations
- b. Hazardous Waste Treatment, Disposal, and/or Recovery Plants
- c. Industrial Facilities subject to SARA or EPCRA Title III
- d. Industrial Facilities with NPDES Permits
- e. Industrial facilities with a discharge to the MS4

4.5.2 The permittee shall continue to maintain and update the industrial facilities database.

4.5.3 The permittee shall continue to perform or provide on-site assistance/inspections and outreach focused on the development of stormwater pollution prevention plans and NPDES permit compliance.

4.5.4 The permittee shall continue to refine and implement procedures to govern the investigation of facilities suspected of contributing pollutants to the MS4, including at a minimum: (i) a review, if applicable, of monitoring data collected by the facility pursuant to its NPDES permit; and (ii) wet weather screening as required by Part 5.2.1 herein (including collecting data on discharges from industrial sites). These procedures shall be submitted as part of each Annual Report required by Part 6.2 herein.

4.5.5 The permittee shall continue to implement the prohibition against illicit discharges, control spills, and prohibit dumping. Continue to implement a program to prevent, contain, and respond to spills that may discharge to the MS4, and report on such implementation submitted in each Annual Report. The spill response program may include a combination of spill response actions by the permittee and/or another public or private entity.

4.5.6 The permittee shall report progress in developing and carrying out industrial-related programs in each Annual Report required by Section 6 herein. Provide an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act.

4.6 Stormwater Management for Construction Sites

4.6.1 Continue implementation of the Program that reduces the discharge of pollutants from construction sites. In each Annual Report, the permittee shall evaluate and report to determine if the existing practices meet the requirements of 40 C.F.R. § 122.26(d)(2)(iv)(A) and (D).

4.6.2 Continue the review and approval process of the sediment and erosion control plans under this program. Also, the permittee shall ensure that all construction projects impacting one acre or greater, or less than one acre when part of a larger common plan of development or sale equal to or larger than one acre, are not authorized until documentation is provided that they have received EPA NPDES Construction General Permit Coverage.

4.6.3 Continue to implement inspection and enforcement procedures, including but not limited to inspection of permitted construction sites that disturb more than 5,000 square feet of soil as follows:

1. First inspection prior to ground disturbing activities to review planned sediment and erosion control measures;
2. Second inspection to verify proper installation and maintenance of sediment and erosion control measures;

3. Third inspection to review planned installation and maintenance of stormwater management practices;
4. Fourth inspection to verify proper installation of stormwater management practices following final stabilization of the project site; and
5. Other inspections as necessary to ensure compliance with relevant standards and requirements.

4.6.4 When a violation of local erosion and sediment control ordinances occurs, the permittee shall follow existing enforcement procedures and practices using standardized reports as part of the inspection process to provide accurate record keeping of inspections of construction sites. The permittee shall use a listing of all violations and enforcement actions to assess the effectiveness of the Enforcement Program in each Annual Report.

4.6.5 Continue with educational measures for construction site operators (Section 4.9 of this permit) that consist, at a minimum, of providing guidance manuals and technical publications.

4.6.6 Report progress in developing and carrying out the above construction-related programs in each Annual Report required by Parts 6.2 herein, including: (i) an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act; (ii) an explanation as to how the implementation of these procedures, particularly with regard to District “waivers and exemptions”, will meet the requirements of the Clean Water Act; and (iii) discussion of progress toward meeting TMDL and the District Watershed Implementation Plan deadlines.

4.7 Illicit Discharges and Improper Disposal.

4.7.1 The permittee shall continue to implement an ongoing program to detect illicit discharges, pursuant to the SWMP, and Part 4 of this permit, and to prevent improper disposal into the storm sewer system, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). Such program shall include, at a minimum the following:

- a. An updated schedule of procedures and practices to prevent illicit discharges, as defined at 40 C.F.R. § 122.26(b)(2), and, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), to detect and remove illicit discharges as defined herein;
- b. An updated inventory (organized by watershed) of all outfalls that discharge through the MS4 including any changes to the identification and mapping of existing permitted outfalls. Such inventory shall include, but not be limited to, the name and address, and a description (such as SIC code) which best reflects the principal products or services provided by each facility which may discharge to the MS4;
- c. Continue to implement an illicit connection detection and enforcement program to perform dry weather flow inspections in target areas;

- d. Visual inspections of targeted areas;
- e. Issuance of fines, tracking and reporting illicit discharges, and reporting progress on stopping targeted illicit discharges, and in appropriate cases, chemical testing immediately after discovery of an illicit discharge;
- f. Enforcement procedures for illicit discharges set forth in Part 4 herein;
- g. All necessary inspection, surveillance, and monitoring procedures to remedy and prevent illicit discharges. The permittee shall submit an inspection schedule, inspection criteria, documentation regarding protocols and parameters of field screening, and allocation of resources as a part of each Annual Report.
- h. The permittee shall continue to implement procedures to prevent, contain, and respond to spills that may discharge into the MS4. The permittee shall provide for the training of appropriate personnel in spill prevention and response procedures.
- i. The permittee shall report the accomplishments of this program in each Annual Report.

4.7.2 The permittee shall continue to ensure the implementation of a program to further reduce the discharge of floatables (e.g. litter and other human-generated solid refuse). The floatables program shall include source controls and, where necessary, structural controls.

4.7.3 The permittee shall continue to implement the prohibition against the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal waste into separate storm sewers. The permittee shall ensure the implementation of programs to collect used motor vehicle fluids (at a minimum oil and anti-freeze) for recycle, reuse, and proper disposal and to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. The permittee shall ensure that such programs are readily available within the District, and that they are publicized and promoted on a regular basis, pursuant to Public Education provisions in this permit at Part 4.9 herein.

4.7.4 The permittee shall continue to work with members of the Metropolitan Police Department to enhance illegal dumping enforcement.

4.7.5 The permittee shall implement the District's ban on coal tar pavement products, including conducting outreach and enforcement activities.

4.7.6 The permittee shall implement the Anacostia Clean Up and Protection Act of 2009, to ban the use of disposable non-recyclable plastic carryout bags and restrict the use on disposable carryout bags in certain food establishments.

4.8 Flood Control Projects

4.8.1 The permittee shall update the impervious surface analysis of floodplains six months after the approval of the revised Flood Insurance Rate Maps by the Federal Emergency Management Agency.

4.8.2 The permittee shall assess potential impacts on the water quality and the ability of the receiving water to support beneficial uses for all flood management projects. Evaluate the feasibility of retrofitting existing flood control devices to provide additional pollutant and volume removal from stormwater. Report results of such assessment, mapping program, and feasibility studies in the Annual Report (Part 6.2 herein).

4.8.3 The permittee shall review all development proposed in flood plain areas to ensure that the impacts on the water quality of receiving water bodies have been properly addressed. Information regarding impervious surface area located in the flood plains shall be used (in conjunction with other environmental indicators) as a planning tool. The permittee shall collect data on the percentage of impervious surface area located in flood plain boundaries for all proposed development beginning six months after the effective date of this permit. The permittee shall collect similar data for existing development in flood plain areas, in accordance with the mapping program and other activities designed to improve water quality. Critical unmapped areas shall be prioritized by the permittee with an emphasis on developed and developing acreage. Reports of this work shall be summarized in the Annual Report.

4.9 Public Education and Public Participation

The permittee shall continue to implement a public education program including but not limited to an education program aimed at residents, businesses, industries, elected officials, policy makers, planning staff and other employees of the permittee. The purpose of education is to reduce or eliminate behaviors and practices that cause or contribute to adverse stormwater impacts. Education initiatives may be developed locally or regionally.

4.9.1 Education and Outreach.

4.9.1.1 The permittee shall continue to implement its education and outreach program for the area served by the MS4 that was established during the previous permit cycle. The outreach program shall be designed to achieve measurable improvements in the target audience's understanding of stormwater pollution and steps they can take to reduce their impacts.

4.9.1.2 The permittee shall assess current education and outreach efforts and identify areas where additional outreach and education are needed. Audiences and subject areas to be considered include:

a. General public

- 1) General impacts of stormwater flows into surface waters
- 2) Impacts from impervious surfaces
- 3) Source control practices and environmental stewardship actions and opportunities in the areas of pet waste, vehicle maintenance, landscaping, and rain water reuse.

- 4) A household hazardous waste educational and outreach program to control illicit discharges to the MS4 as required herein
 - 5) Information and education on proper management and disposal of used oil, other automotive fluids, and household chemicals
 - 6) Businesses, including home-based and mobile businesses
 - 7) Management practices for use and storage of automotive chemicals, hazardous cleaning supplies, carwash soaps and other hazardous materials
 - 8) Impacts of illicit discharges and how to report them including information for industries about stormwater permitting and pollution prevention plans and the requirement that they develop structural and non-structural control systems
- b. Homeowners, landscapers and property managers
- 1) Use of low or no phosphorus fertilizers, alternatives to fertilizers, alternative landscaping requiring no fertilizers
 - 2) Landscape designs to reduce runoff and pollutant loadings
 - 3) Car washing alternatives with the objective of eliminating phosphorus detergent discharges
 - 4) Yard care techniques that protect water quality
 - 5) Management practices for use and storage of pesticides and fertilizers
 - 6) Management practices for carpet cleaning and auto repair and maintenance
 - 7) Runoff Reduction techniques, including site design, on-site retention, pervious paving, retention of forests and mature trees
 - 8) Stormwater pond maintenance
- c. Engineers, contractors, developers, review staff and land use planners
- 1) Technical standards for construction site sediment and erosion control
 - 2) Runoff Reduction techniques, including site design, on-site reduction, pervious pavement, alternative parking lot design, retention of forests and mature trees
 - 3) Stormwater treatment and flow control controls
 - 4) Impacts of increased stormwater flows into receiving water bodies

4.9.2 Measurement of Impacts.

The permittee shall continue to measure the understanding and adoption of selected targeted behaviors among the targeted audiences. The resulting measurements shall be used to direct education and outreach resources most effectively, as well as to evaluate changes in adoption of the targeted behaviors.

4.9.3 Recordkeeping.

The permittee shall track and maintain records of public education and outreach activities.

4.9.4 Public Involvement and Participation.

The permittee shall continue to include ongoing opportunities for public involvement through advisory councils, watershed associations and/or committees, participation in developing updates to the stormwater fee system, stewardship programs, environmental activities or other similar activities. The permittee shall facilitate opportunities for direct action, educational, and volunteer programs such as riparian planting, volunteer monitoring programs, storm drain marking or stream clean up programs.

4.9.4.1 The permittee shall continue to create opportunities for the public to participate in the decision making processes involving the implementation and update of the permittee's SWMP. In particular, the permittee shall provide meaningful opportunity for the public to participate in the development of the permittee's Consolidated TMDL Implementation Plan. The permittee shall continue to implement its process for consideration of public comments on their SWMP.

4.9.4.2 The permittee shall continue to establish a method of routine communication to groups such as watershed associations and environmental organizations that are located in the same watershed(s) as the permittee, or organizations that conduct environmental stewardship projects located in the same watershed(s) or in close proximity to the permittee. This is to make these groups aware of opportunities for their direct involvement and assistance in stormwater activities that are in their watershed.

4.9.4.3 The permittee shall make all draft and approved MS4 documents required under this permit available to the public for comment. The current draft and approved SWMP and the MS4 annual reports deliverable documents required under this permit shall be posted on the permittee's website.

4.9.4.4 The permittee shall continue to develop public educational and participation materials in cooperation and coordination with other agencies and organizations in the District with similar responsibilities and objectives. Progress reports on public education shall be included in the Annual Report. An explanation shall be provided as to how this effort will reduce pollution loadings to meet the requirements of this permit.

4.9.4.5 The permittee shall periodically, and at least annually, update its website.

4.10 Total Maximum Daily Load (TMDL) Wasteload Allocation (WLA) Planning and Implementation

4.10.1 Anacostia River Watershed Trash TMDL Implementation

The permittee shall attain removal of 103,188 pounds of trash annually, as determined in the Anacostia River Watershed Trash TMDL, as a specific single-year measure by the fifth year of this permit term.

Reductions must be made through a combination of the following approaches:

1. Direct removal from waterbodies, e.g., stream clean-ups, skimmers
2. Direct removal from the MS4, e.g., catch basin clean-out, trash racks
3. Direct removal prior to entry to the MS4, e.g., street sweeping
4. Prevention through additional disposal alternatives, e.g., public trash/recycling collection
5. Prevention through waste reduction practices, regulations and/or incentives, e.g., bag fees

At the end of the first year the permittee must submit the trash reduction calculation methodology with Annual Report to EPA for review and approval. The methodology should accurately account for trash prevention/removal methods beyond those already established when the TMDL was approved, which may mean crediting a percentage of certain approaches. The calculation methodology must be consistent with assumptions for weights and other characteristics of trash, as described in the 2010 Anacostia River Watershed Trash TMDL.

Annual reports must include the trash prevention/removal approaches utilized, as well as the overall total weight (in pounds) of trash captured for each type of approach.

The requirements of this Section, and related elements as appropriate, shall be included in the Consolidated TMDL Implementation Plan (Section 4.10.3).

4.10.2 Hickey Run TMDL Implementation

The permittee shall implement and complete the proposed replacement/rehabilitation, inspection and enforcement, and public education aspects of the strategy for Hickey Run as described in the updated Plan to satisfy the requirements of the oil and grease wasteload allocations for Hickey Run. If monitoring or other assessment determine it to be necessary, the permittee shall install or implement appropriate controls to address oil & grease in Hickey Run no later than the end of this permit term. As appropriate, any requirement of this Section not completed prior to finalization of the Consolidated TMDL Implementation Plan (Section 4.10.3) shall be included in that Plan.

4.10.3 Consolidated TMDL Implementation Plan

For all TMDL wasteload allocations assigned to District MS4 discharges, the permittee shall develop, public notice and submit to EPA for review and approval a consolidated TMDL Implementation Plan within 30 months of the effective date of this permit provision. This Plan shall include, at a minimum, the following TMDLs and any subsequent updates:

1. TMDL for Biochemical Oxygen Demand (BOD) in the Upper and Lower Anacostia River (2001)
2. TMDL for Fecal Coliform Bacteria in the Upper and Lower Anacostia River (2003)
3. TMDL for Organics and Metals in the Anacostia River and Tributaries (2003)
4. TMDL for Fecal Coliform Bacteria in Kingman Lake (2003)
5. TMDL for Total Suspended Solids, Oil and Grease and Biochemical Oxygen Demand in Kingman Lake (2003)

6. TMDL for Fecal Coliform Bacteria in Rock Creek (2004)
7. TMDL for Organics and Metals in the Tributaries to Rock Creek (2004)
8. TMDL for Fecal Coliform Bacteria in the Upper, Middle and Lower Potomac River and Tributaries (2004)
9. TMDL for Organics, Metals and Bacteria in Oxon Run (2004)
10. TMDL for Organics in the Tidal Basin and Washington Ship Channel (2004)
11. TMDL for Sediment/Total Suspended Solids for the Anacostia River Basin in Maryland and the District (2007) [pending resolution of court vacature, Anacostia Riverkeeper, Inc. v. Jackson, No. 09-cv-97 (RCL)]
12. TMDL for PCBs for Tidal Portions of the Potomac and Anacostia Rivers in the District of Columbia, Maryland and Virginia (2007)
13. TMDL for Nutrients/Biochemical Oxygen Demand for the Anacostia River Basin in Maryland and the District (2008)
14. TMDL for Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia (2010)
15. TMDL for Nitrogen, Phosphorus and Sediment for the Chesapeake Bay Watershed (2010)

This Plan shall place particular emphasis on the pollutants in Table 4, but shall also evaluate other pollutants of concern for which relevant WLAs exist. EPA will incorporate elements of the Consolidate TMDL Implementation Plan as enforceable permit provisions, including milestones and final dates for attainment of applicable WLAs. The permittee shall fully implement the Plan upon EPA approval. This Plan shall preempt any existing TMDL implementation plans for the relevant WLAs. To account for any new or revised TMDL established or approved by EPA with wasteload allocations assigned to District MS4 discharges, the permittee shall submit an updated Consolidated TMDL Implementation Plan annually, as necessary. Such updates will account for any actions taken in the 12-month period preceding the date 6 months before the revision is due. If necessary, the first such update will be due 18 months after the submittal of the initial Plan, with subsequent updates due on the anniversary of the submittal date.

The Plan shall include:

1. A specified schedule for attainment of WLAs that includes final attainment dates and, where applicable, interim milestones and numeric benchmarks.
 - a. Numeric benchmarks will specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks.
 - b. Interim milestones will be included where final attainment of applicable WLAs requires more than five years. Milestone intervals will be as frequent as possible but will in no case be greater than five (5) years.
2. Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.
3. An associated narrative providing an explanation for the schedules and controls included in the Plan.

4. Unless and until an applicable TMDL is no longer in effect (e.g., withdrawn, reissued or the water delisted), the Plan must include the elements in 1-3 above for each TMDL as approved or established.
5. The current version of the Plan will be posted on the permittee's website.

4.10.4 Adjustments to TMDL Implementation Strategies

If evaluation data, as outlined in the monitoring strategy being developed per Part 5.1, indicate insufficient progress towards attaining any WLA covered in 4.10.1, 4.10.2 or 4.10.3, the permittee shall make the appropriate adjustments within six (6) months to address the insufficient progress and document those adjustments in the Consolidated TMDL Implementation Plan. The Plan modification shall include a reasonable assurance demonstration of the additional controls to achieve the incorporated milestones. Annual reports must include a description of progress as evaluated against all implementation objectives, milestones and benchmarks, as relevant, outlined in Part 4.10.

4.11 Additional Pollutant Sources

For any additional pollutant sources not addressed in sections 4.1 through 4.9, the permittee shall continue to compile pertinent information on known or potential pollution sources, including significant changes in:

1. land use activities,
2. population estimates,
3. runoff characteristics,
4. major structural controls,
5. landfills,
6. publicly owned lands, and
7. industries impacting the MS4.

For purposes of this section, “significant changes” are changes that have the potential to revise, enhance, modify or otherwise affect the physical, legal, institutional, or administrative characteristics of the above-listed potential pollution sources. This information shall be submitted in each of the Annual Reports submitted to EPA pursuant to the procedures in Part 6.2 herein. For the Stormwater Model, analysis of data for these pollution sources shall be reported according to Part 7 herein.

The permittee shall implement controls to minimize and prevent discharges of pollutants from additional pollutant sources, including but not limited to Bacteria (*E. coli*), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash, to receiving waters. Controls shall be designed to prevent and restrict priority pollutants from coming into contact with stormwater, e.g., restricting the use of lawn fertilizers rather than end-of-pipe treatment. These strategies shall include program priorities and a schedule of activities to address those priorities and an outline of which agencies will be responsible for implementing those strategies. The strategies used to reduce or eliminate these pollutants shall be documented in updates to the Stormwater Management Program Plan.

5. MONITORING AND ASSESSMENT OF CONTROLS

5.1 Revised monitoring program

5.1.1 Design of the Revised Monitoring Program

Within 30 months of the effective date of Part 4.10.3 of this permit the permittee shall develop, public notice and submit to EPA for review and approval a revised monitoring program. The permittee shall fully implement the program upon EPA approval. The revised monitoring program shall meet the following objectives:

1. Make wet weather loading estimates of the parameters in Table 4 from the MS4 to receiving waters. Number of samples, sampling frequencies and number and locations of sampling stations must be adequate to ensure data are statistically significant and interpretable.
2. Evaluate the health of the receiving waters, to include biological and physical indicators such as macroinvertebrates and geomorphologic factors. Number of samples, frequencies and locations must be adequate to ensure data are statistically significant and interpretable for long-term trend purposes (not variation among individual years or seasons).
3. Include any additional necessary monitoring for purposes of source identification and wasteload allocation tracking. This strategy must align with the Consolidated TMDL Implementation Plan required in Part 4.10.3 For all pollutants in Table 4 monitoring must be adequate to determine if relevant WLAs are being attained within specified timeframes in order to make modifications to relevant management programs, as necessary.

Table 4
Monitoring Parameters

Parameter
<i>E. coli</i>
Total nitrogen
Total phosphorus
Total Suspended Solids
Cadmium
Copper
Lead
Zinc
Trash

4. All chemical analyses shall be performed in accordance with analytical methods approved under 40 C.F.R. Part 136. When there is not an approved analytical method, the applicant may use any suitable method as described in Section 5.7 herein, but must provide a description of the method.

5.1.2 Utilization of the Revised Monitoring Program

The permittee must use the information to evaluate the quality of the stormwater program and the health of the receiving waters at a minimum to include:

1. The permittee shall estimate annual cumulative pollutant loadings for pollutants listed in Table 4. Pollutant loadings and, as appropriate, event mean concentrations, will be reported in DMRs and annual reports on TMDL implementation for pollutants listed in Table 4 in discharges from the monitoring stations in Table 5.
2. The permittee shall perform the following activities at least once during the permit term, but no later than the fourth year of this permit:
 - a. Identify and prioritize additional efforts needed to address water quality exceedances, and receiving stream impairments and threats;
 - b. Identify water quality improvements or degradation

Upon approval of the Revised Monitoring Program by EPA Region III, or 2 years from the effective date of this permit, whichever comes first, the permittee shall begin implementation of the Revised Monitoring Program.

5.2 Interim Monitoring

Until such time as EPA has approved the Revised Monitoring Program, the permittee shall implement the following monitoring program:

5.2.1 Wet Weather Discharge Monitoring

The permittee shall monitor for the parameters identified in Table 4 herein, at the locations listed in Table 5 herein. Monitoring frequency for chemical/physical parameters shall be taken by at least three times per year at a minimum. This does not include a geomorphologic assessment and/or physical habitat assessment. The permittee shall conduct sampling as provided in 40 C.F.R. § 122.21(g)(7).

The permittee shall monitor and provide an annual Discharge Monitoring Report for the period of interim monitoring.

TABLE 5
Monitoring Stations

A. Anacostia River Sub Watershed Monitoring Sites
1. Gallatin Street & 14 th Street N.E. across from the intersection of 14 th St. and Gallatin St. in an outfall (MS-2)
2. Anacostia High School/Anacostia Recreation Center – Corner of 17 th St and Minnesota Ave SE
B. Rock Creek Subwatershed Monitoring Sites
1. Walter Reed -- Fort Stevens Drive -- 16 th Street and Fort Stevens Road, N.W. at an outfall (MS-6)
2. Soapstone Creek -- Connecticut Avenue and Ablemarle Street N.W. at an outfall (MS-5)
C. Potomac River Subwatershed Monitoring Sites
1. Battery Kemble Creek-49th and Hawthorne Streets, N.W. at an outfall (MS-4)
2. Oxon Run-Mississippi Avenue and 15 th Street, S.E. into Oxon Run via an outfall (MS-1)

The permittee may revise this list of sites in accordance with its revised monitoring program in Section 5.1 herein. Otherwise, changes to the above MS4 monitoring stations and/or sites for any reason shall be considered a major modification to the permit subject to the reopener clause.

During the interim monitoring period for the pollutants listed in Table 4, demonstration of compliance will be calculated using the procedures identified in the SWMP, the approved Anacostia River TMDL Implementation Plan, and/or other appropriate modeling tools and data on management practices efficiencies. The annual report will provide all monitoring data, and a brief synthesis of whether the data indicate that relevant wasteload allocations and other relevant targets are being achieved.

5.2.2 Storm Event Data

In addition to the parameters listed above, the permittee shall continue to maintain records of the date and duration (in hours) of the storm events sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration (in hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and a calculated flow estimate of the total volume (in gallons) and nature of the discharge sampled.

5.2.3 Sample Type, Collection, and Analysis

The following requirements apply only to samples collected for Part 5.2.1, Representative Monitoring.

1. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one sample shall be taken for pollutants listed in Table 4 including temperature, DO, pH and specific conductivity. For all parameters, data shall be reported for the entire event of the discharge pursuant to 40 C.F.R. § 122.26(d)(2)(iii).
2. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge, with each aliquot being separated by a minimum period of fifteen minutes.
3. Analysis and collection of samples shall be done in accordance with the most recent EPA approved laboratory methods and procedures specified at 40 C.F.R. Part 136 and its subsequent amendments.

5.2.4 Sampling Waiver

When a discharger is unable to collect samples due to adverse climatic conditions, the discharger must submit in lieu of sampling data a description of why samples could not be collected, including available documentation of the event.

Adverse climatic conditions which may prohibit the collection of samples includes weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.).

5.3 Dry Weather Monitoring

5.3.1 Dry Weather Screening Program

The permittee shall continue with ongoing efforts to detect the presence of illicit connections and improper discharges to the MS4 pursuant to the District SWMP. The permittee shall perform the following: (1) continue to screen known problem sewersheds within the District based on past screening activities; (2) continue to inventory all MS4 outfalls in the District and inspect all outfalls by the end of the permit term; and (3) ensure that the dry weather screening program has addressed all watersheds within the permit term. The screening shall be

sufficient to estimate the frequency and volume of dry weather discharges and their environmental impact.

5.3.2 Screening Procedures

Screening may be developed and/or modified based on experience gained during actual field screening activities. The permittee shall establish a protocol which requires screening to ensure that such procedures are occurring, but such protocol need not conform to the procedures published at 40 C.F.R. § 122.26(d)(1)(iv)(D). The permittee shall describe the protocol actually used in each Annual Report with a justification for its use. The procedures described in the SWMP shall be used as guidance.

5.3.3 Follow-up on Dry Weather Screening Results

The permittee shall continue to implement its enforcement program for locating and ensuring elimination of all suspected sources of illicit connections and improper disposal identified during dry weather screening activities. The permittee shall report the results of such implementation in each Annual Report.

5.4. Area and/or Source Identification Program

The permittee shall continue to implement a program to identify, investigate, and address areas and/or sources within its jurisdiction that may be contributing excessive levels of pollutants to the MS4 and receiving waters, including but not limited to those pollutants identified in Table 4 herein.

5.5 Flow Measurements

The permittee shall continue to select and use appropriate flow measurement devices and methods consistent with accepted scientific practices to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated, and maintained to insure that the accuracy of the measurements is consistent with the accepted capability of that type of device.

5.6 Monitoring and Analysis Procedures

5.6.1 Monitoring must be conducted according to laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments, unless other test procedures have been specified in the permit.

5.6.2 The permittee is authorized to use a more current or sensitive (i.e., lower) detection method than the one identified in 40 C.F.R. Part 136 exists for a particular parameter, including but not limited to PCBs (Method 1668B) and mercury (Method 1631E). If used, the permittee shall report using the more current and/or more sensitive method for compliance reporting and monitoring purposes.

5.6.3 EPA reserves the right to modify the permit in order to require a more sensitive method for measuring compliance with any pollutant contamination levels, consistent with 40 CFR, Part 136, should it become necessary.

5.7 Reporting of Monitoring Results

The permittee shall continue to report monitoring results annually in a Discharge Monitoring Report. If NetDMR (<http://www.epa.gov/netdmr/>) is unavailable to any of the following then the original and one copy of the Report are to be submitted at the following addresses:

NPDES Permits Branch
U.S. EPA Region III (3WP41)
Water Protection Division
1650 Arch Street
Philadelphia, PA 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive
Gloucester, Massachusetts 01930-2276

Monitoring results obtained during the previous year shall be summarized and reported in the Annual Report.

5.8 Additional Monitoring by the Permittee

If the permittee monitors (for the purposes of this permit) any pollutant more frequently than required by this permit, using laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the annual Discharge Monitoring Report. Such frequency shall also be indicated.

5.9 Retention of Monitoring Information

The permittee shall continue to retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation for a period of at least five(5) years from the date of the sample, measurement or report. This period may be extended by request of EPA at any time.

5.10 Record Content

Records of monitoring information shall include:

1. The date, exact location, time and methods of sampling or measurements;
2. The individual(s) who performed the sampling or measurements;

3. The date(s) analyses were performed;
4. The individual(s) who performed the analyses;
5. The analytical techniques or methods used; and
6. The results of such analyses.

6. **REPORTING REQUIREMENTS**

The permittee shall comply with the reporting requirements identified in this section, including but not limited to the deliverables identified in Table 6 below.

TABLE 6
Reporting Requirements

Submittal	Deadline
Discharge Monitoring Report	Each year on the anniversary of the effective date of the permit (AEDOP)
Annual Report	Each year on the AEDOP.
MS4 Permit Application	Six months prior to the permit expiration date.

6.1 Discharge Monitoring Reports

The permittee shall provide discharge monitoring reports per Part 5.7 of this permit on the quality of stormwater discharges from the MS4 for all analytical chemical monitoring stipulated in Part 5 of this permit.

6.2 Annual Reporting

The permittee shall submit an Annual Report to EPA on or by the effective yearly date of the permit for the duration of the permitting cycle. At the same time the Annual Report it submitted to EPA it shall also be posted on the permittee's website at an easily accessible location. If the annual report is subsequently modified per EPA approval (part 6.2.3 of this permit) the updated report shall be posted on the permittee's website.

6.2.1 Annual Report.

The Annual Report shall follow the format of the permit as written, address each permit requirement, and also include the following elements:

- a. A review of the status of program implementation and compliance (or non-compliance) with all provisions and schedules of compliance contained in this

- permit, including documentation as to compliance with performance standards and other provisions and deliverables contained in Section 4 herein;
- b. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings, including TMDL WLAs and TMDL implementation activities;
 - c. An assessment of the effectiveness of controls established by the SWMP;
 - d. An assessment of the projected cost of SWMP implementation for the upcoming year (or longer) and a description of the permittee's budget for existing stormwater programs, including: (i) an overview of the permittee's financial resources and budget, (ii) overall indebtedness and assets, (iii) sources for funds for stormwater programs; and (iv) a demonstration of adequate fiscal capacity to meet the requirements of this permit, subject to the (a) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, (b) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001), (c) D.C. Official Code § 47-105 (2001), and (d) D.C. Official Code § 1-204.46 (2006 Supp.), as the foregoing statutes may be amended from time to time;
 - e. A summary describing the number and nature of enforcement actions, inspections, and public education programs and installation of control systems;
 - f. Identification of water quality improvements or degradation through application of a measurable performance standard as stated throughout this permit;
 - g. Results of storm and water quality modeling and its use in planning installation of control systems and maintenance and other activities;
 - h. An assessment of any SWMP modifications needed to meet the requirements of this permit;
 - i. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 C.F.R. § 122.26(d)(2)(iv) and (v);
 - j. Methodology to assess the effects of the Stormwater Management Program (SWMP);
 - k. Annual expenditures and budget for the year following each annual report;
 - l. A summary of commitments for the next year and evaluation of the commitments from the previous year;
 - m. A summary of the monitoring data for stormwater and ambient sampling that is collected in the previous year and the plan, including identification of monitoring locations, to collect additional data for the next year;
 - n. The amount of impervious cover within the District, and within the three major watersheds in the District (Anacostia, Potomac and Rock Creek);
 - o. The percentage of effective impervious cover reduced annually, including but not limited to the number and square footage of green roofs installed in the District, including the square footage of drainage managed by practices that meet the performance standard in 4.1.1; and
 - p. An analysis of the work to be performed in the next successive year, including performance measures for those tasks. In the following year, progress with those performance measures shall be part of the Annual Report. The basis for each of the performance standards, which will be used as tools for evaluating environmental results and determining the success of each MS4 activity, shall be described incorporating an integrated program approach that considers all programs and projects which have a direct as well as an indirect affect on

stormwater management quantity and quality within the District. The report shall also provide an update of the fiscal analysis for each year of the permit as required by 40 C.F.R. § 122.26(d)(2)(vi).

6.2.2 Annual Report Meeting

Within 12 months of the effective date of this permit the permittee shall convene an annual report meeting with EPA to present annual progress and plans for the following year. In conjunction with this meeting the annual written report may consist of presentation materials summarizing all required elements of the annual report rather than a lengthy written report, as long as all required elements are included. Following this first annual reporting meeting EPA and the permittee shall determine if the meeting and associated presentation materials constitute an effective reporting mechanism. With the agreement of both EPA and the permittee the annual reporting meeting and the use of summarized presentation materials in lieu of a lengthy written report may be extended for the remainder of the permit term.

6.2.3 Annual Report Revisions

Each Annual Report may be revised with written approval by EPA. The revised Report will become effective after its approval.

6.2.4 Signature and Certification

The permittee shall sign and certify the Annual Report in accordance with 40 C.F.R §122.22(b), and include a statement or resolution that the permittee's governing body or agency (or delegated representative) has reviewed or been appraised of the content of such submissions. The permittee shall provide a description of the procedure used to meet the above requirement.

6.2.5 EPA Approval

In reviewing any submittal identified in Table 1 or 6, EPA may approve or disapprove each submittal. If EPA disapproves any submittal, EPA shall provide comments to the permittee. The permittee shall address such comments in writing within thirty (30) days of receipt of the disapproval from EPA. If EPA determines that the permittee has not adequately addressed the disapproval/comments, EPA may revise that submittal or portions of that submittal. Such revision by EPA is effective thirty (30) days from receipt by the permittee. Once approved by EPA, or in the event of EPA disapproval, as revised by EPA, each submission shall be an enforceable element of this permit.

6.3 MS4 Permit Application

The permittee develop a permit Application based on the findings presented in each of the Annual SWMP Reports submitted during the permitting cycle to be submitted six months prior to the expiration date of the permit. The permit application shall define the next iterative set of objectives for the program and provide an analysis to demonstrate that these objectives will be achieved in the subsequent permit term.

7. **STORMWATER MODEL**

The permittee shall continue to update and report all progress made in developing a Stormwater Model and Geographical Information System (GIS) to EPA on an annual basis as an attachment to each Annual Report required herein.

On an annual basis, the permittee shall report on pollutant load reductions throughout the area covered by this permit using the statistical model developed by DDOE or other appropriate model. In the annual update, the permittee shall include, at a minimum, other applicable components which are not only limited to those activities identified in Section 6 herein, but which are necessary to demonstrate the effectiveness of the permittee's Stormwater Management Program toward implementing a sustainable strategy for reducing stormwater pollution runoff to the impaired waters of the District of Columbia.

Assess performance of stormwater on-site retention projects through monitoring, modeling and/or estimating storm retention capacity to determine the volume of stormwater removed from the MS4 in a typical year of rainfall as a result of implementing stormwater controls. This provision does not require all practices to be individually monitored, only that a reasonable evaluation strategy must provide estimates of overall volume reductions by sewershed.

8. **STANDARD PERMIT CONDITIONS FOR NPDES PERMITS**

8.1 Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and may result in an enforcement action; permit termination, revocation and reissuance, or modification; and denial of a permit renewal application.

8.2 Inspection and Entry

The permittee shall allow EPA, or an authorized representative, and/or the permittee's contractor(s)/subcontractor(s), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises at reasonable times where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be maintained under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), processes, or operations regulated or required under this permit; and
4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

8.3 Civil and Criminal Penalties for Violations of Permit Conditions

Nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

The Clean Water Act provides that any person who violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act, or any permit condition or limitation implementing such section, or any requirement imposed in an approved pretreatment program and any person who violates any Order issued by EPA under Section 301(a) of the Act, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation, Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, EPA has raised the statutory maximum penalty for such violations to \$37,500 per day for each such violation. 74 Fed. Reg. 626 (Jan. 7, 2009). The Clean Water Act also provides for an action for appropriate relief including a permanent or temporary injunction.

Any person who negligently violates Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, any permit condition or limitation implementing any such section, shall be punished by a criminal fine of not less than \$5,000 nor more than \$50,000 per day of such violation, or by imprisonment for not more than 3 years, or by both. Any person who knowingly violates any permit condition or limitation implementing Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000, or by imprisonment of not more than 15 years, or by both.

8.4 Duty to Mitigate

The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

In the event that the permittee or permitting authority determines that discharges are causing or contributing to a violation of applicable WQS, the permittee shall take corrective action to eliminate the WQS exceedance or correct the issues and/or problems by requiring the party or parties responsible for the alleged violation(s) comply with Part I.C.1 (Limitations to Coverage) of this permit. The methods used to correct the WQS exceedances shall be documented in subsequent annual reports and in revisions to the Stormwater Management Program Plan.

8.5 Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause including, but not limited to, the following:

1. Violation of any terms or conditions of this permit;
2. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;
3. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge;
4. Information newly acquired by the Agency, including but not limited to the results of the studies, planning, or monitoring described and/or required by this permit;
5. Material and substantial facility modifications, additions, and/or expansions;
6. Any anticipated change in the facility discharge, including any new significant industrial discharge or changes in the quantity or quality of existing industrial discharges that will result in new or increased discharges of pollutants; or
7. A determination that the permitted activity endangers human health or the environment and that it can only be regulated to acceptable levels by permit modification or termination.

The effluent limitations expressed in this permit are based on compliance with the District of Columbia's water quality standards in accordance with the Clean Water Act. In the event of a revision of the District of Columbia's water quality standards, this document may be modified by EPA to reflect this revision.

The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition. When a permit is modified, only conditions subject to modification are reopened.

8.6 Retention of Records

The permittee shall continue to retain records of all documents pertinent to this permit not otherwise required herein, including but not limited copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least five (5) years from the expiration date of this permit. This period may be extended by request of EPA at any time.

8.7 Signatory Requirements

All Discharge Monitoring Reports, plans, annual reports, certifications or information either submitted to EPA or that this permit requires be maintained by the permittee shall be signed by either a principal executive officer or ranking elected official, or a duly authorized representative of that person. A person is a duly authorized representative only if: (i) the authorization is made in writing by a person described above and submitted to EPA; and (ii) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for an agency. (A duly authorized representative may thus be either a named individual or any individual occupying a named position).

If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new notice satisfying the requirements of this paragraph must be submitted to EPA prior or together with any reports, information, or applications to be signed by an authorized representative.

8.8 Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act, 33 U.S.C. § 1321.

8.9 District Laws, Regulations and Ordinances

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable District law, regulation or ordinance identified in the SWMP. In the case of “exemptions and waivers” under District law, regulation or ordinance, Federal law and regulation shall be controlling.

8.10 Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

8.11 Severability

The provisions of this permit are severable, and if any provisions of this permit, or the application of any provision of this permit to any circumstances is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

8.12 Transfer of Permit

In the event of any change in ownership or control of facilities from which the authorized discharge emanates, the permit may be transferred to another person if:

1. The current permittee notifies the EPA, in writing of the proposed transfer at least 30 days in advance of the proposed transfer date;
2. The notice includes a written agreement between the existing and new permittee containing a specific date for transfer of permit responsibility, coverage, and liability between them; and
3. The EPA does not notify the current permittee and the new permittee of intent to modify, revoke and reissue, or terminate the permit and require that a new application be submitted.

8.13 Construction Authorization

This permit does not authorize or approve the construction of any onshore or offshore physical structures or facilities or the undertaking of any work in any navigable waters.

8.14 Historic Preservation

During the design stage of any project by the Government of the District of Columbia within the scope of this permit that may include ground disturbance, new and existing or retrofit construction, or demolition of a structure, the permittee shall notify the Historic Preservation liaison and provide the liaison planning documents for the proposed undertaking. The documents shall include project location; scope of work or conditions; photograph of the area/areas to be impacted and the methods and techniques for accomplishing the undertaking. Depending on the complexity of the undertaking, sketches, plans and specifications shall also be submitted for review. The documentation will enable the liaison to assess the applicability of compliance procedures associated with Section 106 of the National Historic Preservation Act. Among the steps in the process are included:

1. The determination of the presence or absence of significant historic properties (architectural, historic or prehistoric). This can include the evaluation of standing structures and the determination of the need for an archaeological survey of the project area.
2. The evaluation of these properties in terms of their eligibility for nomination to the National Register of Historic Places.
3. The determination of the effect that the proposed undertaking will have on these properties.
4. The development of mitigating measures in conjunction with any anticipated effects.

All such evaluations and determinations will be presented to the permittee for its concurrence.

If an alternate Historic Preservation procedure is approved by EPA in writing during the term of this permit, the alternate procedure will become effective after its approval.

8.15 Endangered Species

The U.S. Fish and Wildlife Service (FWS) has indicated that Hay's Spring Amphipod, a Federally listed endangered species, occurs at several locations in the District of Columbia. The National Oceanic and Atmospheric Administration National Marine Fisheries Service (NOAA Fisheries) has indicated that the endangered shortnose sturgeon occurs in the Potomac River drainage and may occur within the District of Columbia. The FWS and NOAA Fisheries indicate that at the present time there is no evidence that the ongoing stormwater discharges covered by this permit are adversely affecting these Federally-listed species. Stormwater discharges, construction, or any other activity that adversely affects a Federally-listed endangered or threatened species are not authorized under the terms and conditions of this permit.

The monitoring required by this permit will allow further evaluation of potential effects on these threatened and endangered species once monitoring data has been collected and analyzed. EPA requires that the permittee submit to NOAA Fisheries, at the same time it submits to EPA, the Annual Outfall Discharge Monitoring Report of the monitoring data which will be used by EPA and NOAA Fisheries to further assess effects on endangered or threatened species. If this data indicates that it is appropriate, requirements of this NPDES permit may be modified to prevent adverse impacts on habitats of endangered and threatened species.

The above-referenced Report of monitoring data is required under this permit to be sent on an annual basis to:

The United States Environmental Protection Agency
Region III (3WP41)
Water Protection Division
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive
Gloucester, Massachusetts 01930-2276

8.16 Toxic Pollutants

If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under section 307(a) of the Act, 33 U.S.C. § 1317(a), for a toxic pollutant which is present in the discharge and such standard or prohibition

is more stringent than any limitation for such pollutant in this permit, the permittee shall comply with such standard or prohibition even if the permit has not yet been modified to comply with the requirement.

8.17 Bypass

8.17.1 Bypass not exceeding limitations. In accordance with 40 C.F.R. § 122.41(m), the permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation.

8.17.2 Notice

1. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it must submit prior notice at least ten days before the date of the bypass. See 40 C.F.R. § 122.41(m)(3)(i).
2. Unanticipated bypass. The permittee must submit notice of an unanticipated bypass as required by 40 C.F.R. § 122.41(l)(6) (24-hour notice). See 40 C.F.R. § 122.41(m)(3)(ii).

8.17.3 Prohibition of bypass. See 40 C.F.R. § 122.41(m)(4).

1. Bypass is prohibited, and EPA may take enforcement action against the permittee for bypass, unless:
 - a. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage as defined herein;
 - b. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
 - c. The permittee submitted notices as required herein.
2. EPA may approve an anticipated bypass, after considering its adverse effects, if EPA determines that it will meet the three conditions listed above.

8.18 Upset

Effect of an upset: An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of 40 C.F.R. § 122.41(n) are met.

8.19 Reopener Clause for Permits

The permit shall be modified or revoked and reissued, including but not limited to, for any of the following reasons:

1. To incorporate any applicable effluent standard or limitation issued or approved under Sections 301, 304, or 307 of the Clean Water Act, and any other applicable provision, such as provided for in the Chesapeake Bay Agreements based on water quality considerations, and if the effluent standard or limitation so issued or approved:
 - a. Contains different conditions or is otherwise more stringent than any effluent limitation in the permit; or
 - b. Controls any pollutant not limited in the permit. The permit, as modified or reissued under this paragraph, shall also contain any other requirements of the Act then applicable; or
2. To incorporate additional controls that are necessary to ensure that the permit effluent limits are consistent with any applicable TMDL WLA allocated to the discharge of pollutants from the MS4 or to incorporate milestones and schedules of a TMDL Implementation Plan; or
3. As specified in 40 C.F.R. §§ 122.44(c), 122.62, 122.63, 122.64, and 124.5.

8.20 Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, it must apply for and obtain a new permit. The application shall be submitted at least 180 days before the expiration date of this permit. EPA may grant permission to submit an application less than 180 days in advance but no longer than the permit expiration date. In the event that a timely and complete reapplication has been submitted and EPA is unable through no fault of the permittee, to issue a new permit before the expiration date of this permit, the terms and conditions of this permit are automatically continued and remain fully effective and enforceable.

9. PERMIT DEFINITIONS

Terms that are not defined herein shall have the meaning accorded them under section 502 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, or its implementing regulations, 40 C.F.R. Part 122.

“Annual Report” refers to the consolidated Annual Report that the permittee is required to submit annually.

"Benchmark" as used in this permit is a quantifiable goal or target to be used to assess progress toward "milestones" (see separate definition) and WLAs, such as a numeric goal for BMP implementation. If a benchmark is not met, the permittee should take appropriate corrective action to improve progress toward meeting milestones or other objectives. Benchmarks are intended as an adaptive management aid and generally are not considered to be enforceable.

"Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. See 40 C.F.R. § 122.41(m)(1)(i).

"CWA" means Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. (6-483 and Pub. L. 97-117, 33 U.S.C. §§ 1251 *et seq.*

"Development" is the undertaking of any activity that disturbs a surface area greater than or equal to 5,000 square feet, including new development projects and redevelopment projects. For purposes of Parts 4.1.1 through 4.1.4 of the permit the requirements apply to discharges from sites for which design or construction commenced after 18 months from the effective date of this permit or as required by District of Columbia law, whichever is sooner. The permittee may exempt development projects receiving site plan approval prior to this date from these requirements.

"Director" means the Regional Administrator of USEPA Region 3 or an authorized representative.

"Discharge" for the purpose of this permit, unless indicated otherwise, refers to discharges from the Municipal Separate Storm Sewer System (MS4).

"Discharge Monitoring Report", "DMR" or "Outfall Discharge Monitoring Report" includes the monitoring and assessment of controls identified in Section 5 herein.

"EPA" means USEPA Region 3.

"Green Roof" is a low-maintenance roof system that stores rainwater where the water is taken up by plants and/or transpired into the air.

"Green Technology Practices" means stormwater management practices that are used to mimic pre-development site hydrology by using site design techniques that retain stormwater on-site through infiltration, evapotranspiration, harvest and use.

"Guidance" means assistance in achieving a particular outcome or objective.

"Illicit connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit discharge" means any discharge to a municipal separate storm sewer that is not composed entirely of stormwater except discharges pursuant to an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities, pursuant to 40 C.F.R. § 122.26(b)(2).

"Impaired Water" (or "Water Quality Impaired Water" or "Water Quality Limited Segment"): A water is impaired for purposes of this permit if it has been identified by the District or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards (these waters are called "water quality limited segments" under 40 C.F.R. 30.2(j)). Impaired waters include both waters with approved or established TMDLs, and those for which a TMDL has not yet been approved or established.

"Landfill" means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit (i.e., an area where wastes are applied onto or incorporated into the soil surface [excluding manure spreading operations] for treatment or disposal), surface impoundment, injection well, or waste pile.

"Large or Medium municipal separate storm sewer system" means all municipal separate storm sewers that are either: (1) located in an incorporated place (city) with a population of 100,000 or more as determined by the latest Decennial Census by the Bureau of Census (these cities are listed in Appendices F and G of 40 C.F.R. Part 122); or (2) located in the counties with unincorporated urbanized populations of 100,000 or more, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties (these counties are listed in Appendices H and I of 40 C.F.R. Part 122); or (3) owned or operated by a municipality other than those described in paragraph (i) or (ii) and that are designated by the Director as part of the large or medium municipal separate storm sewer system.

"Milestone" as used in this permit is an interim step toward attainment of a WLA that upon incorporation into the permit will become an enforceable limit or requirement to be achieved by a stated date. A milestone should be expressed in numeric terms, i.e. as a volume reduction, pollutant load, specified implementation action or set of actions or other objective metric, when possible and appropriate.

"MS4" refers to either a Large or Medium Municipal Separate Storm Sewer System.

"Municipal Separate Storm Sewer" means a conveyance, or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (1) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State Law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes; (2) Designed or used to collect or convey stormwater (including storm drains, pipes, ditches, etc.); (3) not a combined sewer; and (4) not part of a Publicly-Owned Treatment Works as defined at 40 C.F.R. § 122.2.

“Offset” means a unit of measurement, either used as monetary or non-monetary compensation, as a substitute or replacement for mitigation of a stormwater control practice that has been determined to be impracticable to implement.

“Performance measure” means for purposes of this permit, a minimum set of criteria for evaluating progress toward meeting a standard of performance.

“Performance standard” means for purposes of this permit, a cumulative measure or provision for attainment of an outcome or objective.

"Permittee" refers to the Government of the District of Columbia.

"Point Source" means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.

“Pollutant of concern” means a pollutant in an MS4 discharge that may cause or contribute to the violation of a water quality criterion for that pollutant downstream from the discharge.

“Pre-Development Condition” means the combination of runoff, infiltration and evapotranspiration rates, volumes, durations and temperatures that typically existed on the site with natural soils and vegetation before human-induced land disturbance occurred. In the context of requirements in this permit the environmental objective is a stable, natural hydrologic site condition that protects or restores to the degree relevant for that site, stable hydrology in the receiving water, which will not necessarily be the hydrologic regime of that receiving water prior to any human disturbance in the watershed.

“Retention” means the use of soils, vegetation, water harvesting and other mechanisms and practices to retain a target volume of stormwater on a given site through the functions of: pore space and surface ponding storage; infiltration; reuse, and/or evapotranspiration.

“Retrofit” means improvement in a previously developed area that results in reduced stormwater discharge volumes and pollutant loads and/or improvement in water quality over current conditions.

“Stormwater” means the flow of surface water which results from, and which occurs immediately following, a rainfall event, snow melt runoff, and surface runoff and drainage.

“Stormwater management” means (1) for quantitative control, a system of vegetative or structural measures, or both, which reduces the increased volume and rate of surface runoff caused by man-made changes to the land; and (2) for qualitative control, a system of vegetative, structural, and other measures which reduce or eliminate pollutants which might otherwise be carried by surface runoff.

“SWMP” is an acronym for Stormwater Management Program. For purposes of this permit, the term includes all stormwater activities described in the District’s SWMP Plan updated February 19, 2009, or any subsequent update, and all other strategies, plans, documents, reports, studies, agreements and related correspondences developed and used pursuant to the requirements of this permit.

“Severe property damage” means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production. See 40 C.F.R. § 122.41(m)(1)(ii).

“Total Maximum Daily Load (TMDL) Units” means for purposes of this permit, the sum of individual waste load allocations (WLAs) and natural background. Unless specifically permitted otherwise in an EPA-approved TMDL report covered under the permit, TMDLs are expressed in terms of mass per time, toxicity or other appropriate measure such as pollutant pounds of a total average annual load.

“TMDL Implementation Plan” means for purposes of this permit, a plan and subsequent revisions/updates to that plan that are designed to demonstrate how to achieve compliance with applicable waste load allocations as set forth in the permit requirements described in Section 4.10.3.

“Stormwater Management Program (SWMP)” is a modified and improved SWMP based on the existing SWMP and on information in each of the Annual Reports/Discharge Monitoring Reports. The purpose of the SWMP is to describe the list of activities that need to be done to meet the requirements of the Clean Water Act, an explanation as to why these activities will meet the Clean Water Act requirements, and a schedule for those activities.

“Upset” means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond reasonable control. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. See 40 C.F.R. § 122.41(n)(1).

“Waste pile” means any non-containerized accumulation of solid, nonflowing waste.

“Water quality standards” refers to the District of Columbia’s Surface and Ground Water Quality Standards codified at Code of District of Columbia Regulations §§ 21-1100 *et seq.*, which are effective on the date of issuance of the permit and any subsequent amendments which may be adopted during the life of this permit.

“Waters of the United States” is defined at 40 C.F.R. § 122.2.

Exhibit 5

Boston, MA – Boston Water and Sewer Commission MS4 Permit
(Permit No. MAS010001)

This page intentionally left blank

AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the federal Clean Water Act, as amended, 33 U.S.C. §§1251 et seq., and the Massachusetts Clean Waters Act, as amended, Mass. Gen. Laws. ch. 21, §§26-53, the

Boston Water and Sewer Commission

is authorized to discharge from all of its new or existing separate storm sewers: 195 identified Separate Storm Sewer Outfalls and associated receiving waters are Listed in Attachment A to receiving waters named: Belle Island Inlet, Boston Harbor, Boston Inner Harbor, Brook Farm Brook, Bussey Brook, Canterbury Brook, Chandler's Pond, Charles River, Chelsea River, Cow Island Pond, Dorchester Bay, Fort Point Channel, Goldsmith Brook, Jamaica Pond, Little Mystic Channel, Mill Pond, Millers River, Mother Brook, Muddy River, Mystic River, Neponset River, Old Harbor, Patten's Cove, Reserved Channel, Sprague Pond, Stony Brook, Turtle Pond and unnamed wetlands, brooks and streams.

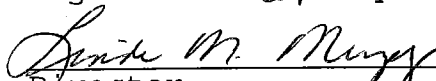
in accordance with effluent limitations, monitoring requirements and other conditions set forth herein.

This permit shall become effective 30 days from date of signature.


This permit and the authorization to discharge expire at midnight, five years from the effective date.

This permit consists of 20 pages and Attachment A in Part I including monitoring requirements, etc., and 35 pages in Part II including General Conditions and Definitions.

Signed this 29 day of September, 1999



Director
Office of Ecosystem Protection
Environmental Protection Agency
Region I
Boston, MA



Director, Division of
Watershed Management
Department of Environmental
Protection
Commonwealth of Massachusetts
Boston, MA

PART I. MUNICIPAL SEPARATE STORM SEWER SYSTEM

A. DISCHARGES THROUGH THE MUNICIPAL SEPARATE STORM SEWER SYSTEM AUTHORIZED UNDER THIS PERMIT

1. Permit Area. This permit covers all areas within the corporate boundary of the City of Boston or otherwise contributing to new or existing separate storm sewers owned or operated by the Boston Water and Sewer Commission, the "permittee".
2. Authorized Discharges. This permit authorizes all storm water discharges to waters of the United States from all existing or new separate storm sewer outfalls owned or operated by the permittee (existing outfalls are identified in Attachment A). This permit also authorizes the discharge of storm water commingled with flows contributed by wastewater or storm water associated with industrial activity provided such discharges are authorized under separate NPDES permits and are in compliance with applicable Federal, State and Boston Water and Sewer Commission regulations (Regulations Regarding the Use of Sanitary and Combined Sewers and Storm Drains of the Boston Water and Sewer Commission). The permittee shall provide a notification to EPA and MA DEP of all new separate storm sewer outfalls as they are activated and of all existing outfalls which are de-activated. The annual report (Part I.E.) will reflect all of the changes to the number of outfalls throughout the year.
3. Limitations on Coverage. Discharges of non-storm water or storm water associated with industrial activity through outfalls listed at Attachment A are not authorized under this permit except where such discharges are:
 - a. authorized by a separate NPDES permit; or
 - b. identified by and in compliance with Part I.B.2.g.2 of this permit.

B. STORM WATER POLLUTION PREVENTION & MANAGEMENT PROGRAMS

The permittee is required to develop and implement a storm water pollution prevention and management program designed to reduce, to the maximum extent practicable the discharge of pollutants from the Municipal Separate Storm Sewer System. The permittee may implement Storm Water Management Program (SWMP) elements through participation with other public agencies or private entities in cooperative efforts satisfying the requirements of this permit in lieu of creating duplicate program elements. Either cumulatively, or separately, the permittee's storm water pollution prevention and management programs shall satisfy the requirements of Part I.B.1-7. below for all portions of the Municipal Separate Storm Sewer System (MS4) authorized to discharge under this permit and shall reduce the discharge of pollutants to the maximum extent practicable. The storm water pollution prevention and management program requirements of this Part shall be implemented through the SWMP submitted as part of the permit application and revised as necessary.

1. POLLUTION PREVENTION REQUIREMENTS The permittee shall develop and implement the following pollution prevention measures as they relate to discharges to the separate storm sewer:
 - a. Development The permittee shall assist and coordinate with the appropriate municipal agencies with jurisdiction over land use to ensure that municipal approval of all new development and significant redevelopment projects within the City of Boston which discharge to the MS4 is conditioned on due consideration of water quality impacts. The permittee shall cooperate with appropriate municipal agencies to ensure that development activities conform to applicable state and local regulations, guidance and policies relative to storm water discharges to separate storm sewers. Such requirements shall limit increases in the discharge of pollutants in storm water as a result of new development, and reduce the discharge of pollutants in storm water as a result of redevelopment.
 - b. Used Motor Vehicle Fluids The permittee shall coordinate with appropriate municipal agencies or private entities to assist in the implementation of a program to collect used motor vehicle fluids (including, at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal. Such program shall be readily available to all residents of the City of Boston and publicized and promoted at least annually.

c. Household Hazardous Waste (HHW) The permittee shall coordinate with appropriate municipal agencies or private entities to assist in the implementation of a program to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal and promote proper handling and disposal. Such program shall be readily available to all private residents. This program shall be publicized and promoted at least annually.

2. STORM WATER MANAGEMENT PROGRAM REQUIREMENTS: The permittee shall continue to implement the Storm Water Management Program (SWMP) which it described in its May 17, 1993 storm water permit application and updated June 1995 and June 1998 in accordance with Section 402(p)(3)(B) of the Clean Water Act (CWA or "the Act"). This SWMP outlined in the permit application, including all updates, is approvable upon issuance of this permit.

In accordance with Part I.E. Annual Report, no later than **March 1, 2000** the permittee shall describe all the updates which it has conducted and all additional measures it will take to satisfy the requirements of this permit and the goals of the storm water management program. The Controls and activities identified in the SWMP shall clearly identify goals, a description of the controls or activities, and a description of the roles and responsibilities of other entities' areas of applicability on a system, jurisdiction, or specific area basis. The permittee will specifically address its roles and activities as they relate to portions of the SWMP which are not under its direct control (e.g. street sweeping, HHW collection, development, redevelopment). The permit may be modified to designate the agencies that administer these programs as co-permittees or require a separate permit. These entities would then be responsible for applicable permit conditions and requirements. The SWMP, and all approved updates, are hereby incorporated by reference and shall be implemented in a manner consistent with the following requirements:

a. Statutory Requirements: The SWMP shall include controls necessary to reduce the discharge of pollutants from the Municipal Separate Storm Sewer System to the Maximum Extent Practicable (MEP). Controls may consist of a combination of best management practices, control techniques, system design and engineering methods, and such other provisions as the permittee, Director or the State determines appropriate. The various components of the SWMP, taken as a whole (rather than individually), shall be sufficient to meet this standard. The SWMP shall be updated as necessary to ensure conformance with the requirements of CWA § 402(p)(3)(B). The permittee shall select measures or controls to satisfy the following water quality prohibitions:

No discharge of toxics in toxic amounts.

No discharge of pollutants in quantities that would cause a violation of State water quality standards.

No discharge of either a visible oil sheen, foam, or floating solids, in other than trace amounts.

b. Structural Controls: The permittee shall operate and maintain all storm water structural controls which it owns or operates in a manner so as to reduce the discharge of pollutants to the MEP.

c. Areas of New Development and Significant Redevelopment: The permittee shall continue to implement its site plan review process and ensure compliance with its existing regulations. The permittee shall also coordinate with appropriate municipal agencies to assist in the development, implementation, and enforcement of controls to minimize the discharge of pollutants to the separate storm sewer system from areas of new development and significant re-development during and after construction. The permittee shall assist appropriate municipal agencies to ensure that development activities conform to applicable state and local regulations, guidance and policies relative to storm water discharges to separate storm sewers.

d. Roadways: The permittee shall coordinate with appropriate agencies to assist in the implementation of measures to ensure that roadways and highways are operated and maintained in a manner so as to minimize the discharge of pollutants to the separate storm sewer system (including those related to deicing or sanding activities).

e. Flood Control Projects: The permittee shall ensure that any flood management projects within its direct control are completed after consideration of impacts on the water quality of receiving waters. The permittee shall also evaluate the feasibility of retro-fitting existing structural flood control devices it owns or operates to provide additional pollutant removal from storm water.

f. Pesticide, Herbicide, and Fertilizer Application: The permittee shall cooperate with appropriate municipal agencies to evaluate existing measures to reduce the discharge of pollutants related to the application of pesticides, herbicides, and fertilizers applied by municipal or public agency employees or contractors to public right of ways, parks, and other municipal facilities. The permittee shall evaluate the necessity to implement controls to reduce discharge of pollutants related to the application and distribution of pesticides, herbicides, and fertilizers by commercial and wholesale distributors and applicators. The permittee shall require controls, within its authority, as necessary.

g. Illicit Discharges and Improper Disposal: The permittee shall continue to implement its program to detect and remove illicit discharges (or require the discharger to the MS4 to remove or obtain a separate NPDES permit for the discharge) and improper disposal into the separate storm sewer.

1. The permittee shall effectively prohibit non-storm water discharges to the Municipal Separate Storm Sewer System, other than those authorized under this permit or a separate NPDES permit.

2. Unless identified by either the permittee, the Director, or the State as significant sources of pollutants to waters of the United States, the following non-storm water discharges are authorized to enter the MS4. As necessary, the permittee may incorporate appropriate control measures in the SWMP to ensure these discharges are not significant sources of pollutants to waters of the United States.

- (a) water line flushing;
- (b) landscape irrigation;
- (c) diverted stream flows;
- (d) rising ground waters;
- (e) uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers;

- (f) uncontaminated pumped ground water;
- (g) discharges from potable water sources;
- (h) foundation drains;
- (i) uncontaminated air conditioning or compressor condensate;
- (j) irrigation water;
- (k) uncontaminated springs;
- (l) water from crawl space pumps;
- (m) footing drains;
- (n) lawn watering;
- (o) non-commercial car washing;
- (p) flows from riparian habitats and wetlands;
- (q) swimming pool discharges which have been dechlorinated;
- (r) street wash waters;
- (s) discharges or flows from emergency fire fighting activities;
- (t) fire hydrant flushing; and
- (u) building washdown water which does not contain detergents.

3. The permittee shall prevent unpermitted discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall implement a program to identify and limit the infiltration of seepage from sanitary sewers into the MS4.

4. The permittee shall prohibit the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into separate storm sewers. The permittee must demonstrate that the prohibition is publicized at least annually, and that the information is available for non-English speaking residents of the City.

5. The permittee shall require the elimination of illicit connections as expeditiously as possible and the immediate cessation of improper disposal practices upon identification of responsible parties. The permittee shall describe its procedure for identification and elimination of illicit discharges. This information shall be included in the annual report required under Part I.E. below. Where elimination of an illicit connection within sixty (60) days is not possible, the permittee shall establish a schedule for the expeditious removal of the discharge. In the interim, the permittee shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

h. Spill Prevention and Response: The permittee shall cooperate with appropriate federal, state, and municipal agencies in the development and implementation of a program to prevent, contain, and respond to spills that may discharge into or through the MS4. The spill response program may include a combination of spill response actions by the permittee (and/or other public or private entities), and requirements for private entities through the permittee's sewer use regulations. Except as explicitly authorized, materials from spills may not be discharged to Waters of the United States.

i. Industrial & High Risk Runoff: In cooperation with the DEP and EPA, the permittee shall implement a program to identify, monitor, and control pollutants in storm water discharges to the MS4 from municipal landfills; hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee determines is contributing a substantial pollutant loading to the MS4. The program shall include:

1. priorities and procedures for inspections and establishing and implementing control measures for such discharges;
2. a monitoring (or self-monitoring) program for facilities identified under this section, including the collection of quantitative data on the following constituents:
 - (a) any pollutants for which the discharger may monitor or which are limited in an existing NPDES permit for an identified facility;
 - (b) any information on discharges required under 40 CFR 122.21(g) (7) (iii) and (iv);
 - (c) any pollutant the permittee has a reasonable expectation is discharged in substantial quantity from the facility to the separate storm sewer system.

Data collected by the industrial facility to satisfy the monitoring requirements of an NPDES or State discharge permit may be used to satisfy this requirement. The permittee may require the industrial facility to conduct self-monitoring to satisfy this requirement.

j. Construction Site Runoff: The permittee shall continue to implement its site plan review process and ensure compliance with its existing regulations. The permittee shall also cooperate with appropriate municipal agencies in the development and implementation of a program to reduce the discharge of pollutants from construction sites to the MS4, including:

1. requirements for the use and maintenance of appropriate structural and non-structural best management practices to reduce pollutants discharged to the MS4 during the time construction is underway;
2. procedures for site planning which incorporate considerations for potential short term and long term water quality impacts and measures to minimize these impacts;
3. prioritized inspection of construction sites and enforcement of control measures as required by the permittee;
4. providing assistance to appropriate municipal agencies in the development of education and training measures for construction site operators; and
5. providing assistance to appropriate municipal agencies in the development of a notification to appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff.

k. Public Education: The permittee, in coordination with other appropriate municipal agencies, shall implement a public education program including, but not limited to:

1. A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4 (e.g. curb inlet stenciling, citizen "streamwatch" groups, "hotlines" for reporting dumping, outreach materials included in billings, advertising on public access/government cable channels, etc.);

2. a program to promote, publicize, and facilitate the proper management and disposal of used oil, vehicle fluids and lubricants, and household hazardous wastes;

3. a program to promote, publicize, and facilitate the proper use, application, and disposal of pesticides, herbicides, and fertilizers;

4. where applicable and feasible, the permittee should publicize those best management practices (including but not limited to the use of reformulated or redesigned products, substitution of less toxic materials, and improvements in housekeeping) developed by municipal agencies or environmental organizations that facilitate better use, application, and/or disposal of materials identified in k.1 - k.3 of this section.

3. DEADLINES FOR PROGRAM COMPLIANCE: Except as provided in PART II, and Part I.B.7. the permittee shall continue to implement its Storm Water Management Program.
4. ROLES AND RESPONSIBILITIES OF PERMITTEE: The Storm Water Management Program shall clearly identify the roles and responsibilities of the permittee and appropriate municipal agencies impacting its efforts to comply with this permit.
5. LEGAL AUTHORITY: The permittee has demonstrated and shall maintain legal authority to control discharges to and from those portions of the MS4 which it owns or operates. This legal authority may be a combination of statute, regulation, permit, contract, or an order to:
- a. Control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;
 - b. Prohibit illicit discharges to the MS4;
 - c. As necessary, control the discharge of spills and the dumping or disposal of materials other than storm water (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;
 - d. Control through interagency or inter-jurisdictional agreements the contribution of pollutants from one portion of the MS4 to another;

e. Require compliance with conditions in regulations, permits, contracts or orders; and

f. Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance with permit conditions.

6. STORM WATER MANAGEMENT PROGRAM RESOURCES The permittee shall provide adequate finances, staff, equipment, and support capabilities to implement its SWMP.

7. STORM WATER MANAGEMENT PROGRAM REVIEW AND MODIFICATION

a. Demonstration Project: Within 180 days of the effective date of the permit, the permittee shall submit a plan to assess the effectiveness of existing non-structural BMPs. This plan shall identify a drainage area or sub-area which has undergone an investigation for illicit connections and is believed to be reasonably free of sanitary sewer influence. The plan shall clearly specify activities to be conducted, responsible parties and method of assessment. The project shall commence within one year of the effective date of the permit and continue for at least one year. Within 90 days of project completion the permittee shall submit a report which identifies measures undertaken and effectiveness of those measures.

b. Program Review: The permittee shall participate in an annual review of its current SWMP in conjunction with preparation of the annual report required under Part I.E. This annual review shall include:

1. A review of the status of program implementation and compliance with program elements and other permit conditions as necessary;
2. An assessment of the effectiveness of controls established by the SWMP;
3. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings;
4. An assessment of any SWMP modifications needed to comply with the CWA §402(p)(3)(B)(iii) requirement to reduce the discharge of pollutants to the maximum extent practicable (MEP).
5. An assessment of staff and funding levels adequate to comply with the permit conditions.

c. Program Modification: The permittee may modify the SWMP in accordance with the following procedures:

1. The approved SWMP shall not be modified by the permittee(s) without the prior approval of the Director, unless in accordance with items c.2. or c.3. below.

2. Modifications adding (but not subtracting or replacing) components, controls, or requirements to the approved SWMP may be made by the permittee at any time upon written notification to the Director.

3. Modifications replacing or eliminating an ineffective or infeasible BMP specifically identified in the SWMP with an alternative BMP may be requested at any time. Unless the Director comments on or denies the request within 60 days from submittal, the permittee shall implement the modification and proposed schedule. Such requests must include the following:

(a) an analysis of why the BMP is ineffective or infeasible (including cost considerations),

(b) expectations on the effectiveness of the replacement BMP and proposed schedule for implementation, and

(c) an analysis of why the replacement of the BMP is expected to achieve the goals of the BMP to be replaced,

(d) in the case of an elimination of the BMP, an analysis of why the elimination is not expected to cause or contribute to a water quality impact.

4. Modification requests and/or notifications must be made in writing and signed in accordance with Part II.D.2.

d. Modifications required by the Permitting Authority:
The Director or the State may require the permittee to modify the SWMP as needed to:

1. Address impacts on receiving water quality caused, or contributed to, by discharges from the MS4;
2. Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements; or
3. Include such other conditions deemed necessary by the Director to comply with the goals and requirements of the Clean Water Act.

Modifications required by the Director shall be made in writing and set forth a time schedule for the permittee to develop the modification(s).

C. WET WEATHER MONITORING AND REPORTING REQUIREMENTS

1. Storm Event Discharges. The permittee shall implement a wet-weather monitoring program for the MS4 to provide data necessary to assess the effectiveness and adequacy of control measures implemented under the SWMP; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from all outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation. Improvement in the quality of discharges from the MS4 will be assessed based on the monitoring information required by this section, along with any additional pertinent information. There have been no numeric effluent limits established for this permit. Further monitoring or effluent limits may be established to ensure compliance with the goals of the Clean Water Act, appropriate Water Quality Standards, or applicable technology based requirements.

a. Representative Monitoring: Within 90 days after the effective date of this permit, the permittee shall submit a proposed sampling plan. The permittee shall monitor a minimum of five (5) representative drainage areas to characterize the quality of storm water discharges from the MS4. The proposed sampling plan shall consider monitoring each site three (3) times a year for a period of at least two years. All five sites shall be completed within the five year permit term and may be done partially or consecutively. The permittee shall choose locations representing the different land uses or is representative of drainage areas served by the MS4. The permittee may submit an alternative plan for sampling frequency only subject to the approval of EPA and DEP. At a minimum, the monitoring program shall analyze for the following parameters: pH, Temperature, Dissolved Oxygen, Total Suspended Solids, BOD5, COD, Fecal Coliform, Total Nitrogen, Nitrate/Nitrite, Ammonia (as N), Total Phosphorous, Ortho-Phosphate, Oil and Grease, Total Petroleum Hydrocarbons, Surfactants, Fluoride, Copper, and Zinc. Unless commented on or denied by the Director within 60 days after its submittal, the proposed sampling plan shall be deemed approved. This monitoring program shall commence no later than 180 days from the effective date of the permit unless otherwise specified by EPA and DEP. Subsequent monitoring locations and parameters for the remainder of the permit term shall be determined based upon the results of these sampling locations and other water quality information available to EPA, DEP and the permittee.

b. Receiving Water Quality Monitoring. The permittee shall monitor a minimum of four (4) receiving waters three (3) times a year throughout the permit term to characterize the water quality impacts of storm water discharges from the MS4. Sampling shall be conducted during a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (0.1 inch) storm event. Within 90 days after the effective date of this permit, the permittee shall submit its proposed sampling plan. At a minimum, the monitoring program shall analyze for the following parameters: pH, Temperature, Dissolved Oxygen, Total Suspended Solids, BOD5, COD, Fecal Coliform, Total Nitrogen, Nitrate/Nitrite, Ammonia (as N), Total Phosphorous, Ortho-Phosphate, Oil and Grease, Total Petroleum Hydrocarbons, Surfactants, Fluoride, Copper, and Zinc. Unless commented on or denied by the Director within 60 days after its submittal, the proposed sampling plan shall be deemed approved. This monitoring program shall commence no later than six months after the effective date of the permit.

- c. Alternate Representative Monitoring: Monitoring locations may be substituted for just cause during the term of the permit. Requests for alternate monitoring locations by the permittee shall be made to the Director in writing and include the rationale for the requested monitoring station relocation. Unless commented on or denied by the Director, use of an alternate monitoring location may commence sixty (60) days from the date of the request.
2. Storm Event Data: For Part I.C.1.a Data shall be collected to estimate pollutant loadings and event mean concentrations for each parameter sampled. The permittee shall maintain records of the date and duration (hours) of the storm event sampled; rainfall measurements or estimates (inches) of the storm event which generated the sampled runoff; the duration (hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and the total estimated volume (in gallons) of the discharge sampled. If manual sampling is employed, the permittee shall record physical observations of the discharge such as color and smell; and visible water quality impacts such as floatables, oil sheen, or evidence of sedimentation in the vicinity of the outfall (e.g. sandbars).
3. Sample Type, Collection, and Analysis: The following requirements apply to samples collected pursuant to Part I.C.1.a.
- a. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one grab sample may be taken.
- b. Grab samples shall be used for the analysis of pH, temperature, cyanide, total phenols, residual chlorine, oil & grease, fecal coliform, and fecal streptococcus. For all other parameters, data shall be reported for flow weighted composite samples of the entire event or, at a minimum, the first three hours of discharge.

c. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Composite samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes.

d. Analysis and collection of samples shall be conducted in accordance with the methods specified at 40 CFR Part 136. Where an approved Part 136 method does not exist, any available method may be used.

4. Sampling Waiver. When the permittee is unable to collect samples required by Part I.C.1.a due to adverse climatic conditions, the discharger must submit, in lieu of sampling data, a description of why samples could not be collected, including available documentation of the event. Adverse climatic conditions which may prohibit the collection of samples include weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.) or otherwise make the collection of a sample impracticable (drought, extended frozen conditions, etc.).
5. Sampling Results. The permittee shall record the results of sampling and assessment of the data in a report and submit results with its Annual Report.
6. Wet Weather Screening: The permittee shall develop and implement a program to identify, investigate, and address areas within their jurisdiction that may be contributing excessive levels of pollutants to the MS4 as a result of rainfall or snow melt. Screening shall be conducted at anytime precipitation causes a flow from the storm sewer. At a minimum the wet weather screening program:
 - a. shall screen all major outfalls at least once during the permit term;
 - b. shall record the structural integrity of the outfall (if visible); physical observations of the discharge (if visible) such as color and smell; and visible water quality impacts such as floatables, oil sheen, or evidence of sedimentation in the vicinity of the outfall (e.g. sandbars).

c. shall summarize the results of the program in its Annual Report.

d. The permittee may submit an alternate wet weather screening pilot program on a watershed or sub-watershed basis. The pilot project concept must be submitted to EPA and DEP within 90 days of the effective date of the permit. The permittee shall identify reasons it believes that a system wide screening program would not be effective. The pilot project may be conducted in conjunction with Receiving Water Quality Monitoring (C.1.b.), but not Representative Monitoring (C.1.a.)

D. DRY WEATHER DISCHARGES

1. Dry Weather Screening Program: At least once during the permit term, the permittee shall inspect all major outfalls, or nearest upstream location not subject to tidal influence or backflow, during dry weather to identify those outfalls with dry weather flow. Dry weather screening shall be conducted when there has been no greater than 0.10 inches of precipitation in the 72 hours prior to screening. The permittee shall record the structural integrity of the outfall (if visible). If flow is observed, the permittee shall record physical observations such as color, visible sheen, turbidity, floatables, smell, and an estimate of flow. If sewage is suspected, the permittee shall develop a schedule for follow-up activities to eliminate the source as soon as is practicable. The permittee shall summarize the results in its Annual Report
2. Screening Procedures: Screening methodology need not conform to the protocol at 40 CFR §122.26(d)(1)(iv)(D) or sample and collection methods of 40 CFR §136.
3. Follow-up on Dry Weather Screening Results: Follow-up activities shall be prioritized on the basis of:
 - a. magnitude and nature of the suspected discharge;
 - b. sensitivity of the receiving water; and
 - c. other factors the permittee deems appropriate.
4. The permittee shall summarize the results of dry weather screening and submit with its Annual Report.

E. ANNUAL REPORT:

The permittee shall prepare and submit an annual report to be submitted by no later than **March 1, 2000** and annually thereafter. The report shall include the following separate sections, with an overview for the entire MS4:

1. The status of implementing the storm water management program(s);
2. Proposed changes to the storm water management program(s);
3. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (d)(2)(v);
4. A summary of the data, including monitoring or screening data, that is accumulated throughout the reporting year;
5. A revised list of all current separate storm sewer outfalls and their locations, reflecting changes of the previous year.
6. Annual expenditures for the reporting period, with a breakdown of the major elements of the storm water management program, and the budget for the year following each annual report as well as an assessment of adequacy of staffing and equipment;
7. A summary describing the number and nature of enforcement actions, inspections, and public education programs;
8. Identification of water quality improvements or degradation attributable to the permittee;
9. An analysis of the effectiveness and removal efficiencies of structural controls owned or operated by the permittee (such as the off-line particle separator in Fenwood Road); and,

10. An update on the illicit connection program to include the total number of identified connections with an estimate of flow for each, total number of connections found in the reporting period to include how they were found (i.e. citizen complaint, routine inspection), number of connections corrected in the reporting period to include total estimated flow, and the costs of such repairs to include how the repairs were financed (i.e. by the permittee, costs provided to the permittee by the responsible party, repairs effected and financed by the responsible party). As an attachment to the report, the permittee should submit any existing tracking system information.

F. CERTIFICATION AND SIGNATURE OF REPORTS

All reports required by the permit and other information requested by the Director shall be signed and certified in accordance with the General Conditions-Part II of this permit.

G. REPORT SUBMISSION

1. Original signed copies of all notifications and reports required herein, shall be submitted to the Director at the following address:

U.S. Environmental Protection Agency
NPDES PROGRAMS (SPA)
P.O. Box 8127
Boston, MA 02114

2. Signed copies of all notifications and reports shall be submitted to the State at:

Massachusetts Department of Environmental Protection
1 Winter Street
Boston, MA 02108
Attn: Mr. Steve Lipman

and

Massachusetts Department of Environmental Protection
Metro Boston/Northeast Regional Office
205A Lowell Street
Wilmington, MA 01887
Attn: Mr. Sabin Lord

H. RETENTION OF RECORDS

The permittee shall retain all records of all monitoring information, copies of all reports required by this permit and records of all other data required by or used to demonstrate compliance with this permit, until at least three years after coverage under this permit terminates. This period may be modified by alternative provisions of this permit or extended by request of the Director at any time. The permittee shall retain the latest approved version of the SWMP developed in accordance with Part I of this permit until at least three years after coverage under this permit terminates.

I. STATE PERMIT CONDITIONS

1. This Discharge Permit is issued jointly by the U. S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection under Federal and State law, respectively. As such, all the terms and conditions of this permit are hereby incorporated into and constitute a discharge permit issued by the Commissioner of the Massachusetts DEP pursuant to M.G.L. Chap. 21, §43.
2. Each Agency shall have the independent right to enforce the terms and conditions of this Permit. Any modification, suspension or revocation of this Permit shall be effective only with respect to the Agency taking such action, and shall not affect the validity or status of this Permit as issued by the other Agency, unless and until each Agency has concurred in writing with such modification, suspension or revocation. In the event any portion of this Permit is declared, invalid, illegal or otherwise issued in violation of State law such permit shall remain in full force and effect under Federal law as an NPDES Permit issued by the U.S. Environmental Protection Agency. In the event this Permit is declared invalid, illegal or otherwise issued in violation of Federal law, this Permit shall remain in full force and effect under State law as a Permit issued by the Commonwealth of Massachusetts.

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

OUTFALL NUMBER	OUTFALL TYPE	LOCATION	NEIGHBORHOOD	SIZE (INCHES)	TIDEGATES No. OF GATES / NUMBER	RECEIVING WATER
08B066	MAJOR	EASEMENT/VFW PARKWAY	WEST ROXBURY	18		CHARLES RIVER
08B122	MAJOR	EASEMENT/NORTH OF SPRING STREET	WEST ROXBURY	30		CHARLES RIVER
08B126	MINOR	SPRING STREET EXTENDED	WEST ROXBURY	24		CHARLES RIVER
09B049	MAJOR	EASEMENT/RIVERMOOR STREET	WEST ROXBURY	30		COW ISLAND POND/ CHARLES RIVER
10B015	MAJOR	EASEMENT/CHARLES PARK ROAD	WEST ROXBURY	21		COW ISLAND POND/ CHARLES RIVER
11B123	MAJOR	EASEMENT/EAST OF BAKER ST. EXT.	WEST ROXBURY	72		BROOK FARM BROOK
12B010	MINOR	BAKER STREET	WEST ROXBURY	15		BROOK FARM BROOK
12B014	MINOR	BAKER STREET	WEST ROXBURY	12		BROOK FARM BROOK
12B031	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B033	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B124	MAJOR	EASEMENT/LaGRANGE STREET	WEST ROXBURY	120x102		BROOK FARM BROOK
13B002	MINOR	LaGRANGE STREET	WEST ROXBURY	15		UNNAMED STREAM
13B011	MINOR	LaGRANGE STREET	WEST ROXBURY	12		UNNAMED STREAM
06C110	MAJOR	EASEMENT/PLEASANTDALE ST. EXT.	WEST ROXBURY	60		NONE SHOWN
07C006	MAJOR	EASEMENT/VFW PARKWAY/BELLE AVENUE	WEST ROXBURY	126x126		CHARLES RIVER
08C318	MAJOR	WEDGEMERE ROAD	WEST ROXBURY	24		NONE SHOWN
08C319	MINOR	WEDGEMERE ROAD	WEST ROXBURY	24		UNNAMED STREAM
14C009	MAJOR	EASEMENT/WESTGATE ROAD	WEST ROXBURY	36		UNNAMED WETLANDS
21C212	MINOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	30		CHANDLERS POND
22C384	MAJOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	36		CHANDLERS POND
24C174	MINOR	EASEMENT/NEWTON STREET	ALLSTON/BRIGHTON	9x20		CHARLES RIVER
24C031	MAJOR	PARSONS STREET	ALLSTON/BRIGHTON	60X60		CHARLES RIVER
06D057	MINOR	CEDAR CREST CIRCLE	WEST ROXBURY	21		NEPONSET RIVER
06D083	MINOR	MARGARETTA DRIVE	WEST ROXBURY	15		WETLANDS/CHARLES RIVER
06D084	MINOR	EASEMENT/MARGARETTA DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D085	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D086	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D091	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D184	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	18		WETLANDS/CHARLES RIVER
06D187	MAJOR	EASEMENT/GROVE STREET	WEST ROXBURY	36		BROOK GROVE STREET CEMETERY
13D077/078	MAJOR	WEST ROXBURY PARKWAY/VFW PARKWAY	WEST ROXBURY	2-60		BUSSEY BROOK
24D032	MAJOR	NORTH BEACON STREET, ABOUT 800' EAST OF PARSONS STREET	ALLSTON/BRIGHTON	119X130	1 / 24D032-18	CHARLES RIVER
24D150	MAJOR	SOLDIERS FIELD PLACE	ALLSTON/BRIGHTON	36		CHARLES RIVER
25D033	MAJOR	ABOUT 390' NORTH OF INTERSECTION OF SOLDIERS FIELD ROAD & WESTERN AVENUE	ALLSTON/BRIGHTON	36		CHARLES RIVER
01B024	MAJOR	EASEMENT/LAKESIDE	HYDE PARK	15		SPRAGUE POND/NEPONSET RIVER
03E185	MAJOR	NORTON STREET	HYDE PARK	2-18		WETLANDS/NEPONSET RIVER
03E186	MINOR	RIVER STREET	HYDE PARK	24		MILL POND/MOTHER BROOK
03E207	MINOR	RIVER STREET	HYDE PARK			MILL POND/MOTHER BROOK

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

04E064	MINOR	ALVARADO AVE./RIVER STREET BRIDGE	HYDE PARK	12		MILL POND/MOTHER BROOK
04E069	MAJOR	KNIGHT STREET DAM	HYDE PARK	36		MOTHER BROOK
05E180	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E181	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E182	MINOR	DEDHAM STREET	HYDE PARK	21		UNNAMED STREAM/CHARLES RIVER
05E183	MINOR	GEORGETOWN PLACE/DEDHAM PARKWAY	HYDE PARK	12		UNNAMED STREAM
08E031	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	18		TURTLE POND
08E033	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	UNKNOWN		TURTLE POND
08E035	MINOR	WASHINGTON STREET	WEST ROXBURY	15		TURTLE POND
09E229	MINOR	GRANDVIEW STREET	WEST ROXBURY	12		NONE SHOWN
09E243	MAJOR	BLUE LEDGE TR./EASEMENT	WEST ROXBURY	30		UNNAMED STREAM
13E174	MINOR	EASEMENT/VFW PARKWAY	ROSLINDALE	24		BUSSEY BROOK
13E175	MAJOR	EASEMENT/VFW PARKWAY	ROSLINDALE	108X86		BUSSEY BROOK
13E176	MAJOR	EASEMENT/WELD STREET	ROXBURY	15		NONE SHOWN
25E037	MAJOR	EASEMENT/TELFORD STREET EXTENDED	ALLSTON/BRIGHTON	66		CHARLES RIVER
01F031	MAJOR	EASEMENT/MILLSTONE ROAD	HYDE PARK	48x24		NEPONSET RIVER
02F085	MINOR	LAWTON STREET	HYDE PARK	12		NEPONSET RIVER RESERVATION
02F093	MAJOR	EASEMENT/SIERRA ROAD	HYDE PARK	15		NEPONSET RIVER
02F120	MAJOR	EASEMENT/WOLCOTT CT./HYDE PARK AVE. EXT.	HYDE PARK	54		NEPONSET RIVER
04F016	MAJOR	EASEMENT RIVER STREET	HYDE PARK	30		MOTHER BROOK/NEPONSET RIVER
04F118	MINOR	MASON STREET EXT.	HYDE PARK	18		NEPONSET RIVER
04F119	MAJOR	EASEMENT/HYDE PARK AVE./RESERVATION RD.	HYDE PARK	24		NEPONSET RIVER
04F189	MAJOR	RESERVATION ROAD	HYDE PARK	36		MOTHER BROOK/NEPONSET RIVER
04F191	MINOR	FARADAY STREET	HYDE PARK	24		NONE SHOWN/NEPONSET RIVER
04F203	MINOR	GLENWOOD AVE	HYDE PARK	28		NEPONSET RIVER
04F204	MAJOR	TRUMAN HWY./CHITTICK STREET	HYDE PARK	36		NEPONSET RIVER
05F117	MAJOR	EASEMENT/TRUMAN HWY./WILLIAMS AVE.	HYDE PARK	33		NEPONSET RIVER
05F244	MINOR	HYDE PARK AVENUE BRIDGE	HYDE PARK	20		MOTHER BROOK/NEPONSET RIVER
05F245	MINOR	HYDE PARK AVENUE	HYDE PARK	33		MOTHER BROOK/NEPONSET RIVER
05F253	MAJOR	EASEMENT/BUSINESS ST., NEAR BUSINESS TERRACE	HYDE PARK	48x24		MOTHER BROOK/NEPONSET RIVER
05F254	MINOR	DANA AVENUE	HYDE PARK	12		NEPONSET RIVER
05F265	MAJOR	BEHIND L.E. MASON CO.	HYDE PARK	15		MOTHER BROOK/NEPONSET RIVER
06F233	MINOR	MOUNT ASH ROAD	HYDE PARK	UNK		WETLAND - STONY BROOK RESERVATION
12F322	MINOR	EASEMENT/WALTER STREET	ROSLINDALE	18		NONE SHOWN
13F095	MINOR	EASEMENT/BUSSEY STREET	ROSLINDALE	12		BUSSEY BROOK
14F181	MAJOR	CENTER STREET EXTENSION	ROSLINDALE	38X86		GOLDSMITH BROOK
14F185	MINOR	ALLANDALE STREET	ROSLINDALE	12		BUSSEY BROOK
15F288	MAJOR	ARNOLD ARBORETUM/MURRAY CIRCLE	JAMAICA PLAIN	54		GOLDSMITH BROOK
15F307	MAJOR	ARNOLD ARBORETUM, 100' EAST OF ARBORWAY & SAINT JOSEPH STREET	JAMAICA PLAIN	36X36		GOLDSMITH BROOK
17F012	MINOR	FRANCIS PARKMAN DRIVE	JAMAICA PLAIN	15		JAMAICA POND

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

26F038	MAJOR	HARVARD STREET EXT.	ALLSTON/BRIGHTON	36		CHARLES RIVER
05G112	MAJOR	EASEMENT/RR ROW/WATER ST. EXT.	HYDE PARK	30		NEPONSET RIVER
05G115	MINOR	FAIRMOUNT AVENUE BRIDGE (NORTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116	MINOR	FAIRMOUNT AVE, BRIDGE (SOUTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116A	MINOR	WARREN AVENUE	HYDE PARK	24		NEPONSET RIVER
06G108	MAJOR	EASEMENT/WEST OF WOOD AVE. EXT.	HYDE PARK	69		NEPONSET RIVER
06G109	MAJOR	RIVER TERRACE EXT. NEAR ROSA STREET	HYDE PARK	48		NEPONSET RIVER
06G110	MAJOR	EASEMENT/WEST STREET EXT.	HYDE PARK	30		NEPONSET RIVER
06G111	MINOR	EASEMENT/VOSE STREET EXT., TRUMAN HWY.	HYDE PARK	24		NEPONSET RIVER
06G165	MINOR	TRUMAN HIGHWAY/METROPOLITAN AVE	HYDE PARK	10		NEPONSET RIVER
06G166	MAJOR	ABOUT 30 FEET FROM GUARDRAIL NORTHERLY SIDE OF TRUMAN HIGHWAY NEAR MILTON LINE.	HYDE PARK	36x36		NEPONSET RIVER
11G318	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	24		CANTERBURY BROOK
11G319	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	18		CANTERBURY BROOK
11G344	MAJOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	162X78		CANTERBURY BROOK
18G233	MINOR	WILLOW POND ROAD	JAMAICA PLAIN	15		MUDDY RIVER
19G043	MAJOR	HUNTINGTON AVENUE	ROXBURY/MISSION HALL	45x45		MUDDY RIVER
19G194	MINOR	HUNTINGTON AVENUE	ROXBURY/MISSION HILL	24		MUDDY RIVER
19G199	MINOR	JAMAICA WAY	ROXBURY/MISSION HILL	10		MUDDY RIVER
20G161	MAJOR	EASEMENT/BROOKLINE AVENUE	ROXBURY/MISSION HILL	36		MUDDY RIVER
20G163	MINOR	EASEMENT/RIVERWAY	ROXBURY/MISSION HILL	20		MUDDY RIVER
23G132	MAJOR	EASEMENT/MASS TURNPIKE/WEST OF B. U. BRIDGE	ALLSTON/BRIGHTON	60		CHARLES RIVER
24G034	MAJOR	SOLDIER'S FIELD ROAD, SOUTH OF CAMBRIDGE STREET	ALLSTON/BRIGHTON	36	1 / 24G034-1	CHARLES RIVER
24G035	MAJOR	SOLDIERS FIELD ROAD/BABCOCK STREET	ALLSTON/BRIGHTON	90x84		CHARLES RIVER
25G005	MINOR	FROM WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	12		CHARLES RIVER
25G041	MINOR	SOLDIERS FIELD ROAD/NORTH OF WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	24		CHARLES RIVER
06H106	MINOR	OSCEOLA STREET	HYDE PARK	24		NEPONSET RIVER
06H107	MAJOR	EASEMENT/BELNEL ROAD	HYDE PARK	24		NEPONSET RIVER
07H105	MAJOR	EASEMENT/EDGEWATER/SOUTH RIVER STREET	NEPONSET/MATTAPAN	102x72		NEPONSET RIVER
07H285	MAJOR	BLUE HILL AVENUE	NEPONSET/MATTAPAN	106x63		NEPONSET RIVER
07H287	MINOR	RIVER STREET/EDGEWATER DRIVE	NEPONSET/MATTAPAN	12		NEPONSET RIVER
07H346	MINOR	EDGEWATER DRIVE/HOLMFIELD AVENUE	HYDE PARK	18		NEPONSET RIVER
07H347	MINOR	EDGEWATER DRIVE/BURMAH ROAD	NEPONSET/MATTAPAN	21		NEPONSET RIVER
07H348	MINOR	EDGEWATER DRIVE/TOPALIAN STREET	NEPONSET/MATTAPAN	24		NEPONSET RIVER
12H085	MINOR	MORTON STREET	ROSLINDALE	15		CANTERBURY BROOK
	MAJOR	AMERICAN LEGION HIGHWAY	WEST ROXBURY	24		CANTERBURY BROOK
21H047	MINOR	PALACE ROAD EXT.	BOSTON PROPER	24		MUDDY RIVER

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

21H048	MINOR	EASEMENT/FENWAY/EVANS WAY	BOSTON PROPER	15		MUDDY RIVER
21H201	MINOR	PALACE ROAD EXT.	BOSTON PROPER	6		MUDDY RIVER
23H040	MINOR	RALEIGH STREET EXT.	BOSTON PROPER	24		CHARLES RIVER
23H042	MAJOR	DEERFIELD STREET	BOSTON PROPER	116x120		CHARLES RIVER
08I153	MINOR	DUXBURY ROAD	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I154	MINOR	EASEMENT/RIVER STREET/GLADSIDE AVE	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I155	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I156	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I158	MINOR	EASEMENT/RIVER STREET/FREMONT ST.	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I207	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I209	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	12		NEPONSET RIVER
11I577	MAJOR	HARVARD STREET	NEPONSET/MATTAPAN	102x102		CANTERBURY BROOK
08J041	MINOR	RIVER STREET	DORCHESTER	18		NEPONSET RIVER
08J102	MINOR	ADAMS STREET	DORCHESTER	15x15		NEPONSET RIVER
08J103	MAJOR	EASEMENT/CENTRAL AVENUE BRIDGE	DORCHESTER	30		NEPONSET RIVER
08J49/50	MAJOR	DESMOND ROAD	DORCHESTER	2-18&24		NEPONSET RIVER
26J052	MINOR	MONSIGNOR O'BRIEN HIGHWAY	BOSTON PROPER	12		CHARLES RIVER
26J055	MINOR	LEVERETT CIRCLE	BOSTON PROPER	12	1 / NOT MAPPED	CHARLES RIVER
27J001	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	72		MILLERS RIVER
27J044	MAJOR	PRISON POINT BRIDGE	CHARLESTOWN	15		MILLERS RIVER
27J096	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	54		MILLERS RIVER
29J029	MINOR	ALFORD STREET/RYAN PLGD. EXT.	CHARLESTOWN	15		MYSTIC RIVER
29J129	MINOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
29J212	MAJOR	EASEMENT/MEDFORD STREET (ALSO OF017)	CHARLESTOWN	72		MYSTIC RIVER
30J006	MAJOR	EASEMENT/ALFORD STREET	CHARLESTOWN	18		MYSTIC RIVER
30J019	MAJOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
30J030	MAJOR	EASEMENT/ARLINGTON AVENUE	CHARLESTOWN	42	1 / NOT MAPPED	MYSTIC RIVER
08K049	MINOR	BEARSE AVENUE	DORCHESTER	12		NEPONSET RIVER
09K016	MINOR	EASEMENT/BEARSE AVENUE EXT.	DORCHESTER	15		NEPONSET RIVER
09K100	MAJOR	EASEMENT/MELLISH ROAD	DORCHESTER	34x24		NEPONSET RIVER
09K101	MINOR	EASEMENT/HUNTOON STREET EXT.	DORCHESTER	24		NEPONSET RIVER
21K069	MAJOR	EAST BERKELEY STREET	BOSTON PROPER	48	1 / 21K069-1	FORT POINT CHANNEL
26K099	MAJOR	CHELSEA STREET EXT.	CHARLESTOWN	84		CHARLES RIVER

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

26K245	MINOR	EASEMENT	CHARLESTOWN	15		CHARLES RIVER
28K018	MAJOR	OLD LANDING WAY EXT.	CHARLESTOWN	42	1 / 28K058	LITTLE MYSTIC CHANNEL
28K061	MAJOR	EASEMENT/MEDFORD STREET	CHARLESTOWN	42	1 / 28K062	LITTLE MYSTIC CHANNEL
28K386	MAJOR	EASEMENT/TERMINAL STREET	CHARLESTOWN	30	1 / 28K385	LITTLE MYSTIC CHANNEL
10L094	MAJOR	EASEMENT/GALLIVAN BOULEVARD	DORCHESTER	74x93		NEPONSET RIVER VIA DAVENPORT BROOK
10L096	MAJOR	HILLTOP AND LENOXDALE STREETS	DORCHESTER	36		NEPONSET RIVER
12L092	MAJOR	PINE NECK CREEK STORM DRAIN TEANEAN STREET WEST OF LAWLEY	DORCHESTER	72	2 / 12L294	NEPONSET RIVER
16L097	MAJOR	EASEMENT/OFF SAVIN HILL AVENUE	DORCHESTER	24		PATTEN'S COVE
20L081	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
20L083	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
21L077	MAJOR	CLAPLIN STREET EXT./EAST STREET EXT.	SOUTH BOSTON	24	1 / NOT MAPPED	RESERVED CHANNEL
23L016	MINOR	NORTHERN AVENUE	SOUTH BOSTON	2-15&16		BOSTON INNER HARBOR
23L074	MINOR	SUMMER STREET BRIDGE	SOUTH BOSTON	15		FORT POINT CHANNEL
23L075	MAJOR	CONGRESS STREET BRIDGE	SOUTH BOSTON	54		FORT POINT CHANNEL
23L140	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L145	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L164	MAJOR	CONGRESS STREET BRIDGE	BOSTON PROPER	48	1 / 23L164 IN CHANNEL WALL	FORT POINT CHANNEL
23L195	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
23L196	MAJOR	NEW NORTHERN AVENUE BRIDGE	SOUTH BOSTON	36		FORT POINT CHANNEL
23L202	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
24L057	MINOR	STATE STREET EXT.	BOSTON PROPER	18x18		BOSTON INNER HARBOR
24L233	MAJOR	ROWE'S WHARF/ATLANTIC AVENUE	BOSTON PROPER	42		BOSTON HARBOR
25L058	MAJOR	CHRISTOPHER COLUMBUS PARK - WATERFRONT	BOSTON PROPER	84		BOSTON INNER HARBOR
25L144	MINOR	CLARK STREET	BOSTON PROPER	12		BOSTON INNER HARBOR
26L055	MAJOR	NEAR BATTERY WHARF	BOSTON PROPER	24X24		BOSTON INNER HARBOR
26L070	MAJOR	HANOVER STREET EXT.	BOSTON PROPER	36		BOSTON INNER HARBOR
26L84	MINOR	LEWIS STREET	EAST BOSTON	18		BOSTON INNER HARBOR
27L020	MAJOR	PIER NO. 4 EASEMENT - NAVY YARD	CHARLESTOWN	2-20&24	1 / 27K020-1	BOSTON INNER HARBOR
28L073	MINOR	EASEMENT/4TH STREET - NAVY YARD	CHARLESTOWN	6		LITTLE MYSTIC CHANNEL
28L074/075/ 076	MAJOR	16TH STREET/4TH AVENUE - NAVY YARD	CHARLESTOWN	3-30		LITTLE MYSTIC CHANNEL
28L077	MINOR	EASEMENT/4TH AVENUE - NAVY YARD	CHARLESTOWN	10		LITTLE MYSTIC CHANNEL
11M093	MAJOR	NEPONSET AVENUE AT NROTHWEST END OF NEPONSET AVENUE BRIDGE	DORCHESTER	48		NEPONSET RIVER
12M091	MAJOR	ERICSSON/WALNUT ST.	NEPONSET/MATTAPAN	36		NEPONSET RIVER
17M033	MAJOR	HARBOR POINT PARK (RELOCATED MT. VERNON ST. DRAIN)	DORCHESTER	72		DORCHESTER BAY
21M005	MAJOR	SUMMER STREET	SOUTH BOSTON	18		RESERVED CHANNEL

ATTACHMENT A
 BOSTON WATER AND SEWER COMMISSION
 STORMWATER OUTFALLS

29M032	MINOR	CONDOR STREET	EAST BOSTON	30		CHELSEA RIVER
29M041	MAJOR	EASEMENT/CONDOR STREET	EAST BOSTON	36x30		CHELSEA RIVER
29M049	MINOR	CONDOR STREET	EAST BOSTON	24		CHELSEA RIVER
29N135	MAJOR	ADDISON STREET	EAST BOSTON	30x30		CHELSEA RIVER
28N156	MINOR	COLERIDGE STREET EXT.	EAST BOSTON	12		BOSTON HARBOR
29O001	MAJOR	BENNINGTON STREET	EAST BOSTON	66	1 / 290062	BOSTON HARBOR NEAR CONSTITUTION BEACH
31O004	MINOR	EASEMENT/WALDEMAR AVENUE	EAST BOSTON	15		CHELSEA RIVER
28P001	MINOR	EASEMENT	EAST BOSTON	12		BOSTON HARBOR NEAR CONSTITUTION BEACH
29P015	MINOR	EASEMENT/BARNES AVENUE	EAST BOSTON	12		BELLE ISLE INLET
29P044	MINOR	SHAWSHEEN STREET	EAST BOSTON	12		BOSTON HARBOR
30P062	MINOR	PALERMO AVENUE EXTENSION	EAST BOSTON	12		WETLANDS
31P084	MINOR	EASEMENT/BENNINGTON STREET	EAST BOSTON	30		BELLE ISLE INLET, REVERE

Major* : 93

Minor : 102

Total: 195

* Major outfall means : An outfall that discharges from a single pipe of 36" or larger in diameter or a non-circular pipe which is associated with drainage area of more than 50 acres; or an outfall that discharges from a single pipe of 12" or larger in diameter serving lands zoned for industrial activity or a non-circular pipe which is associated with drainage area of 2 acres or more.

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

OUTFALL NUMBER	OUTFALL TYPE	LOCATION	NEIGHBORHOOD	SIZE (INCHES)	TIDEGATES No. OF GATES / NUMBER	RECEIVING WATER
08B066	MAJOR	EASEMENT/VFW PARKWAY	WEST ROXBURY	18		CHARLES RIVER
08B122	MAJOR	EASEMENT/NORTH OF SPRING STREET	WEST ROXBURY	30		CHARLES RIVER
08B126	MINOR	SPRING STREET EXTENDED	WEST ROXBURY	24		CHARLES RIVER
09B049	MAJOR	EASEMENT/RIVERMOOR STREET	WEST ROXBURY	30		COW ISLAND POND/ CHARLES RIVER
10B015	MAJOR	EASEMENT/CHARLES PARK ROAD	WEST ROXBURY	21		COW ISLAND POND/ CHARLES RIVER
11B123	MAJOR	EASEMENT/EAST OF BAKER ST. EXT.	WEST ROXBURY	72		BROOK FARM BROOK
12B010	MINOR	BAKER STREET	WEST ROXBURY	15		BROOK FARM BROOK
12B014	MINOR	BAKER STREET	WEST ROXBURY	12		BROOK FARM BROOK
12B031	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B033	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B124	MAJOR	EASEMENT/LaGRANGE STREET	WEST ROXBURY	120x102		BROOK FARM BROOK
13B002	MINOR	LaGRANGE STREET	WEST ROXBURY	15		UNNAMED STREAM
13B011	MINOR	LaGRANGE STREET	WEST ROXBURY	12		UNNAMED STREAM
06C110	MAJOR	EASEMENT/PLEASANTDALE ST. EXT.	WEST ROXBURY	60		NONE SHOWN
07C006	MAJOR	EASEMENT/VFW PARKWAY/BELLE AVENUE	WEST ROXBURY	126x126		CHARLES RIVER
08C318	MAJOR	WEDGEMERE ROAD	WEST ROXBURY	24		NONE SHOWN
08C319	MINOR	WEDGEMERE ROAD	WEST ROXBURY	24		UNNAMED STREAM
14C009	MAJOR	EASEMENT/WESTGATE ROAD	WEST ROXBURY	36		UNNAMED WETLANDS
21C212	MINOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	30		CHANDLERS POND
22C384	MAJOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	36		CHANDLERS POND
24C174	MINOR	EASEMENT/NEWTON STREET	ALLSTON/BRIGHTON	9x20		CHARLES RIVER
24C031	MAJOR	PARSONS STREET	ALLSTON/BRIGHTON	60x60		CHARLES RIVER
06D057	MINOR	CEDAR CREST CIRCLE	WEST ROXBURY	21		NEPONSET RIVER WETLANDS/CHARLES RIVER
06D083	MINOR	MARGARETTA DRIVE	WEST ROXBURY	15		WETLANDS/CHARLES RIVER
06D084	MINOR	EASEMENT/MARGARETTA DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D085	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D086	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D091	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D184	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	18		WETLANDS/CHARLES RIVER
06D187	MAJOR	EASEMENT/GROVE STREET	WEST ROXBURY	36		BROOK GROVE STREET CEMETERY
13D077/078	MAJOR	WEST ROXBURY PARKWAY/VFW PARKWAY	WEST ROXBURY	2-60		BUSSEY BROOK
24D032	MAJOR	NORTH BEACON STREET, ABOUT 800' EAST OF PARSONS STREET	ALLSTON/BRIGHTON	119X130	1 / 24D032-18	CHARLES RIVER
24D150	MAJOR	SOLDIERS FIELD PLACE	ALLSTON/BRIGHTON	36		CHARLES RIVER
25D033	MAJOR	ABOUT 390' NORTH OF INTERSECTION OF SOLDIERS FIELD ROAD & WESTERN AVENUE	ALLSTON/BRIGHTON	36		CHARLES RIVER
01B024	MAJOR	EASEMENT/LAKESIDE	HYDE PARK	15		SPRAGUE POND/NEPONSET RIVER
03E185	MAJOR	NORTON STREET	HYDE PARK	2-18		WETLANDS/NEPONSET RIVER
03E186	MINOR	RIVER STREET	HYDE PARK	24		MILL POND/MOTHER BROOK
03E207	MINOR	RIVER STREET	HYDE PARK			MILL POND/MOTHER BROOK

ATTACHMENT A
 BOSTON WATER AND SEWER COMMISSION
 STORMWATER OUTFALLS

04E064	MINOR	ALVARADO AVE./RIVER STREET BRIDGE	HYDE PARK	12		MILL POND/MOTHER BROOK
04E069	MAJOR	KNIGHT STREET DAM	HYDE PARK	36		MOTHER BROOK
05E180	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E181	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E182	MINOR	DEDHAM STREET	HYDE PARK	21		UNNAMED STREAM/CHARLES RIVER
05E183	MINOR	GEORGETOWN PLACE/DEDHAM PARKWAY	HYDE PARK	12		UNNAMED STREAM
08E031	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	18		TURTLE POND
08E033	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	UNKNOWN		TURTLE POND
08E035	MINOR	WASHINGTON STREET	WEST ROXBURY	15		TURTLE POND
09E229	MINOR	GRANDVIEW STREET	WEST ROXBURY	12		NONE SHOWN
09E243	MAJOR	BLUE LEDGE TR./EASEMENT	WEST ROXBURY	30		UNNAMED STREAM
13E174	MINOR	EASEMENT/VFW PARKWAY	ROSLINDALE	24		BUSSEY BROOK
13E175	MAJOR	EASEMENT/VFW PARKWAY	ROSLINDALE	108X86		BUSSEY BROOK
13E176	MAJOR	EASEMENT/WELD STREET	ROXBURY	15		NONE SHOWN
25E037	MAJOR	EASEMENT/TELFORD STREET EXTENDED	ALLSTON/BRIGHTON	66		CHARLES RIVER
01F031	MAJOR	EASEMENT/MILLSTONE ROAD	HYDE PARK	48x24		NEPONSET RIVER
02F085	MINOR	LAWTON STREET	HYDE PARK	12		NEPONSET RIVER RESERVATION
02F093	MAJOR	EASEMENT/SIERRA ROAD	HYDE PARK	15		NEPONSET RIVER
02F120	MAJOR	EASEMENT/WOLCOTT CT./HYDE PARK AVE. EXT.	HYDE PARK	54		NEPONSET RIVER
04F016	MAJOR	EASEMENT RIVER STREET	HYDE PARK	30		MOTHER BROOK/NEPONSET RIVER
04F118	MINOR	MASON STREET EXT.	HYDE PARK	18		NEPONSET RIVER
04F119	MAJOR	EASEMENT/HYDE PARK AVE./RESERVATION RD.	HYDE PARK	24		NEPONSET RIVER
04F189	MAJOR	RESERVATION ROAD	HYDE PARK	36		MOTHER BROOK/NEPONSET RIVER
04F191	MINOR	FARADAY STREET	HYDE PARK	24		NONE SHOWN/NEPONSET RIVER
04F203	MINOR	GLENWOOD AVE	HYDE PARK	28		NEPONSET RIVER
04F204	MAJOR	TRUMAN HWY./CHITTICK STREET	HYDE PARK	36		NEPONSET RIVER
05F117	MAJOR	EASEMENT/TRUMAN HWY./WILLIAMS AVE.	HYDE PARK	33		NEPONSET RIVER
05F244	MINOR	HYDE PARK AVENUE BRIDGE	HYDE PARK	20		MOTHER BROOK/NEPONSET RIVER
05F245	MINOR	HYDE PARK AVENUE	HYDE PARK	33		MOTHER BROOK/NEPONSET RIVER
05F253	MAJOR	EASEMENT/BUSINESS ST., NEAR BUSINESS TERRACE	HYDE PARK	48x24		MOTHER BROOK/NEPONSET RIVER
05F254	MINOR	DANA AVENUE	HYDE PARK	12		NEPONSET RIVER
05F265	MAJOR	BEHIND L.E. MASON CO.	HYDE PARK	15		MOTHER BROOK/NEPONSET RIVER
06F233	MINOR	MOUNT ASH ROAD	HYDE PARK	UNK		WETLAND - STONY BROOK RESERVATION
12F322	MINOR	EASEMENT/WALTER STREET	ROSLINDALE	18		NONE SHOWN
13F095	MINOR	EASEMENT/BUSSEY STREET	ROSLINDALE	12		BUSSEY BROOK
14F181	MAJOR	CENTER STREET EXTENSION	ROSLINDALE	38X86		GOLDSMITH BROOK
14F185	MINOR	ALLANDALE STREET	ROSLINDALE	12		BUSSEY BROOK
15F288	MAJOR	ARNOLD ARBORETUM/MURRAY CIRCLE	JAMAICA PLAIN	54		GOLDSMITH BROOK
15F307	MAJOR	ARNOLD ARBORETUM, 100' EAST OF ARBORWAY & SAINT JOSEPH STREET	JAMAICA PLAIN	36X36		GOLDSMITH BROOK
17F012	MINOR	FRANCIS PARKMAN DRIVE	JAMAICA PLAIN	15		JAMAICA POND

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

26F038	MAJOR	HARVARD STREET EXT.	ALLSTON/BRIGHTON	36		CHARLES RIVER
05G112	MAJOR	EASEMENT/RR ROW/WATER ST. EXT.	HYDE PARK	30		NEPONSET RIVER
05G115	MINOR	FAIRMOUNT AVENUE BRIDGE (NORTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116	MINOR	FAIRMOUNT AVE, BRIDGE (SOUTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116A	MINOR	WARREN AVENUE	HYDE PARK	24		NEPONSET RIVER
06G108	MAJOR	EASEMENT/WEST OF WOOD AVE. EXT.	HYDE PARK	69		NEPONSET RIVER
06G109	MAJOR	RIVER TERRACE EXT. NEAR ROSA STREET	HYDE PARK	48		NEPONSET RIVER
06G110	MAJOR	EASEMENT/WEST STREET EXT.	HYDE PARK	30		NEPONSET RIVER
06G111	MINOR	EASEMENT/VOSE STREET EXT., TRUMAN HWY.	HYDE PARK	24		NEPONSET RIVER
06G165	MINOR	TRUMAN HIGHWAY/METROPOLITAN AVE	HYDE PARK	10		NEPONSET RIVER
06G166	MAJOR	ABOUT 30 FEET FROM GUARDRAIL NORTHERLY SIDE OF TRUMAN HIGHWAY NEAR MILTON LINE.	HYDE PARK	36x36		NEPONSET RIVER
11G318	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	24		CANTERBURY BROOK
11G319	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	18		CANTERBURY BROOK
11G344	MAJOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	162X78		CANTERBURY BROOK
18G233	MINOR	WILLOW POND ROAD	JAMAICA PLAIN	15		MUDDY RIVER
19G043	MAJOR	HUNTINGTON AVENUE	ROXBURY/MISSION HALL	45x45		MUDDY RIVER
19G194	MINOR	HUNTINGTON AVENUE	ROXBURY/MISSION HILL	24		MUDDY RIVER
19G199	MINOR	JAMAICA WAY	ROXBURY/MISSION HILL	10		MUDDY RIVER
20G161	MAJOR	EASEMENT/BROOKLINE AVENUE	ROXBURY/MISSION HILL	36		MUDDY RIVER
20G163	MINOR	EASEMENT/RIVERWAY	ROXBURY/MISSION HILL	20		MUDDY RIVER
23G132	MAJOR	EASEMENT/MASS TURNPIKE/WEST OF B. U. BRIDGE	ALLSTON/BRIGHTON	60		CHARLES RIVER
24G034	MAJOR	SOLDIER'S FIELD ROAD, SOUTH OF CAMBRIDGE STREET	ALLSTON/BRIGHTON	36	1 / 24G034-1	CHARLES RIVER
24G035	MAJOR	SOLDIERS FIELD ROAD/BABCOCK STREET	ALLSTON/BRIGHTON	90x84		CHARLES RIVER
25G005	MINOR	FROM WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	12		CHARLES RIVER
25G041	MINOR	SOLDIERS FIELD ROAD/NORTH OF WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	24		CHARLES RIVER
06H106	MINOR	OSCEOLA STREET	HYDE PARK	24		NEPONSET RIVER
06H107	MAJOR	EASEMENT/BELNEL ROAD	HYDE PARK	24		NEPONSET RIVER
07H105	MAJOR	EASEMENT/EDGEWATER/SOUTH RIVER STREET	NEPONSET/MATTAPAN	102x72		NEPONSET RIVER
07H285	MAJOR	BLUE HILL AVENUE	NEPONSET/MATTAPAN	106x63		NEPONSET RIVER
07H287	MINOR	RIVER STREET/EDGEWATER DRIVE	NEPONSET/MATTAPAN	12		NEPONSET RIVER
07H346	MINOR	EDGEWATER DRIVE/HOLMFIELD AVENUE	HYDE PARK	18		NEPONSET RIVER
07H347	MINOR	EDGEWATER DRIVE/BURMAH ROAD	NEPONSET/MATTAPAN	21		NEPONSET RIVER
07H348	MINOR	EDGEWATER DRIVE/TOPALIAN STREET	NEPONSET/MATTAPAN	24		NEPONSET RIVER
12H085	MINOR	MORTON STREET	ROSLINDALE	15		CANTERBURY BROOK
	MAJOR	AMERICAN LEGION HIGHWAY	WEST ROXBURY	24		CANTERBURY BROOK
21H047	MINOR	PALACE ROAD EXT.	BOSTON PROPER	24		MUDDY RIVER

**ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS**

21H048	MINOR	EASEMENT/FENWAY/EVANS WAY	BOSTON PROPER	15		MUDDY RIVER
21H201	MINOR	PALACE ROAD EXT.	BOSTON PROPER	6		MUDDY RIVER
23H040	MINOR	RALEIGH STREET EXT.	BOSTON PROPER	24		CHARLES RIVER
23H042	MAJOR	DEERFIELD STREET	BOSTON PROPER	116x120		CHARLES RIVER
08I153	MINOR	DUXBURY ROAD	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I154	MINOR	EASEMENT/RIVER STREET/GLADSIDE AVE	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I155	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I156	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I158	MINOR	EASEMENT/RIVER STREET/FREMONT ST.	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I207	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I209	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	12		NEPONSET RIVER
11I577	MAJOR	HARVARD STREET	NEPONSET/MATTAPAN	102x102		CANTERBURY BROOK
08J041	MINOR	RIVER STREET	DORCHESTER	18		NEPONSET RIVER
08J102	MINOR	ADAMS STREET	DORCHESTER	15x15		NEPONSET RIVER
08J103	MAJOR	EASEMENT/CENTRAL AVENUE BRIDGE	DORCHESTER	30		NEPONSET RIVER
08J49/50	MAJOR	DESMOND ROAD	DORCHESTER	2-18&24		NEPONSET RIVER
26J052	MINOR	MONSIGNOR O'BRIEN HIGHWAY	BOSTON PROPER	12		CHARLES RIVER
26J055	MINOR	LEVERETT CIRCLE	BOSTON PROPER	12	1 / NOT MAPPED	CHARLES RIVER
27J001	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	72		MILLERS RIVER
27J044	MAJOR	PRISON POINT BRIDGE	CHARLESTOWN	15		MILLERS RIVER
27J096	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	54		MILLERS RIVER
29J029	MINOR	ALFORD STREET/RYAN PLGD. EXT.	CHARLESTOWN	15		MYSTIC RIVER
29J129	MINOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
29J212	MAJOR	EASEMENT/MEDFORD STREET (ALSO OF017)	CHARLESTOWN	72		MYSTIC RIVER
30J006	MAJOR	EASEMENT/ALFORD STREET	CHARLESTOWN	18		MYSTIC RIVER
30J019	MAJOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
30J030	MAJOR	EASEMENT/ARLINGTON AVENUE	CHARLESTOWN	42	1 / NOT MAPPED	MYSTIC RIVER
08K049	MINOR	BEARSE AVENUE	DORCHESTER	12		NEPONSET RIVER
09K016	MINOR	EASEMENT/BEARSE AVENUE EXT.	DORCHESTER	15		NEPONSET RIVER
09K100	MAJOR	EASEMENT/MELLISH ROAD	DORCHESTER	34X24		NEPONSET RIVER
09K101	MINOR	EASEMENT/HUNTOON STREET EXT.	DORCHESTER	24		NEPONSET RIVER
21K069	MAJOR	EAST BERKELEY STREET	BOSTON PROPER	48	1 / 21K069-1	FORT POINT CHANNEL
26K099	MAJOR	CHELSEA STREET EXT.	CHARLESTOWN	84		CHARLES RIVER

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

26K245	MINOR	EASEMENT	CHARLESTOWN	15		CHARLES RIVER
28K018	MAJOR	OLD LANDING WAY EXT.	CHARLESTOWN	42	1 / 28K058	LITTLE MYSTIC CHANNEL
28K061	MAJOR	EASEMENT/MEDFORD STREET	CHARLESTOWN	42	1 / 28K062	LITTLE MYSTIC CHANNEL
28K386	MAJOR	EASEMENT/TERMINAL STREET	CHARLESTOWN	30	1 / 28K385	LITTLE MYSTIC CHANNEL
10L094	MAJOR	EASEMENT/GALLIVAN BOULEVARD	DORCHESTER	74x93		NEPONSET RIVER VIA DAVENPORT BROOK
10L096	MAJOR	HILLTOP AND LENOXDALE STREETS	DORCHESTER	36		NEPONSET RIVER
12L092	MAJOR	PINE NECK CREEK STORM DRAIN TENEAN STREET WEST OF LAWLEY	DORCHESTER	72	2 / 12L294	NEPONSET RIVER
16L097	MAJOR	EASEMENT/OFF SAVIN HILL AVENUE	DORCHESTER	24		PATTEN'S COVE
20L081	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
20L083	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
21L077	MAJOR	CLAFLIN STREET EXT./EAST STREET EXT.	SOUTH BOSTON	24	1 / NOT MAPPED	RESERVED CHANNEL
23L016	MINOR	NORTHERN AVENUE	SOUTH BOSTON	2-15&16		BOSTON INNER HARBOR
23L074	MINOR	SUMMER STREET BRIDGE	SOUTH BOSTON	15		FORT POINT CHANNEL
23L075	MAJOR	CONGRESS STREET BRIDGE	SOUTH BOSTON	54		FORT POINT CHANNEL
23L140	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L145	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L164	MAJOR	CONGRESS STREET BRIDGE	BOSTON PROPER	48	1 / 23L164 IN CHANNEL WALL	FORT POINT CHANNEL
23L195	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
23L196	MAJOR	NEW NORTHERN AVENUE BRIDGE	SOUTH BOSTON	36		FORT POINT CHANNEL
23L202	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
24L057	MINOR	STATE STREET EXT.	BOSTON PROPER	18x18		BOSTON INNER HARBOR
24L233	MAJOR	ROWE'S WHARF/ATLANTIC AVENUE	BOSTON PROPER	42		BOSTON HARBOR
25L058	MAJOR	CHRISTOPHER COLUMBUS PARK - WATERFRONT	BOSTON PROPER	84		BOSTON INNER HARBOR
25L144	MINOR	CLARK STREET	BOSTON PROPER	12		BOSTON INNER HARBOR
26L055	MAJOR	NEAR BATTERY WHARF	BOSTON PROPER	24X24		BOSTON INNER HARBOR
26L070	MAJOR	HANOVER STREET EXT.	BOSTON PROPER	36		BOSTON INNER HARBOR
26L84	MINOR	LEWIS STREET	EAST BOSTON	18		BOSTON INNER HARBOR
27L020	MAJOR	PIER NO. 4 EASEMENT - NAVY YARD	CHARLESTOWN	2-20&24	1 / 27K020-1	BOSTON INNER HARBOR
28L073	MINOR	EASEMENT/4TH STREET - NAVY YARD	CHARLESTOWN	6		LITTLE MYSTIC CHANNEL
28L074/075/ 076	MAJOR	16TH STREET/4TH AVENUE - NAVY YARD	CHARLESTOWN	3-30		LITTLE MYSTIC CHANNEL
28L077	MINOR	EASEMENT/4TH AVENUE - NAVY YARD	CHARLESTOWN	10		LITTLE MYSTIC CHANNEL
11M093	MAJOR	NEPONSET AVENUE AT NROTHWEST END OF NEPONSET AVENUE BRIDGE	DORCHESTER	48		NEPONSET RIVER
12M091	MAJOR	ERICSSON/WALNUT ST.	NEPONSET/MATTAPAN	36		NEPONSET RIVER
17M033	MAJOR	HARBOR POINT PARK (RELOCATED MT. VERNON ST. DRAIN)	DORCHESTER	72		DORCHESTER BAY
21M005	MAJOR	SUMMER STREET	SOUTH BOSTON	18		RESERVED CHANNEL

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

29M032	MINOR	CONDOR STREET	EAST BOSTON	30		CHELSEA RIVER
29M041	MAJOR	EASEMENT/CONDOR STREET	EAST BOSTON	36x30		CHELSEA RIVER
29M049	MINOR	CONDOR STREET	EAST BOSTON	24		CHELSEA RIVER
29N135	MAJOR	ADDISON STREET	EAST BOSTON	30x30		CHELSEA RIVER
28N156	MINOR	COLERIDGE STREET EXT.	EAST BOSTON	12		BOSTON HARBOR
29O001	MAJOR	BENNINGTON STREET	EAST BOSTON	66	1 / 290062	BOSTON HARBOR NEAR CONSTITUTION BEACH
31O004	MINOR	EASEMENT/WALDEMAR AVENUE	EAST BOSTON	15		CHELSEA RIVER
28P001	MINOR	EASEMENT	EAST BOSTON	12		BOSTON HARBOR NEAR CONSTITUTION BEACH
29P015	MINOR	EASEMENT/BARNES AVENUE	EAST BOSTON	12		BELLE ISLE INLET
29P044	MINOR	SHAWSHEEN STREET	EAST BOSTON	12		BOSTON HARBOR
30P062	MINOR	PALERMO AVENUE EXTENSION	EAST BOSTON	12		WETLANDS
31P084	MINOR	EASEMENT/BENNINGTON STREET	EAST BOSTON	30		BELLE ISLE INLET, REVERE

Major : 93

Minor : 102

Total: 195

* Major outfall means : An outfall that discharges from a single pipe of 36" or larger in diameter or a non-circular pipe which is associated with drainage area of more than 50 acres; or an outfall that discharges from a single pipe of 12" or larger in diameter serving lands zoned for industrial activity or a non-circular pipe which is associated with drainage area of 2 acres or more.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203

FACT SHEET

DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
PERMIT TO DISCHARGE TO WATERS OF THE UNITED STATES.

NPDES PERMIT NO.: MAS010001

NAME AND ADDRESS OF APPLICANT:

**Boston Water and Sewer Commission
425 Summer Street
Boston, Massachusetts 02210**

NAME AND ADDRESS OF FACILITIES WHERE DISCHARGES OCCUR:

195 Storm water Outfalls listed in Permit Attachment A

RECEIVING WATERS:

Belle Isle Inlet, Boston Harbor, Boston Inner Harbor, Brook Farm Brook, Bussey Brook, Canterbury Brook, Chandler Pond, Charles River, Chelsea River, Dorchester Bay, Fort Point Channel, Goldsmith Brook, Jamaica Pond, Little Mystic Channel, Mill Pond, Millers River, Mother Brook, Muddy River, Mystic River, Neponset River, Old Harbor, Patten's Cove, Reserved Channel, Sprague Pond, Stony Brook, Turtle Pond, and unnamed wetlands, brooks and streams .

CLASSIFICATION: **Class SB and B**

I. Proposed Action, Type of Facility and Discharge Location.

The Boston Water and Sewer Commission (BWSC), the permittee, is empowered to promulgate rules and regulations regarding the use of its common sewers, including its sanitary sewers, combined sewers and storm drains. BWSC applied for its Municipal Separate Storm Sewer System (MS4) permit, which will discharge storm water from 195 identified separate storm sewer outfalls to receiving waters listed in Attachment A.

1. Discharge Characteristics

At the time of this draft, BWSC operates 195 identified separate storm sewer outfalls. Locations, size, and receiving waters for these outfalls are identified in Attachment A. Storm water discharge sampling results from five representative outfalls are shown on Table 3-21 of the permit application (Part II) dated May 17, 1993 and are included as Attachment B. A discussion of the results of sampling can be found in Part II Chapter 3 of the application.

2. Limitations and Conditions.

Permit conditions and all other requirements described herein may be found in Part I of the draft permit. No numeric effluent limitations have been established for this draft permit.

3. Permit Basis and Explanation of Permit Conditions.

As authorized by Section 402(p) of the Act, this permit is being proposed on a system-wide basis. This permit covers all areas under the jurisdiction of BWSC or otherwise contributing to discharges from municipal separate storm sewers owned or operated by the permittee.

a. Statutory basis for permit conditions. The conditions established by this permit are based on Section §402(p)(3)(B) of the Act which mandates that a permit for discharges from MS4s must: effectively prohibit the discharge of non-storm water to the MS4 and require controls to reduce pollutants in discharges from the MS4 to the maximum extent practicable including best management practices, control techniques, and system design and engineering methods, and such other provisions determined to be appropriate. MS4s are required to achieve compliance with Water Quality Standards. Section 301(b)(1)(C) of the Act, requires that NPDES permits include limitations, including those necessary to meet water quality standards. The intent of the permit conditions is to meet the statutory mandate of the Act.

EPA has determined that under the provisions of 40 CFR 122.44(k) the permit will include Best Management Practices (BMPs). A comprehensive Storm Water Management Program (SWMP) includes BMPs to demonstrate compliance with the maximum extent practicable standard. Section 402(p)(3)(B)(iii) of the Act clearly includes structural controls as a component of the maximum extent practicable requirement as necessary to achieve compliance with Water Quality Standards.

EPA encourages the permittee to explore opportunities for pollution prevention measures, while reserving the more costly structural controls for higher priority watersheds, or where pollution prevention measures prove unfeasible or ineffective in achieving water quality goals and standards.

b. Regulatory basis for permit conditions. As a result of the statutory requirements of the Act the EPA promulgated the MS4 Permit application regulations, 40 CFR 122.26(d). These regulations describe in detail the permit application requirements for operators of MS4s. The information in the application (Parts 1 and 2) and supplemental information provided in June 1995 and June 1998 was used to develop the draft permit conditions.

4. Discharges Authorized By This Permit.

a. Storm water. This permit authorizes all existing or new storm water point source discharges to waters of the United States from the MS4.

b. Non-storm water. This permit authorizes the discharge of storm water commingled with flows contributed by wastewater, or Storm Water Associated with Industrial Activity, provided such discharges are authorized by separate NPDES permits and in compliance with the permittee's regulations regarding the use of storm drains. Nothing in this draft permit conveys a right to discharge to the permittee's system without the permittee's authorization. In addition, certain types of non-storm waters identified in the draft permit at Part I.B.2.g. are authorized if appropriately addressed in the permittee's Storm Water Management Program.

The following demonstrates the difference between the Act's statutory requirements for discharges from municipal storm sewers and industrial sites:

i. Section 402(p)(3)(B) of the Act requires an effective prohibition on non-storm water discharges to a MS4 and controls to reduce the discharge of pollutants from the MS4 to the Maximum Extent Practicable (MEP).

ii. Section 402(p)(3)(A) of the Act requires compliance with treatment technology (BAT/BCT) and Section 301 water quality requirements on discharges of Storm Water Associated with Industrial Activity.

The Act requires Storm Water Associated with Industrial Activity discharging to the MS4 to be covered by a separate NPDES permit. However, the permittee is responsible for the quality of the ultimate discharge, and has a vested interest in locating uncontrolled and unpermitted discharges to the system.

c. Spills. This permit does not authorize discharges of material resulting from a spill. If discharges from a spill are unavoidable to prevent imminent threat to human life, personal injury, or severe property damage, the permittee has the responsibility to take (or insure the party responsible for the spill takes) reasonable and prudent measures to minimize the impact of discharges on human health and the environment.

5. Receiving Stream Segments and Discharge Locations.

The permittee discharges to the receiving waters listed in Attachment A, which are classified according to the Massachusetts Surface Water Quality Standards as Class B, B_{CSO}, SB, and SB_{CSO} water bodies. Despite variance conditions and CSO designation, storm water discharges shall achieve compliance with Class B and SB standards. Class B and SB waters shall be of such quality that they are suitable for the designated uses of protection and propagation of fish, other aquatic life and wildlife; and for primary and secondary contact recreation. Notwithstanding specific conditions of this permit, the discharges must not lower the quality of any classified water body below such classification, or lower the existing quality of any water body if the existing quality is higher than the classification, except in accordance with Massachusetts' Antidegradation Statutes and Regulations.

6. SWMP.

The following prohibitions apply to discharges from MS4s and were considered in review of the current management programs which the permittee is operating. In implementing the SWMP, the permittee is required to select measures or activities intended to achieve the following prohibitions.

No discharge of toxics in toxic amounts. The discharge of toxics in toxic amounts is prohibited (Section 101(a)(3) of the Act).

No discharge of pollutants in quantities that would cause a violation of State water quality standards. Section 301(b)(1)(C) of the Act and 40 CFR 122.44(d) require that NPDES permits include "...any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to State law or regulations..." Implementation of the SWMP is reasonably expected to provide for protection of State water quality standards.

No discharge of non-storm water from the municipal separate storm sewer system, except in accordance with Part II.B.2. Permits issued to MS4s are specifically required by Section 402(p)(3)(B) of the Act to "...include a requirement to effectively prohibit non-storm water discharges into the storm sewers..." The regulations (40 CFR 122.26(d)(2)(iv)(B)(1)) allow the permittee to accept certain non-storm water discharges where they have not been identified as significant sources of pollutants. Any discharge allowed by the permittee and authorized by a separate NPDES permit is not subject to the prohibition on non-storm water discharges.

No numeric effluent limitations are proposed in the draft permit. In accordance with 40 CFR §122.44(k), the EPA has required a series of Best Management Practices, in the form of a comprehensive SWMP, in lieu of numeric limitations.

7. Storm Water Management Program.

BWSC provided updates to its SWMP in June 1995 and June 1998. The current SWMP addresses all required elements. Some of the elements of the SWMP are wholly or in part the responsibility of the City of Boston rather than BWSC. The permit requires the permittee to cooperate with appropriate municipal agencies to assure that the goals of the SWMP are achieved by building upon existing programs and procedures which address activities impacting storm water discharges to the MS4.

EPA has requested permit application information from the City of Boston. This information will be used to develop permit conditions for the City to implement the SWMP measures which are under its control. This will be effected through a permit modification identifying the City as a co-permittee and specifying its responsibilities or through the issuance of a separate permit to the City.

Table A identifies the required elements of the SWMP, the regulatory cite, and the relevant draft permit condition.

Table A - Storm Water Management Program Elements

Required Program Element	Permit Parts	Regulatory References (40 CFR 122.26...)
Structural Controls	I.B.2.b	(d) (2) (iv) (A) (1)
Areas of new development & significant redevelopment	I.B.2.c	(d) (2) (iv) (A) (2)
Roadways	I.B.2.d	(d) (2) (iv) (A) (3)
Flood Control Projects	I.B.2.e	(d) (2) (iv) (A) (4)
Pesticides, Herbicides, & Fertilizers Application	I.B.2.f	(d) (2) (iv) (A) (6)
Illicit Discharges and Improper Disposal	I.B.2.g	(d) (2) (iv) (B) (1) - (3), (iv) (B) (7)
Spill Prevention and Response	I.B.2.h	(d) (2) (iv) (B) (4)
Industrial and High Risk Runoff	I.B.2.i	(d) (2) (iv) (C), (iv) (A) (5)
Construction Site Runoff	I.B.2.j	(d) (2) (iv) (D)
Public Education	I.B.2.k	(d) (2) (iv) (A) (6), (iv) (B) (5), (iv) (B) (6)
Monitoring Program	I.C	(d) (2) (iv) (B) (2), (iii), (iv) (A), (iv) (C) (2)

Attachment C provides a discussion of the permit condition and the permittee's existing SWMP.

8. Legal Authority. BWSC has demonstrated its authority to promulgate regulations regarding the use of its common sewers, including its sanitary sewers, combined sewers and storm drains. Regulations Governing the Use of Sanitary and Combined Sewers and Storm Drains of the Boston Water and Sewer Commission were adopted January 15, 1998 and effective February 27, 1998.

9. **Resources.** Part I.B.6 of the permit requires the permittee to provide adequate support capabilities to implement its activities under the SWMP. Compliance with this requirement will be demonstrated by the permittee's ability to fully implement the SWMP, monitoring programs, and other permit requirements. The permit does not require specific funding or staffing levels, thus providing the permittee with the ability, and incentive, to adopt the most efficient and cost effective methods to comply with the permit requirements. The draft permit also requires an Annual Report (Part I.E.) which includes an evaluation of resources to implement the plan.

10. **Monitoring and Reporting.**

a. Monitoring. The BWSC sampled five locations which were selected to provide representative data on the quality and quantity of discharges from the MS4 as a whole. Parameters sampled included conventional, non-conventional, organic toxics, and other toxic pollutants. The EPA reviewed this information during the permitting process. Monitoring data is intended to be used by the BWSC to assist in its determination of appropriate storm water management practices. EPA used the data to identify the minimum parameters for sampling under Part I.C of the permit.

The BWSC is required (40 CFR §122.26(d)((2)(iii)(C) and (D)) to monitor the MS4 to provide data necessary to assess the effectiveness and adequacy of SWMP control measures; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from major outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation. The BWSC is responsible for conducting any additional monitoring necessary to accurately characterize the quality and quantity of pollutants discharged from the MS4.

EPA will make future permitting decisions based on the monitoring data collected during the permit term and available water quality information. Where the required permit term monitoring proves insufficient to show pollutant reductions, the EPA may require more stringent Best Management Practices, or where necessary to protect water quality, establish numeric effluent limitations.

1. Representative monitoring: The monitoring of the discharge of representative outfalls during actual storm events will provide information on the quality of runoff from the MS4, a basis for estimating annual pollutant loadings, and a mechanism to evaluate reductions in pollutants discharged from the MS4. Results from the monitoring program will be submitted annually with the annual report.

2. Requirements: The BWSC shall monitor representative discharges to characterize the quality of storm water discharges from the MS4. Within 90 days after the effective date of this permit, the BWSC will submit its proposed sampling plan. The BWSC shall choose five locations representing the different land uses or drainage areas representative of the system, with a focus on what it considers priority areas, such as an outfall in the vicinity of a public beach or a shellfish bed. This submittal shall also include any related monitoring which the BWSC has done since its MS4 permit application was submitted. Unless commented on or denied by the Director within 60 days after its submittal, the proposed sampling plan shall be deemed approved.

3. Parameters: The EPA established minimum permit parameter monitoring requirements based on the information available regarding storm water discharges and potential impacts of these discharges. The basic parameter list allows satisfaction of the regulatory requirement [40 CFR §122.26(d)(2)(iii)] to provide estimates of pollutant loadings for each major outfall.

4. Frequency: The frequency of annual monitoring is based on monitoring at least one representative storm event three times a year. The plan should consider sampling events in the spring, summer, and fall (excluding January to March). Monitoring frequency is based on permit year, not a calendar year. The first complete calendar year monitoring could be less than the stated frequency.

5. Receiving Water Quality Monitoring: The draft permit is conditioned to include four sampling stations to assess the impact of storm water discharges from the MS4 to receiving waters. The permittee shall submit a plan to sample four locations three times a year for the permit term within 90 days of the effective date of the permit. The minimum parameters for analysis are consistent with the representative monitoring requirements.

b. Screening. The draft permit requires two screening programs. Part I.C.6 requires the permittee to develop a Wet Weather Screening Program. This screening shall record physical observations of wet weather flows from all major outfalls at least once during the permit term. The program will identify discharges which may be contributing to water quality impairments short of analytical monitoring. Part I.D. requires a dry weather screening program.

c. Reporting. The permittee is required (40 CFR §122.42(c) (1)) to contribute to the preparation of an annual system-wide report including the status of implementing the SWMP; proposed changes to the SWMP; revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application; a summary of the data, including monitoring data, that is accumulated throughout the reporting year; annual expenditures and the budget for the year following each annual report; a summary describing the number and nature of enforcement actions, inspections, and public education programs; and identification of water quality improvements or degradation. Part I.E. of the draft permit requires the permittee to do annual evaluations on the effectiveness of the SWMP, and institute or propose modifications necessary to meet the overall permit standard of reducing the discharge of pollutants to the maximum extent practicable. In order to allow the orderly collection of budgetary and monitoring data it was determined to establish the annual report due date relative to the permittee's annual fiscal year. BWSC's fiscal year ends on **December 31** and the annual report is due on **March 1** each year commencing March 1, 1999.

11. Permit Modifications.

a. Reopener Clause. The EPA may reopen and require modifications to the permit (including the SWMP) based on the following factors: changes in the State's Water Quality Management Plan and State or Federal requirements; adding co-permittee(s); SWMP changes impacting compliance with permit requirements; other modifications deemed necessary by the EPA to adhere to the requirements of the Clean Water Act. Co-permittees may be incorporated into this permit or separate permits may be required as necessary to achieve the goals of the SWMP. Implementation of the SWMP is expected to result in the protection of water quality. The draft permit contains a reopener clause should new information indicate that the discharges from the MS4 are causing, or are significantly contributing to, a violation of the State's water quality standards.

b. SWMP Changes. The SWMP is intended to be a tool to achieve the maximum extent practicable and water quality standards. Therefore, minor changes and adjustments to the various SWMP elements are expected and encouraged where necessary. Changes may be necessary to more successfully adhere to the goals of the permit. Part I.B.7.c of the draft permit describes the allowable procedure for the permittee to make changes to the SWMP. Any changes requested by a permittee shall be reviewed by the EPA and DEP. The EPA and DEP have 60 days to respond to the permittee and inform the permittee if the suggested changes will impact or change the SWMP's compliance with a permit requirement.

c. Additions. The EPA intends to allow the permittee to annex lands, activate new outfalls, deactivate existing outfalls, and accept the transfer of operational authority over portions of the MS4 without mandating a permit modification. Implementation of appropriate SWMP elements for these additions (annexed land or transferred authority) is required. Upon notification of the additions in the Annual Report, the EPA shall review the information to determine if a modification to the permit is necessary based on changed circumstances.

The remaining conditions of the permit are based on the NPDES regulations, 40 CFR Parts 122 through 125, and consist primarily of management requirements common to all permits.

II. State Certification Requirements.

EPA may not issue a permit unless the State Water Pollution Control Agency with jurisdiction over the receiving waters certifies that the effluent limitations contained in the permit are stringent enough to assure that the discharge will not cause the receiving water to violate State Water Quality Standards. The staff of the Massachusetts Department of Environmental Protection has reviewed the draft permit and advised EPA that the limitations are adequate to protect water quality. EPA has requested permit certification by the State and expects that the draft permit will be certified.

III. Comment Period, Hearing Requests and Procedures for Final Decisions.

All persons, including applicants, who believe any condition of the draft permit is inappropriate must raise all issues and submit all available arguments and all supporting material for their arguments in full by the close of the public comment period, to the U.S. EPA, Planning and Administration (SPA), P.O. Box 8127, Boston, MA 02114. Any person, prior to such date, may submit a request in writing for a public hearing to consider the draft permit to EPA and the State Agency. Such requests shall state the nature of the issues proposed to be raised in the hearing. A public hearing may be held after at least thirty days public notice whenever the Regional Administrator finds that response to this notice indicates significant public interest. In reaching a final decision on the draft permit the Regional Administrator will respond to all significant comments and make those responses available to the public at EPA's Boston Office.

Following the close of the comment period, and after a public hearing, if such hearing is held, the Regional Administrator will issue a final permit decision and forward a copy of the final decision to the applicant and to each person who has submitted written comments or requested notice. Within 30 days following the notice of the final permit decision any interested person may submit a request for a formal hearing to reconsider or contest the final decision. Requests for formal hearings must satisfy the requirements of 40 CFR §124.74, 48 Fed. Reg. 14279-14280 (April 1, 1983).

IV. EPA Contact

Additional information concerning the draft permit may be obtained between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, excluding holidays from:

Jay Brolin
U.S. Environmental Protection Agency
John F. Kennedy Federal Building
Office of Ecosystem Protection (CMA)
Boston, MA 02203-0001
Telephone: (617) 565-9453 Fax: (617) 565-4940

September 2, 1998
Date

Linda M. Murphy, Director
Office of Ecosystem Protection
U.S. Environmental Protection Agency

Attachment C

Structural Controls: The permittee shall operate the separate storm sewer system and any storm water structural controls in a manner to reduce the discharge of pollutants to the Maximum Extent Practicable. The permittee's existing SWMP includes operation and maintenance procedures to include an inspection schedule of storm water structural controls adequate to satisfy the permit condition.

Areas of New Development and Significant Redevelopment: The permittee has no authority over land use issues. The draft permit is conditioned to require the permittee to coordinate with the appropriate municipal agencies as it relates to discharges to the MS4. The permittee has its own site plan review process relating to new or modified connections for water, sewer, and drains and has the authority to require controls on discharges to the storm drain system during and after construction.

Roadways: The permittee has no authority to ensure that public streets, roads, and highways are operated and maintained in a manner to minimize discharge of pollutants, including those pollutants related to deicing or sanding activities. The draft permit is conditioned to require the permittee to coordinate with appropriate municipal agencies as it relates to discharge to the MS4.

Pesticide, Herbicide, and Fertilizer Application: The permittee shall coordinate with appropriate municipal agencies to evaluate existing measures to reduce the discharge of pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied to public property.

Non-Storm Water discharges: Non-storm water discharges shall be effectively prohibited. However, the permittee may allow certain non-storm water discharges as listed in 122.26(d)(2)(iv)(B)(1) and Part I.B.2 of the draft permit. The permittee has identified allowable non-storm water discharges in its regulations.

The permittee shall implement controls to prevent discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall also control the infiltration of seepage from sanitary sewers into the MS4. This is presently accomplished through the permittee's illicit connection program and it's Inflow/Infiltration program.

The discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into the MS4 is prohibited in accordance with the permittee's regulations. The permittee shall coordinate with appropriate

regulations. The permittee shall coordinate with appropriate public and private agencies to ensure continued implementation of programs to collect used motor vehicle fluids (at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal and to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. The City of Boston has an existing program.

Illicit Discharges and Improper Disposal: The BWSC shall continue to implement its program to locate and eliminate illicit discharges and improper disposal into the MS4. This program shall include dry weather screening activities to locate portions of the MS4 with suspected illicit discharges and improper disposal. Follow-up activities to eliminate illicit discharges and improper disposal may be prioritized on the basis of magnitude and nature of the suspected discharge; sensitivity of the receiving water; and/or other relevant factors. This program shall establish priorities and schedules for screening the entire MS4 at least once every five years. At present the permittee has on-going programs in Brighton (BOS 032) discharges to the Charles River, discharges to Brookline's Village and Tannery Brook drainage systems, and discharges through Dedham to Mother Brook. Facility inspections may be carried out in conjunction with other programs (e.g. pretreatment inspections of industrial users, health inspections, fire inspections, etc.).

The BWSC shall eliminate illicit discharges as expeditiously as possible and require the immediate termination of improper disposal practices upon identification of responsible parties. Where elimination of an illicit discharge within sixty (60) days is not possible, the BWSC shall establish an expeditious schedule for removal of the discharge. In the interim, the BWSC shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

Spill Prevention and Response: The permittee shall coordinate with appropriate municipal agencies to implement a program to prevent, contain, and respond to spills that may discharge into the MS4. The existing spill response program in the City includes a combination of spill response actions by the permittee, municipal agencies and private entities. The permittee's regulations include legal requirements for public and private entities within the permittee's jurisdiction.

Industrial & High Risk Runoff: The permittee shall coordinate with EPA and DEP to develop a program to identify and control pollutants in storm water discharges to the MS4 from municipal landfills; other treatment, storage, or disposal facilities for municipal waste (e.g. transfer stations, incinerators, etc.);

hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge which the permittee determine is contributing a substantial pollutant loading to the MS4 shall be implemented. The program shall include inspections, a monitoring program and a list of industrial storm water sources discharging to the MS4 which shall be maintained and updated as necessary. This requirement is not meant to cover all such discharges, but is intended to prioritize those discharges from this group which are believed to be contributing pollutants to the MS4 and to identify those dischargers which may require NPDES permit coverage or are not in compliance with existing permits.

Construction Site Runoff: The permittee shall coordinate with appropriate municipal agencies to implement a program to reduce the discharge of pollutants from construction sites to the separate storm sewer. This program shall include: requirements for the use and maintenance of appropriate structural and non-structural control measures to reduce pollutants discharged to the MS4 from construction sites; inspection of construction sites and enforcement of control measure requirements required by the permittee; appropriate education and training measures for construction site operators; and notification of appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff and any post-construction permitting.

Public Education: The permittee shall coordinate with appropriate municipal agencies to implement a public education program with the following elements: (a) a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials into the MS4; (b) a program to promote, publicize, and facilitate the proper management and disposal of used oil and household hazardous wastes; and (c) a program to promote, publicize, and facilitate the proper use, application, and disposal of pesticides, herbicides, and fertilizers.

**DOCUMENTATION IN SUPPORT
OF REBUTTAL COMMENTS OF
JOINT TEST CLAIMANTS**

**CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD, SAN DIEGO REGION,
ORDER NO. R9-2009-0002, TC-10-11**

INDEX

FEDERAL CASES	TAB
<i>Appalachian Power Co. v. EPA</i> (D.C. Cir. 200) 208 F.3d 1015	1
<i>Defenders of Wildlife v. EPA</i> (10 th Cir. 2005) 415 F.3d 1121	2
<i>Iowa League of Cities v. EPA</i> (8 th Cir. 2013) 711 F.3d 844	3
<i>Nat'l Env't. Dev. Ass'ns Clean Air Project v. EPA</i> (D.C. Cir. 2014) 752 F.3d 999	4
<i>Nat'l Res. Def. Council v. EPA</i> (D.C. Cir. 2011) 643 F.3d 311	5
<i>Nat'l Res. Def. Council v. EPA</i> (9 th Cir. 2015) 779 F.3d 1119	6
<i>Sierra Club v. EPA</i> (D.C. Cir. 2012) 699 F.3d 530	7
<i>U.S. Telecom. Ass'n v. FCC</i> (D.C. Cir. 2005) 400 F.3d 29	8
<i>Virginia Dept. of Transp. v. EPA</i> (E.D. Va. 2013) 43 CLR 20002	9
FEDERAL STATUTES AND REGULATIONS	
33 U.S.C. § 1362	10
40 C.F.R. § 122.21	11
40 C.F.R. § 123.25	12
40 C.F.R. § 124.8	13
40 C.F.R. § 131.2	14
40 C.F.R. § 131.3	15
CALIFORNIA STATUTES	
Evid. Code § 452	16
Govt. Code § 11515	17
Water Code § 13050	18
Water Code § 13170.2	19
Water Code § 13201	20
Water Code § 13240	21
Water Code § 13241	22
Water Code § 13260	23
Water Code § 13263	24
Water Code § 13376	25
Water Code § 13377	26

CALIFORNIA EXECUTIVE ORDERS	
State Water Resources Control Board, Order No. WQ 2015-0075	27
California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Fact Sheet	28
California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Attachment A	29
California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Attachment C	30
COMMISSION ON STATE MANDATES, STATEMENTS OF DECISION	
Statement of Decision, Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21 (July 31, 2009)	31
Statement of Decision, Test Claim Nos. 10-TC-12 and 12-TC-01 (December 5, 2014)	32

Tab 1

Appalachian Power Co. v. EPA

United States Court of Appeals for the District of Columbia Circuit

February 8, 2000, Argued ; April 14, 2000, Decided

No. 98-1512, Consolidated with Nos. 98-1536, 98-1537, 98-1538, 98-1540 & 98-1542

Reporter

208 F.3d 1015 *; 2000 U.S. App. LEXIS 6826 **; 341 U.S. App. D.C. 46; 30 ELR 20560; 50 ERC (BNA) 1449

APPALACHIAN POWER COMPANY, ET AL.,
PETITIONERS v. ENVIRONMENTAL
PROTECTION AGENCY, RESPONDENT

Prior History: [**1] On Petitions for Review of
an Order of the Environmental Protection Agency.

Core Terms

EPA, monitoring, requirements, testing,
regulations, permits, emission standards,
authorities, Air, applicable requirements, federal
standard, rulemaking, emission, promulgated,
binding, pollutants, agencies, limitations,
frequency, notice, petitioners', revise, amend,
procedures, sources, terms, policy statement,
noninstrumental, instrumental, one-time

Case Summary

Procedural Posture

Petitioner's sought review of an order of the Environmental Protection Agency, which released a document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs" outlining periodic monitoring of source point emissions subject to Title V of the Clean Air Act Amendments of 1990.

Overview

In consolidated petitions for review, petitioners, electric power companies and trade associations representing the nation's chemical and petroleum industry, challenged the validity of portions of an Environmental Protection Agency (EPA) document

entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs" (Guidance). The court of appeals set aside the Guidance in its entirety. The court found that provisions of the Guidance directing state permitting authorities to conduct wide-ranging sufficiency reviews and to enhance the monitoring required in individual permits beyond that contained in state or federal emission standards significantly expanded the scope of 40 C.F.R. § 70.6(a)(3)(i)(B). The court held that these provisions should have been subject to the rulemaking procedures required by 42 U.S.C.S. § 7607(d). Accordingly, in view of the intertwined nature of the challenged and unchallenged portions of the Guidance, the court concluded that the Guidance must be set aside in its entirety.

Outcome

Upon petition for review, an Environmental Protection Agency document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs" (Guidance) on finding certain Guidance provisions should have been subject to the rulemaking procedures required under federal law.

LexisNexis® Headnotes

Environmental Law > Air Quality > General
Overview

Environmental Law > Air Quality > Operating
Permits

HNI See 40 C.F.R. § 70.6(a)(3).

Administrative Law > Agency

Rulemaking > Informal Rulemaking

Environmental Law > Air

Quality > Enforcement > Administrative Proceedings

HN2 Only legislative rules have the force and effect of law. A legislative rule is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act.

Administrative Law > Agency

Rulemaking > Negotiated Rulemaking

Governments > Federal Government > Claims By & Against

HN3 If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."

Administrative Law > Agency

Rulemaking > Informal Rulemaking

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Publication

HN4 5 U.S.C.S. § 552(a)(1)(D) requires publication in the Federal Register of all interpretations of general applicability.

Administrative Law > Agency

Rulemaking > Informal Rulemaking

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

HN5 5 U.S.C.S. § 552(a)(2)(B) requires agencies to make available for inspection and copying those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.

Administrative Law > Agency

Rulemaking > Informal Rulemaking

Administrative Law > Agency

Rulemaking > Negotiated Rulemaking

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

Environmental Law > Air Quality > General Overview

Environmental Law > Air

Quality > Enforcement > Administrative Proceedings

HN6 Under the Administrative Procedure Act (APA), a rule may consist of part of an agency statement of general or particular applicability and future effect. 5 U.S.C.S. § 551(4). Interpretative rules and policy statements may be rules within the meaning of the APA and the Clean Air Act, although neither type of rule has to be promulgated through notice and comment rulemaking. See 42 U.S.C.S. § 7607(d)(1), referring to 5 U.S.C.S. § 553(b)(A) & (B).

Administrative Law > Agency

Rulemaking > Informal Rulemaking

Administrative Law > Judicial

Review > Reviewability > Reviewable Agency Action

HN7 In the administrative setting, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Administrative Law > Judicial

Review > Reviewability > Reviewable Agency Action

HN8 The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.

Administrative Law > Agency

Rulemaking > Negotiated Rulemaking

Environmental Law > Air

Quality > Enforcement > Administrative Proceedings

HN9 An agency may not escape the notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation. Courts must still look to whether the interpretation itself carries the force and effect of law, or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe.

Environmental Law > Air Quality > General Overview

Environmental Law > Air Quality > Operating Permits

HN10 See 42 U.S.C.S. § 7661c(b).

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Negotiated Rulemaking

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN11 The Environmental Protection Agency cannot amend its regulations without complying with the rulemaking procedures required by 42 U.S.C.S. § 7607(d).

Administrative Law > Judicial Review > General Overview

Environmental Law > Solid Wastes > Disposal Standards

HN12 Partial affirmance of agency action is not an option when there is substantial doubt that the agency would have adopted the severed portion on its own.

Environmental Law > Air Quality > General Overview

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Environmental Law > Air Quality > Operating Permits

HN13 State permitting authorities therefore may not, on the basis of Environmental Protection Agency's "Periodic Monitoring Guidance for Title V Operating Permits Programs" or 40 C.F.R. § 70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test.

Counsel: Lauren E. Freeman argued the cause for petitioners. With her on the briefs were Henry V. Nickel, Leslie Sue Ritts, Michael H. Levin, Edmund B. Frost, David F. Zoll, Alexandra Dapolito Dunn, John Reese, Charles F. Lettow, Marcilynn A. Burke, L. Burton Davis, William H. Lewis, Michael A. McCord and Ellen Siegler. Michael P. McGovern and Neal J. Cabral entered appearances.

Jon M. Lipshultz, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the briefs were Lois J. Schiffer, Assistant Attorney General, and Gregory B. Foote, Attorney, Environmental Protection Agency.

Judges: Before: WILLIAMS, HENDERSON, and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge RANDOLPH.

Opinion by: RANDOLPH

Opinion

[*1017] RANDOLPH, *Circuit Judge*: These consolidated petitions for judicial review, brought by electric power companies, and trade associations representing the nation's chemical and petroleum industry, challenge the validity of portions of an EPA document entitled "Periodic Monitoring Guidance," released in 1998. In the alternative, petitioners seek review of a 1992 EPA rule [**2] implementing Title V of the Clean Air

Amendments of 1990.

I.

Title V of the 1990 amendments to the Clean Air Act altered the method by which government regulated the private sector to control air pollution. Henceforth, stationary sources of air pollution, or of potential air pollution, must obtain operating permits from State or local authorities administering their EPA-approved implementation plans. The States must submit to EPA for its review all operating permits and proposed and final permits. See 42 U.S.C. § 7661d. EPA has 45 days to object; if it does so, "the permitting authority may not issue the permit," *id.* § 7661d(b)(3).¹ Congress instructed EPA to pass regulations establishing the "minimum elements of a permit program to be administered by any air pollution control agency," including "Monitoring and reporting requirements." 42 U.S.C. § 7661a(b). Under Title V, the Governor of each State could submit to EPA a permit program by November 15, 1993, to comply with Title V and with whatever regulations EPA had promulgated in the interim. See 42 U.S.C. § 7661a(d). This was to be accompanied [**3] by a legal opinion from the State's attorney general that the laws of the State contained sufficient authority to authorize the State to implement the program. *Id.* If a State decided not to participate, or if EPA disapproved the State's program, federal sanctions would kick in, including a cut-off of federal highway funds and an EPA takeover of permit-issuing authority within the State. See Commonwealth of Virginia v. Browner, 80 F.3d 869, 873-74 (4th Cir. 1996).

HNI EPA promulgated rules implementing the Title V permit program in 1992. The rules list the items each State permit program must contain,²

¹ If the State permitting authority fails to revise the permit to satisfy EPA's objection, EPA shall issue or deny the permit, at which point EPA's action becomes subject to judicial review. See 42 U.S.C. § 7661d(c).

² The list is nicely summarized in DAVID R. WOOLEY, CLEAN

including this one:

(3) *Monitoring and related record-keeping and reporting requirements.* (i) Each permit shall contain the following requirements [**4] with respect to monitoring:

(A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;

(B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring [*1018] (which may consist of record-keeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph(a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent [**5] with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section; and

(C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods....

40 C.F.R. § 70.6(a)(3).

The key language--key because this dispute revolves around it--is in the first sentence of § 70.6(a)(3)(i)(B). Permits contain terms and conditions with which the regulated entities must comply. Some of the terms and conditions--in regulatory lingo, "applicable requirements" (see § 70.6(a)(3)(i)(B))³--consist of emission limitations and standards, State and federal. Experts in the field know that federal emission standards, such as those issued for hazardous air pollutants and new stationary sources, contain far more than simply limits on the [**6] amount of pollutants emitted.

Take for instance the following examples drawn at random from the Code of Federal Regulations. The national emission standard for hazardous air pollutants from primary lead smelting is contained in 40 C.F.R. §§ 63.1541-1550. In addition to emission limits,⁴ [**8] the operator must comply with detailed and extensive testing requirements [**7] contained in § 63.8 of the regulations, and must monitor certain pressure drops daily; make weekly checks to ensure that dust is being removed from hoppers; perform quarterly

³ One EPA official explained:

Permits must incorporate terms and conditions to assure compliance with all applicable requirements under the Act, including the [state implementation plan], title VI, sections 111 and 112, the sulfur dioxide allowance system and NOx limits under the acid rain program, emission limits applicable to the source, monitoring, recordkeeping and reporting requirements, and any other federally-recognized requirements applicable to the source.

John S. Seitz, Director, Office of Air Quality Planning and Standards, *Developing Approvable State Enabling Legislation Required to Implement Title V*, at p. 4 (Feb. 25, 1993).

⁴ See 40 C.F.R. § 63.1543(a):

No owner or operator of any existing, new, or reconstructed primary lead smelter shall discharge or cause to be discharged into the atmosphere lead compounds in excess of 500 grams of lead per megagram of lead metal produced ... from the aggregation of emissions discharged from the air pollution control devices used to control emissions from the sources [listed].

inspections of fans, and so forth. *Id.* § 63.1547. Or consider the standards of performance for new stationary sources contained in 40 C.F.R. part 60, one of the thickest of the dozen or so volumes EPA commands in the C.F.R. In the "beverage can surface coating industry," those subject to these regulations must--if they use "a capture system and an incinerator"--install some sort of "temperature measurement device," properly calibrated and having a specified accuracy stated in terms of degrees Celsius. 40 C.F.R. § 60.494.⁵ Or if the new source is in the rubber tire manufacturing industry, an operator doing a "green tire spraying operation" using organic solvent-based sprays must install "an organics monitoring device used to indicate the concentration level of organic compounds [**1019] based on a detection principle such as infrared ..., equipped with a continuous recorder, for the outlet of the carbon bed." *Id.* § 60.544(a)(3).

Typically, EPA delegates to the States its authority to require companies to comply with these federal standards. The States incorporate the federal standards in their implementation plans and, under Title V of the 1990 law, the applicable standards become terms and conditions in permits. States too have their own emissions limitations and standards in their implementation plans, which they need in order to comply with national ambient air quality standards. See 40 C.F.R. part 52; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 846, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984); *Union Electric Co. v. EPA*, 427 U.S.

⁵ If the facility does not use a capture system, it must calculate its emission limits using a series of equations provided by EPA. For some idea of the complexity of this exercise, consider that the facility must figure its total volume of coating solids per month using the following equation:

$$L[s] = \sum_{i=1}^n L[ci]V[si]$$

40 C.F.R. § 60.493(b)(1)(i)(B). It would serve no useful purpose to explain this or the many other equations in the sequence.

246, 249-50, 49 L. Ed. 2d 474, 96 S. Ct. 2518 (1976); [**9] Commonwealth of Virginia v. EPA, 323 U.S. App. D.C. 368, 108 F.3d 1397, 1406 (D.C. Cir.), modified, 116 F.3d 499 (D.C. Cir. 1997).

Petitioners tell us that States may formulate their emission standards not only by limiting the amount of air pollutants, but also by imposing practices, including the monitoring of emissions.⁶

On one thing the parties are in agreement. If an applicable State emission standard contains no monitoring requirement to ensure compliance, EPA's regulation requires the State permitting agency to impose on the stationary source some sort of "periodic monitoring" as a condition in the permit or specify a reasonable frequency for any data collection mandate already specified in the applicable requirement. According [**10] to petitioners this sort of gap-filling is all § 70.6(a)(3)(i)(B)--the so-called periodic monitoring rule--requires of State permit programs. By petitioners' lights, if a federal or State emission standard already contains some sort of requirement to do testing⁷ from time to time, this portion of the standard must be incorporated in the permit, not changed by the State to conform to EPA's imprecise and evolving notion of what constitutes "periodic monitoring."⁸ Otherwise, State authorities will wind up amending federal emission standards in individual permits, something not even EPA could do without conducting individual rulemakings to amend the regulations containing the federal standards. And with respect to State standards, the State agency will in effect be

⁶In some instances, States may adopt emission standards or limitations that are more stringent than federal standards. 42 U.S.C. § 7416. States may also adopt more stringent permit requirements. 40 C.F.R. § 70.1(c).

⁷By testing we mean to include instrumental and noninstrumental monitoring as well.

⁸In support of their view, petitioners point to the Title V rule's preamble which states: "If the underlying applicable requirement imposes a requirement to do periodic monitoring or testing ..., the permit must simply incorporate this provision under § 70.6(a)(3)(i)(A)." 57 Fed. Reg. 32,278 (1992).

revising its implementation plan at EPA's behest, without going through the procedures needed to accomplish this. *See, e.g., 42 U.S.C. § 7410(k)(5) & (l)*.

[**11] In a document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs," released in September 1998, EPA took a sharply different view of § 70.6(a)(3) than do petitioners. The "Guidance" was issued over the signature of two EPA officials--the Director of the Office of Regulatory Enforcement, and the Director of the Office of Air Quality Planning and Standards. It is narrative in form, consists of 19 single-spaced, typewritten pages, and is available on EPA's internet web site (www.epa.gov). "Periodic monitoring," the Guidance states, "is required for each emission point at a source subject to title V of the Act that is subject to an applicable requirement, such as a Federal regulation or a SIP emission limitation." PERIODIC MONITORING GUIDANCE FOR TITLE V OPERATING PERMITS PROGRAMS (hereinafter "GUIDANCE") at 5. New source performance standards, and national emission standards for hazardous pollutants, if EPA promulgated the standards after November 15, 1990, the effective date of the [**1020] Clean Air Act amendments, are "presumed to have adequate monitoring." *Id.* Also, for "emission units subject to the acid rain requirements," EPA has determined that its "regulations [**12] contain sufficient monitoring for the acid rain requirements." *Id.* Outside of these categories and one other, the Guidance states that "periodic monitoring is required ... when the applicable requirement does not require ... monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." *Id.* at 6. How to determine this? Clearly, according to the Guidance, if an "applicable requirement imposes a one-time testing requirement, periodic monitoring is not satisfied ...," presumably because one time is not from time to time, which is what periodic means. *Id.*

II.

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail [**13] regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995).⁹ The agency may also think there is another advantage--immunizing its lawmaking from judicial review.

[**14] A.

EPA tells us that its Periodic Monitoring Guidance is not subject to judicial review because it is not final, and it is not final because it is not "binding."

¹⁰ [**16] Brief of Respondent at 30. See

⁹How much more efficient than, for instance, the sixty rounds of notice and comment rulemaking preceding the final rule in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

¹⁰Our jurisdiction extends to "any ... nationally applicable ... final action taken by" the EPA "Administrator." 42 U.S.C. § 7607(b)(1).

GUIDANCE at 19. It is worth pausing a minute to consider what is meant by "binding" in this context. **HN2** Only "legislative rules" have the force and effect of law. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 & n.31, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979). A "legislative rule" is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act.¹¹ If this were all that "binding" meant, EPA's [**1021] Periodic Monitoring Guidance could not possibly qualify: it was not the product of notice and comment rulemaking in accordance with the Clean Air Act, 42 U.S.C. § 7607(d), and it has not been published in the Federal Register.¹² But we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect. See, e.g., *McLouth Steel Prods. Corp. v. Thomas*, 267 U.S. App. D.C. 367, 838 F.2d 1317, 1321 (D.C. Cir. 1988). **HN3** If an agency [**15] acts as if a document issued at headquarters is controlling in

The Guidance issued over the signatures of two high level EPA officials rather than the Administrator. EPA does not, however, contest petitioners' assertion that because "the document was drafted, and reviewed by, high ranking officials in several EPA offices, including EPA's lawyers, there is no reason to doubt the authors' authority to speak for the Agency." Brief of Petitioners at 42. See *Her Majesty the Queen v. EPA*, 286 U.S. App. D.C. 171, 912 F.2d 1525, 1531-32 (D.C. Cir. 1990); *Natural Resources Defense Council, Inc. v. Thomas*, 269 U.S. App. D.C. 343, 845 F.2d 1088, 1094 (D.C. Cir. 1988).

¹¹We have also used "legislative rule" to refer to rules the agency should have, but did not, promulgate through notice and comment rulemaking. See, e.g., *American Mining Congress v. Department of Labor*, 302 U.S. App. D.C. 38, 995 F.2d 1106, 1110 (D.C. Cir. 1993). In this case, by "rule" we mean the following:

... the whole or a 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(A).

¹²**HN4** 5 U.S.C. § 552(a)(1)(D) requires publication in the Federal Register of all "interpretations of general applicability." **HN5** Compare 5 U.S.C. § 552(a)(2)(B), requiring agencies to make available for inspection and copying "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."

the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding." See Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?*, 41 *DUKE L.J.* 1311, 1328-29 (1992), and cases there cited.

[**17] For these reasons, EPA's contention must be that the Periodic Monitoring Guidance is not binding in a practical sense. Even this, however, is not an accurate way of putting the matter. Petitioners are not challenging the Guidance in its entirety. HN6 Under the Administrative Procedure Act, a "rule" may consist of "part of an agency statement of general or particular applicability and future effect...." 5 *U.S.C.* § 551(4), quoted in full in *supra* note 11; see 5 *U.S.C.* §§ 551(13), 702. "Interpretative rules" and "policy statements" may be rules within the meaning of the APA and the Clean Air Act, although neither type of "rule" has to be promulgated through notice and comment rulemaking. See 42 *U.S.C.* § 7607(d)(1), referring to 5 *U.S.C.* § 553(b)(A) & (B).¹³ [**19] EPA

¹³ We quoted, in *Panhandle Eastern Pipeline Co. v. FERC*, 339 *U.S. App. D.C.* 94, 198 *F.3d* 266, 269 (*D.C. Cir.* 1999), the statement in *Pacific Gas & Electric Co. v. Federal Power Commission*, 164 *U.S. App. D.C.* 371, 506 *F.2d* 33, 38 (*D.C. Cir.* 1974), that a policy statement is not a "rule," apparently within the meaning of 5 *U.S.C.* § 551(4). Dicta in *Syncor International Corp. v. Shalala*, 326 *U.S. App. D.C.* 422, 127 *F.3d* 90, 94 (*D.C. Cir.* 1997), suggests the same without referring to § 551(4). See also *Hudson v. FAA*, 338 *U.S. App. D.C.* 194, 192 *F.3d* 1031 (*D.C. Cir.* 1999).

On the other hand, in *Batterton v. Marshall*, 208 *U.S. App. D.C.* 321, 648 *F.2d* 694, 700 (*D.C. Cir.* 1980), we interpreted the term "rule" in § 551(4) as "broad enough to include nearly every statement an agency may make...." Quoting this language, we held in *Center for Auto Safety v. National Highway Safety Administration*, 228 *U.S. App. D.C.* 331, 710 *F.2d* 842, 846 (*D.C. Cir.* 1983), that agency policy statements accompanying the withdrawal of a notice of proposed rulemaking fell within the definition of a "rule." A few

claims, on the one hand, that the Guidance is a policy statement, rather than an interpretative rule, and is not binding.¹⁴ On [**1022] the other hand, EPA agrees with petitioners that "the Agency's position on the central legal issue here--the appropriateness of a sufficiency review of all Title V monitoring requirements--indeed is settled. [**18] ..." Brief of Respondent at 32. In other words, whatever EPA may think of its Guidance generally, the elements of the Guidance petitioners challenge consist of the agency's settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply.

Of course, an agency's action is not necessarily final merely because it is binding.¹⁵ [**22] Judicial

years later, then-Judge Scalia--citing *Batterton*--wrote for the court that under APA § 551(4), it is "clear" that "the impact of an agency statement upon private parties is relevant only to whether it is the sort of rule that is ... a general statement of policy." *Thomas v. New York*, 256 *U.S. App. D.C.* 49, 802 *F.2d* 1443, 1447 n.* (*D.C. Cir.* 1986). See also *National Tank Truck Carriers, Inc. v. Federal Highway Admin.*, 335 *U.S. App. D.C.* 166, 170 *F.3d* 203, 207 n.3 (*D.C. Cir.* 1999).

There is no need for us to try to reconcile these two lines of authority. Nothing critical turns on whether we initially characterize the Guidance as a "rule."

¹⁴ EPA is under the impression that policy statements can never be "rules" within the meaning of APA § 551(4): "even if the Guidance were somehow deemed to be a 'rule' (a conclusion that would, in EPA's view, be erroneous due to the non-binding nature of the Guidance), Petitioners' procedural challenge would still fail because the Guidance undoubtedly would be an interpretive (not legislative) rule...." Brief of Respondent at 43-44 n.40. We should note that the Guidance itself states that it "interprets" § 70.6(a)(3) of the regulations. GUIDANCE at 4 n.1.

¹⁵ We add that agency action does not necessarily have binding effect--that is, does not necessarily alter legal rights and obligations--merely because it is final. Denials of petitions for rulemaking, for instance, may be final although no private person is required to do anything. In the past, when this court examined the binding effect of agency action, we did so for the purpose of determining whether the non-legislative rule should have undergone notice and comment rulemaking because it was, in effect, a regulation. See, e.g., *Florida Power & Light Co. v. EPA*, 330 *U.S. App. D.C.* 344, 145 *F.3d* 1414,

orders can be binding; a temporary restraining order, for instance, compels compliance but it does not finally decide the case. HN7 In the administrative setting, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process, Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113, 92 L. Ed. 568, 68 S. Ct. 431 (1948)-- it **[**20]** must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,' Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71, 27 L. Ed. 2d 203, 91 S. Ct. 203 (1970)." Bennett v. Spear, 520 U.S. 154, 178, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997). The first condition is satisfied here. The "Guidance," as issued in September 1998, followed a draft circulated four years earlier and another, more extensive draft circulated in May 1998. This latter document bore the title "EPA Draft Final Periodic Monitoring Guidance." ¹⁶ On the question whether States must review their emission standards and the emission standards EPA has promulgated to determine if the standards provide enough monitoring, the Guidance is unequivocal--the State agencies must do so. See GUIDANCE at 6-8. On the question whether the States may supersede federal and State standards and insert additional monitoring requirements as terms or conditions of a permit, the Guidance is certain--the State agencies must do so if they **[**21]** believe existing requirements are inadequate, as measured by EPA's multi-factor, case-by-case analysis set forth in the Guidance. See GUIDANCE at 7-8.

1418-19 (D.C. Cir. 1998); American Portland Cement Alliance v. EPA, 322 U.S. App. D.C. 99, 101 F.3d 772, 776 (D.C. Cir. 1996); Kernecott Utah Copper Corp. v. Dep't of Interior, 319 U.S. App. D.C. 128, 88 F.3d 1191, 1207 (D.C. Cir. 1996); National Solid Waste Mgmt. Ass'n v. EPA, 276 U.S. App. D.C. 207, 869 F.2d 1526, 1534 (D.C. Cir. 1989).

¹⁶In the title to the Guidance we have before us, EPA dropped the word "final."

EPA may think that because the Guidance, in all its particulars, is subject to change, it is not binding and therefore not final action. There are suggestions in its brief to this effect. See, e.g., Brief of Respondent at 3, 33 n.30. But all laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time. HN8 The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment. See McLouth Steel Prods. Corp. v. EPA, 838 F.2d at 1320.

On the issue whether the challenged portion of the Guidance has legal consequences, EPA points to the concluding paragraph of the document, which contains **[*1023]** a disclaimer: "The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party." GUIDANCE at 19. This language is boilerplate; since 1991 EPA has been placing it at the **[**23]** end of all its guidance documents. See Robert A. Anthony, *supra*, 41 DUKE L.J. at 1361; Peter L. Strauss, Comment, The Rulemaking Continuum, 41 DUKE L.J. 1463, 1485 (1992) (referring to EPA's notice as "a charade, intended to keep the proceduralizing courts at bay"). Insofar as the "policies" mentioned in the disclaimer consist of requiring State permitting authorities to search for deficiencies in existing monitoring regulations and replace them through terms and conditions of a permit, "rights" may not be created but "obligations" certainly are--obligations on the part of the State regulators and those they regulate. At any rate, the entire Guidance, from beginning to end--except the last paragraph--reads like a ukase. It commands, it requires, it orders, it dictates. Through the Guidance, EPA has given the States their "marching orders" and EPA expects the States to fall in line, as all have done, save perhaps Florida and Texas. See Natural Resources Defense Council, Inc. v. Thomas, 269 U.S. App. D.C. 343, 845 F.2d 1088, 1094 (D.C. Cir. 1988); Community Nutrition Inst. v. Young, 260 U.S. App. D.C. 294, 818 F.2d 943, 947-48 (D.C. Cir. 1987). **[**24]**

Petitioners tell us, and EPA does not dispute, that many of them are negotiating their Title V permits, that State authorities, with EPA's Guidance in hand, are insisting on continuous opacity monitors¹⁷ for determining compliance with opacity limitations although the applicable "standard specifies EPA Method 9 (a visual observation method) as the compliance method (and, in some cases, already provides for periodic performance of that method)." Brief of Petitioners at 43-44. See *Natural Resources Defense Council, Inc. v. EPA*, 306 U.S. App. D.C. 43, 22 F.3d 1125, 1133 (D.C. Cir. 1994).

[**25] The short of the matter is that the Guidance, insofar as relevant here, is final agency action, reflecting a settled agency position which has legal consequences both for State agencies administering their permit programs and for companies like those represented by petitioners who must obtain Title V permits in order to continue operating.¹⁸

[**26] B.

As to the validity of the Guidance, petitioners' arguments unfold in the following sequence. First, they contend that the Guidance amended the "periodic monitoring rule" of § 70.6(a)(3)(i)(B). Although the rule only allowed State authorities to fill in gaps, that is, to require periodic monitoring

when the applicable State emission standard contained no monitoring requirement, a one-time startup test, or provided no frequency for monitoring, the Guidance applies across the board, charging State authorities with the duty of assessing the sufficiency of all State and federal standards.¹⁹ With the Guidance in [*1024] place, regional EPA offices have solid legal grounds for objecting to State-issued permits if the State authorities refuse to bend to EPA's will. Therefore, as petitioners see it, the Guidance is far more than a mere interpretation of the periodic monitoring rule and it is far more than merely a policy statement. In practical effect, it creates a new regime, a new legal system governing permits, and as such it should have been, but was not, promulgated in compliance with notice and comment rulemaking procedures. Petitioners say that if they are wrong about this, if the Guidance [**27] represents a valid interpretation of the periodic monitoring rule in § 70.6(a)(3)(i)(B), then the rule itself is invalid. Congress did not authorize EPA to require States, in issuing Title V permits, to make revisions to monitoring requirements in existing federal emission standards.

The case is presented to us in pure abstraction. Neither side cites any specific federal or State emission standard. Although petitioners complain that State officials will revise federal standards promulgated before November 1990, petitioners' briefs identify no specific federal standard potentially subject to revision. Which, if any, federal standards are susceptible to State revision in a permit for lack of periodic monitoring is thus something about which we can only guess. [**28] The same is true regarding State emission standards.

Perhaps petitioners should not be faulted. They

¹⁷A continuous opacity monitor employs "a calibrated light source that provides for accurate and precise measurement of opacity at all times." See *Credible Evidence Revisions*, 62 Fed. Reg. 8319 (1997). In contrast, "Method 9 requires that a trained visible emissions observer (VEO) view a smoke plume with the sun at a certain angle to the plume" to determine the opacity of the plume released. *Id.*

¹⁸EPA also claims that the Guidance is not ripe for review because the court's review would be more focused in the context of a challenge to a particular permit. We think there is nothing to this. Whether EPA properly instructed State authorities to conduct sufficiency reviews of existing State and federal standards and to make those standards more stringent if not enough monitoring was provided will not turn on the specifics of any particular permit. Furthermore, EPA's action is national in scope and Congress clearly intended this court to determine the validity of such EPA actions. See 42 U.S.C. § 7607. A challenge to an individual permit would not be heard in this court. (Petitioners contend that only state courts could adjudicate such cases. We express no view about that.)

¹⁹Petitioners also claim that the Guidance revised EPA's "Compliance Assurance Monitoring" rule, sustained in *Natural Resources Defense Council, Inc. v. EPA*, 338 U.S. App. D.C. 340, 194 F.3d 130 (D.C. Cir. 1999), an argument we find unnecessary to consider.

disagree with EPA's general principle, with the agency's position that it can give State permit officials the authority to substitute new monitoring requirements in place of existing State or federal emission standards already containing some sort of monitoring requirements. The validity of that general principle does not turn on the specifics of any particular emission standard, although its application does. Besides, EPA is currently developing even more detail in far more extensive "guidance" using concrete examples of what would, and would not, constitute "periodic monitoring" in EPA's opinion. See Draft--Periodic Monitoring Technical Reference Document (Apr. 30, 1999).

HN9 It is well-established that an agency may not escape the notice and comment requirements (here, of 42 U.S.C. § 7607 (d)) by labeling a major substantive legal addition to a rule a mere interpretation. See Paralyzed Veterans v. D.C. Arena L.P., 326 U.S. App. D.C. 25, 117 F.3d 579, 588 (D.C. Cir. 1997); American Mining Congress v. MSHA, 302 U.S. App. D.C. 38, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993). **[**29]** "We must still look to whether the interpretation itself carries the force and effect of law, ... or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe." (citations and internal quotations omitted). See Paralyzed Veterans, 117 F.3d at 588. With that in mind, we will deal first with petitioners' claim that the Guidance significantly expanded the scope of the periodic monitoring rule. Section 70.6(a)(3)(i)(B) tells us that "periodic monitoring" must be made part of the permit when the applicable State or federal standard does not provide for "periodic testing or instrumental or noninstrumental monitoring." ²⁰ If "periodic" has its

²⁰ **HN10** EPA identified the source of its authority for § 70.6(a)(3) as 42 U.S.C. § 7661c(b). This provides that EPA "may by rule" set forth methods and procedures "for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance."

usual meaning, ²¹ this signifies that any State or federal standard requiring testing from time to time--that is yearly, monthly, weekly, daily, hourly--would be satisfactory. The supplementing authority in § 70.6(a)(3)(i)(B) therefore would not be **[*1025]** triggered; instead, the emission standard would simply be incorporated in the permit, as EPA acknowledged in the rule's preamble, see *supra* note 8. On the other hand, if the State or federal standard contained merely a **[**30]** one-time startup test, specified no frequency for monitoring or provided no compliance method at all, § 70.6(a)(3)(i)(B) would require the State authorities to specify that some testing be performed at regular intervals to give assurance that the company is complying with emission limitations.

So far, our parsing of the language of § 70.6(a)(3)(i)(B) corresponds with petitioners' view that the rule serves only a gap-filling **[**31]** function. If this is what the rule means, there is no doubt that it is much narrower than the Guidance issued in 1998. There, EPA officials stated that regardless whether an emission standard contained a "periodic testing" or monitoring requirement, additional monitoring "may be necessary" if the monitoring in the standard "does not provide the necessary assurance of compliance." ²² *E.g.*, GUIDANCE at 7-8. Petitioners describe that aspect of the Guidance this way: "The Guidance unequivocally directs state permitting authorities,

²¹ Although EPA defined many terms in its regulations governing permits, 40 C.F.R. § 70.2, it provided no definition of "periodic" or of "monitoring."

²² By measuring the adequacy of monitoring in this manner, EPA's position introduces circularity. The Guidance instructs permitting authorities that monitoring is sufficient if it provides "a reasonable assurance of compliance with requirements applicable to the source." GUIDANCE at 7. But some of the applicable requirements are themselves methods for testing a source's compliance with other standards. For instance, in the case of a requirement to conduct an annual stack test, EPA's methodology suggests that performance of the one-time test would be sufficient as it provides "a reasonable assurance of compliance" with the applicable requirement. The problem is this gives permitting authorities no assistance in evaluating the proper frequency of such tests.

as a minimum element of continued EPA program approval, to conduct wide-ranging sufficiency reviews and upgrade monitoring in nearly all individual permits or permit applications, even where the underlying applicable requirement incorporates 'periodic testing or instrumental or noninstrumental monitoring' in facial compliance with § 70.6(a)(3)(i)(B)." Reply Brief of Petitioners at 13.

[**32] EPA's view of the scope of the Guidance is about the same as petitioners'. But the agency thinks statements in the preamble to its 1992 rule and its responses to comments in the final rulemaking alerted interested onlookers to its current position and show that the Guidance issued in 1998 is no broader than the rule itself. EPA's strongest point is the following statement made in 1992: "To the extent commentators assert that Title V does not authorize EPA to require monitoring beyond that provided for in the applicable requirement, EPA disagrees with the commenters." EPA Response to Comments (hereinafter "RTC") at 6-3. On the face of it, this assertion of statutory authority may have reflected EPA's claim--which no one now disputes--that if an "applicable requirement" contained a one-time stack test, the federal agency could insist that the State authority insert in the permit a requirement that the test be performed at regular intervals. If that is all the EPA statement signified, it would be entirely consistent with petitioners' interpretation of the final rule.²³

[**33] In its response to comments and in the preamble to the Title V regulations, EPA promised that if there is "any federally promulgated

²³ According to EPA's response to comments:

Examples of situations where Section 70.6(a)(3)(i)(B) would apply include a SIP provision which contains a reference test method but no testing obligation, or a NSPS which requires only a one time stack test on startup. Any Federal standards promulgated pursuant to the Act amendments of 1990 are presumed to contain sufficient monitoring and, therefore, only Section 70.6(a)(3)(i)(A) applies.

RTC at 6-4.

requirement with insufficient monitoring, EPA will issue a rulemaking to revise such requirement." 57 Fed. Reg. 32,278 (1992); RTC at 6-4.²⁴ The Guidance, [*1026] of course, charts a very different course. Now, it is initially up to the States to identify federal standards with deficient monitoring, doubtless with EPA's input, formal or informal. And it is the State and local agencies that must alter the standards by requiring permittees--such as petitioners--to comply with more stringent monitoring requirements. Needless to say, EPA's approach--delegating to State officials the authority to alter duly promulgated federal standards--raises serious issues, not the least of which is whether EPA possesses the authority it now purports to delegate. One would suppose, and EPA did in 1992, that if federal regulations proved inadequate for one reason or another, EPA would have to conduct a rulemaking to amend them. *See Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1203-04 (D.C. Cir. 1998)*.

[**34] EPA thinks two other statements in its response to comments alerted everyone that its new rule would set in motion an across-the-board review of the existing monitoring requirements contained in federal and State emission standards. The first of these statements is: "In many cases, the monitoring requirements in the underlying regulation will suffice for assessing compliance." RTC at 6-3. EPA treats the "in many cases" as a qualification. What does this tell the careful reader? Only that sometimes the State or federal emission standard will need to be supplemented. But the critical question is when--when the monitoring in the standard consists only of a one-time test? or when the yearly or monthly or weekly or daily testing specified in the standard is not enough, as determined by State authorities or EPA during the permit process?

The second statement is this:

²⁴ Later in its response to comments, EPA repeated this promise: "... EPA will revise federal regulations that need additional specification of test methods, including specification of frequency and degree of testing." RTC at 6-5.

The EPA reiterates that permits must be enforceable, and must include periodic monitoring, which might involve the use of, or be based on, appropriate reference test methods.... Where EPA has not provided adequate guidance in regard to source testing or monitoring, permitting authorities are allowed to establish additional [**35] requirements, including requirements concerning the degree and frequency of source testing on a case-by-case basis, as necessary to assure compliance with Part 70 [Title V] permit terms or conditions. However, in no case may such frequency be less stringent than any frequency required by an underlying applicable requirement.

Id. at 6-5. If "periodic monitoring" means testing from time to time, the first sentence in this passage hardly advances EPA's current position. And the second sentence seems set against it. Only when "EPA has not provided adequate guidance in regard to source testing or monitoring," may State authorities provide additional monitoring. So what is "adequate guidance"? Once again the only concrete example EPA gave in 1992 was a one-time stack test, which rather makes petitioners' point.

The short of the matter is that the regulatory history EPA offers fails to demonstrate that § 70.6(a)(3)(i)(B) initially had the broad scope the Guidance now ascribes to it. Nothing on the face of the regulation or in EPA's commentary at the time said anything about giving State authorities a roving commission to pore over existing State and federal standards, to decide [**36] which are deficient, and to use the permit system to amend, supplement, alter or expand the extent and frequency of testing already provided. In fact, EPA's promise in the 1992 rulemaking--that if federal standards were found to be inadequate in terms of monitoring it would open rulemaking proceedings--is flatly against EPA's current position. (EPA makes no attempt to square this promise with the argument it makes today.)

Furthermore, we attach significance to EPA's recognition, in its 1992 permit regulations, that "Title V does not impose substantive new requirements," 40 C.F.R. [**1027] § 70.1(b). Test methods and the frequency of testing for compliance with emission limitations are surely "substantive" requirements; they impose duties and obligations on those who are regulated. Federal testing requirements contained in emissions standards are promulgated after notice and comment rulemaking. Testing requirements in emission standards in State standards are presumably adopted by the State's legislature or administrative agency, and approved by EPA as part of the State's implementation plan. We have recognized before that changing the method of measuring compliance with an emission limitation [**37] can affect the stringency of the limitation itself. Portland Cement Ass'n v. Ruckelshaus, 158 U.S. App. D.C. 308, 486 F.2d 375, 396-97 (D.C. Cir. 1973), discussed in Clean Air Implementation Project v. EPA, 150 F.3d at 1203. In addition, monitoring imposes costs. Petitioners represent that a single stack test can "cost tens of thousands of dollars, and take a day or more to complete," which is why "stack testing is limited to once or twice a year (at most)." Brief of Petitioners at 22 n.75. If a State agency, acting under EPA's direction in the Guidance, devised a permit condition increasing a company's stack test obligation (as set forth in a State or federal standard) from once a year to once a month, no one could seriously maintain that this was something other than a substantive change.²⁵

[**38] There is still another problem with EPA's position. Although its Guidance goes to great lengths to explain what is meant by the words "periodic monitoring," it almost completely

²⁵ The Guidance, at p. 8, provides a six-point bullet point list for permit-writers, making clear that EPA expects them to engage in an intricate regulatory trade off (often on a unit-by-unit basis), assessing the costs and benefits of available technologies for the particular pollutant. This six-part list has mutated into a complex flow chart in the Draft Periodic Monitoring Technical Reference Document, and is reprinted as an Addendum to this opinion.

neglects a critical first step. On the face of § 70.6(a)(3)(i)(B), "periodic monitoring" is required if and only if "the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record-keeping designed to serve as monitoring)." While the Guidance is quick to say that all Title V permits must contain "periodic monitoring," it never explains what constitutes "periodic testing" or what constitutes "instrumental or noninstrumental monitoring." Instead, throughout the Guidance, EPA either yokes these three items together, or treats the terms as synonymous, without saying why. Yet if "periodic testing" and "instrumental or noninstrumental monitoring" mean the same thing as "periodic monitoring," there is no accounting for why § 70.6(a)(3)(i)(B) was written as it was. The regulation could simply have said "periodic monitoring" is required for all permits, period.²⁶

²⁶EPA argues that our opinion in *Natural Resources Defense Council, Inc. v. EPA*, 338 U.S. App. D.C. 340, 194 F.3d 130, 135-36 (D.C. Cir. 1999), reflects an understanding of § 70.6(a)(3) "nearly identical" to that contained in the Guidance. Supplemental Brief of Respondent at 4. The opinion stated:

The 1990 Clean Air Act Amendments did not mandate that EPA fit all enhanced monitoring under one rule and EPA has reasonably illustrated how its enhanced monitoring program, when considered in its entirety, complies with § 114(a)(3). Specifically, EPA demonstrated that many of the major stationary sources exempt from CAM are subject to other specific rules, and if they are not, they are subject to the two residual rules: (1) "[The permit shall contain] periodic monitoring sufficient to yield reliable data ... that are representative of the source's compliance with the permit..." 40 C.F.R. § 70.6(a)(3)(i)(B); (2) "All part 70 permits shall contain the following elements with respect to compliance: (1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, [and] monitoring ... requirements sufficient to assure compliance with the terms and conditions of the permit." *Id.* § 70.6(c)(1).

Id. The bracketed portion of the quotation reads out of subsection (B) the conditions that "periodic monitoring" is required only when "the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record-keeping designed to serve as monitoring)." When that clause is reinserted, it becomes clear that the quotation does not speak to the situation of permits which already provide for periodic testing,

[**39] [*1028] In sum, we are convinced that elements of the Guidance--those elements petitioners challenge--significantly broadened the 1992 rule. The more expansive reading of the rule, unveiled in the Guidance, cannot stand. HN11 In directing State permitting authorities to conduct wide-ranging sufficiency reviews and to enhance the monitoring required in individual permits beyond that contained in State or federal emission standards even when those standards demand some sort of periodic testing, EPA has in effect amended § 70.6(a)(3)(i)(B). This it cannot legally do without complying with the rulemaking procedures required by 42 U.S.C. § 7607(d).²⁷ See *Alaska Professional Hunters Ass'n v. FAA*, 336 U.S. App. D.C. 197, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 174 F.3d 166, 176-78 (3d Cir. 1999); *Paralyzed Veterans*, 117 F.3d at 585-86.

[**40] For the reasons stated, we find setting aside EPA's Guidance to be the appropriate remedy. Though petitioners challenge only portions of the Guidance, HN12 partial affirmance is not an option when, as here, "there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis County Solid Waste Management v. EPA*, 323 U.S. App. D.C. 425, 108 F.3d 1454, 1458 (D.C. Cir. 1997) (quoting *North Carolina v. FERC*, 235 U.S. App. D.C. 28, 730 F.2d 790, 795-96 (D.C. Cir. 1984)). In view of the intertwined nature of the challenged and unchallenged portions of the Guidance, the Guidance must be set aside in its entirety. See 42 U.S.C. § 7607. HN13 State permitting authorities therefore may not, on the basis of EPA's Guidance or 40 C.F.R. § 70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard

addressed in 40 C.F.R. § 70.6(a)(3)(i)(A).

²⁷Unless EPA certifies that the amendments to the Title V rule would not "have a significant economic impact on a substantial number of small entities," 5 U.S.C. § 605(b), it must also comply with the various procedural requirements of the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. §§ 601-612.

requires no periodic testing, specifies no frequency,
or requires only a one-time test.

So ordered.

[SEE ADDENDUM IN ORIGINAL]

[Addendum not available electronically] **[**41]**

End of Document

Tab 2

Defenders of Wildlife v. United States EPA

United States Court of Appeals for the Tenth Circuit

July 6, 2005, Filed

No. 04-2151

Reporter

415 F.3d 1121 *; 2005 U.S. App. LEXIS 13390 **; 35 ELR 20141; 60 ERC (BNA) 2127

DEFENDERS OF WILDLIFE; FOREST GUARDIANS, Plaintiffs-Appellants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant-Appellee.

Prior History: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. (D. Ct. No. CIV-02-150 JB/LAM).

Disposition: AFFIRMED.

Core Terms

regulation, pollutants, water quality standards, waters, capricious, water quality, requirements, exemption, non-point, approve, irrigation, ambiguous, dissolved, point source, discharges, arbitrarily, sources, flood control, measurements, activities, facilities, assessing, numerical

Case Summary

Procedural Posture

Plaintiff environmental advocacy groups (the environmentalists) sued defendant, the United States Environmental Protection Agency (EPA), alleging that EPA's approval of New Mexico's water quality standards was contrary to the federal Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., and the Administrative Procedure Act (APA), 5 U.S.C.S. § 701 et seq.

Overview

EPA approved a New Mexico regulation, N.M.

Admin. Code tit. 20, § 6.4.12, that exempted pollutants emanating from flood control and irrigation facilities from five CWA-required water quality standards. Initially, EPA rejected the regulation, finding that it was ambiguous. However, EPA approved the regulation pursuant to 33 U.S.C.S. § 1313(c)(2) and 40 C.F.R. § 131.21(a) once the New Mexico Water Quality Control Commission (WQCC) declared its interpretation of the regulation to prohibit enforcement against the listed activities but not to authorize the state to ignore such pollutants when assessing the quality of surface waters of the State of New Mexico. EPA did not act arbitrarily or capriciously in determining that N.M. Admin. Code tit. 20, § 6.4.12 was ambiguous or in relying on the State's interpretation of that regulation to approve it while reserving the right to withdraw EPA approval should New Mexico not adhere to the same position in the future. In addition the WQCC did not impermissibly rewrite the regulation by stating its interpretation of the regulation without first complying with the notice and comment requirements of the CWA.

Outcome

The court affirmed the judgment of the district court.

LexisNexis® Headnotes

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN1 The Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., was adopted to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.S. § 1251(a). To achieve this goal, Congress prohibited the discharge from a "point source" of any pollutant into the waters of the United States unless that discharge meets specific requirements set forth in the CWA. 33 U.S.C.S. § 1311(a) and 33 U.S.C.S. § 1362(14). In order for point source discharges to comply with the CWA, such discharges must adhere to the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to the CWA. 33 U.S.C.S. § 1342. NPDES permits are issued by the Environmental Protection Agency (EPA) or, in certain jurisdictions, by state agencies authorized to do so by the EPA. 33 U.S.C.S. § 1342(a)-(d).

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

HN2 A "point source" is defined by the Clean Water Act, 33 U.S.C.S. § 1251 et seq., as any discernible, confined and discrete conveyance from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14).

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Nonpoint Source Pollution

HN3 Unlike "point source" discharges, nonpoint source discharges are not defined by the Clean Water Act, 33 U.S.C.S. § 1251 et seq., nonpoint source pollution has been described as nothing more than a water pollution problem not involving

a discharge from a point source.

Environmental Law > Water Quality > General Overview

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Real Property Law > Water Rights > Nonconsumptive Uses > Fishing

HN4 Unlike "point source" pollutants, the Environmental Protection Agency (EPA) lacks the authority to control nonpoint source discharges through a permitting process; instead, Congress requires states to develop water quality standards for intrastate waters. 33 U.S.C.S. § 1313. Development of water quality standards involves three steps: (1) every applicable body of water in the state must be given a "designated use," such as public water supply, fish propagation, or navigation; (2) the state must specify water quality criteria for each body of water, which sets the amounts of various pollutants that may be present without impairing the body's designated use; and (3) each state must adopt an antidegradation review policy which allows the state to assess whether the water is deteriorating below the level necessary to sustain its designated use. 33 U.S.C.S. § 1313(c)(2)(A); 40 C.F.R. § 130.3; 40 C.F.R. § 130.10(d)(4); 40 C.F.R. § 131.6; 40 C.F.R. § 131.10; 40 C.F.R. § 131.11.

Environmental Law > Water Quality > General Overview

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN5 In addition to setting water quality standards for intrastate waters, 33 U.S.C.S. § 1313, the Clean Water Act, 33 U.S.C.S. § 1251 et seq., requires states to identify all intrastate waters not satisfying these water quality standards and establish "total maximum daily loads" (TMDL) for those waters. 33 U.S.C.S. § 1313(d). A TMDL defines the specified maximum amount of a pollutant which can be discharged into a body of water from all sources combined.

Environmental Law > Water Quality > General Overview

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN6 The Environmental Protection Agency's (EPA) role in formulating intrastate water quality standards and "total maximum daily loads" is limited. When states enact water quality standards, they must also submit them to the EPA's Regional Administrator to determine whether the new standard is consistent with the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., 33 U.S.C.S. § 1313(c)(2); 40 C.F.R. § 131.21(a). The EPA must either approve the standard within 60 days of submission or--if the EPA determines that the standard is inconsistent with the Act--disapprove the standard and notify the state of any changes necessary to gain the EPA's approval. Should a state fail to make the required changes, the EPA must enact replacement standards that are consistent with the CWA and impose them upon the state. 33 U.S.C.S. § 1313(c)(3)-(4)(A). Thus, states have the primary role, under § 303 of the CWA (33 U.S.C.S. § 1313), in establishing water quality standards. EPA's sole function, in this respect, is to review those standards for approval. Indeed, Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states.

Environmental Law > Water Quality > General Overview

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Nonpoint Source Pollution

HN7 The Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., does not require states to take regulatory action to limit the amount of nonpoint water pollution introduced into its waterways. While the CWA requires states to designate water standards and identify bodies of water that fail to meet these standards, nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources.

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Navigable Waters

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN8 The New Mexico Water Quality Control Commission has adopted revised water quality standards that, among other things, include a revised enforcement exemption for some pollutants that result from irrigation and flood control facilities.

Environmental Law > Water Quality > General Overview

HN9 See N.M. Admin. Code tit. 20, § 6.4.12.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN10 The standard of review of a lower court's decision in a case brought under the Administrative Procedure Act, 5 U.S.C.S. § 701 et seq., is de novo. A court will not overturn an agency action unless it fails to meet statutory, procedural or constitutional requirements, or unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Water Quality > General Overview

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HNI1 A federal court reviews the Environmental Protection Agency's (EPA) decision to approve state water quality standards under the arbitrary and capricious standard. The court will accord Chevron deference to the EPA's interpretation of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., when it makes decisions to approve state water quality standards.

Environmental Law > Water Quality > General Overview

HNI2 N.M. Admin. Code tit. 20, § 6.4.12 states that when specified changes in water quality result from the reasonable operation of irrigation and flood control facilities numerical standards for temperature, dissolved solids content, dissolved oxygen, sediment or turbidity adopted under the Water Quality Act do not apply. N.M. Admin. Code tit. 20, § 6.4.12.

Environmental Law > Water Quality > General Overview

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HNI3 New Mexico's Water Quality Act requires many things, including: the setting of water quality standards, N.M. Stat. Ann. § 74-6-4(C); the taking of measurements of the states waters to determine if these standards are being met, N.M. Stat. Ann. § 74-6-4(C); and the meeting out of fines for polluters, N.M. Stat. Ann. § 74-6-10(A).

Administrative Law > Agency Rulemaking > Informal Rulemaking

HNI4 The Environmental Protection Agency may not effectively rewrite or amend existing state regulations, nor may it escape the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C.S. § 701 et seq., by labeling

a major substantive legal addition to a rule a mere interpretation.

Counsel: Alletta d'A. Belin, Belin & Sugarman, Santa Fe, New Mexico, for Plaintiffs-Appellants.

Lane M. McFadden, United States Department of Justice, Environmental & Natural Resources Division, Washington, D.C. (Thomas L. Sansonetti, Assistant Attorney General, Lois Godfrey Wye, and Robert S. Oakley, United States Department of Justice, Environmental & Natural Resources Division, Washington, D.C.; and Cathy Winer, United States Environmental Protection Agency, Washington, D.C., with her on the briefs) for Defendant-Appellee.

Judges: Before TACHA, Chief Circuit Judge, McWILLIAMS, and HARTZ, Circuit Judges.

Opinion by: TACHA

Opinion

[*1123] TACHA, Chief Circuit Judge.

Plaintiffs-Appellants Defenders of Wildlife and Forest Guardians are environmental advocacy groups. They filed suit challenging the Defendant-Appellee United States Environmental Protection Agency's ("EPA") approval of New Mexico's water quality standards as contrary to the federal Clean Water Act ("CWA"). *See 33 U.S.C. § 1251 et seq.* The Plaintiffs contend that the New Mexico regulation [**2] exempts pollutants emanating from flood control and irrigation facilities from five CWA-required water quality standards. *See* N.M. Admin. Code tit. 20, § 6.4.12. The District Court found the regulation ambiguous and held that EPA's reliance upon a state agency's informal interpretation of the regulation, which construed the regulation as consistent with the CWA, was not arbitrary and capricious. We take jurisdiction under 28 U.S.C. § 1291 and AFFIRM.

I. BACKGROUND

As this case involves the interplay of state water regulations and the federal CWA, we begin with an overview of the CWA. We then turn to the facts and procedural history that give rise to this appeal.

A. The Clean Water Act

HN1 The CWA was adopted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, Congress prohibited the discharge from a "point source" of any pollutant into the waters of the United States unless that discharge meets specific requirements set forth in the CWA. 33 U.S.C. §§ 1311(a), 1362(14).¹ In order for point source discharges [**3] to comply with the CWA, such discharges must adhere to the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to the CWA. 33 U.S.C. § 1342. NPDES permits are issued by the EPA or, in certain jurisdictions, by state agencies authorized to do so by the EPA. 33 U.S.C. § 1342(a)-(d).

HN3 [**1124] Unlike point source discharges, non-point source discharges, which are the pollutants at issue in this case, are not defined by the CWA. Non-point source pollution has been described as "nothing more [than] a [water] pollution problem not involving a discharge from a point source." Am. Wildlands v. Browner, 260 F.3d 1192, 1193-94 (10th Cir. 2001) (quoting Nat'l Wildlife Fed'n v. Gorsuch, 224 U.S. App. D.C. 41, 693 F.2d 156, 166 n.28 (D.C. Cir. 1982)). [**4] At least in New Mexico, most non-point pollutants are from farming run-off and dam overflows.

HN4 Unlike point source pollutants, the EPA lacks the authority to control non-point source discharges through a permitting process; instead, Congress requires states to develop water quality standards for intrastate waters. 33 U.S.C. § 1313.

Development of water quality standards involves three steps: (1) every applicable body of water in the state must be given a "designated use," such as public water supply, fish propagation, or navigation; (2) the state must specify water quality criteria for each body of water, which sets the amounts of various pollutants that may be present without impairing the body's designated use; and (3) each state must adopt an antidegradation review policy which allows the state to assess whether the water is deteriorating below the level necessary to sustain its designated use. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.3, 130.10(d)(4), 131.6, 131.10, 131.11; Am. Wildlands, 260 F.3d at 1194; [**5] City of Albuquerque v. Browner, 97 F.3d 415, 419 n.4 (10th Cir. 1996).

HN5 In addition to setting these water quality standards, states must identify all intrastate waters not satisfying these water quality standards and establish "total maximum daily loads" ("TMDL") for those waters. 33 U.S.C. § 1313(d). "A TMDL defines the specified maximum amount of a pollutant which can be discharged into a body of water from all sources combined." Am. Wildlands, 260 F.3d at 1194.

HN6 The EPA's role in formulating these water quality standards is limited. When states enact water quality standards, they must also submit them to the EPA's Regional Administrator to determine whether the new standard is consistent with the CWA. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.21(a). "The EPA must either approve the standard within sixty days of submission or--if the EPA determines that the standard is inconsistent with the Act--disapprove the standard and notify the state of any changes necessary to gain the EPA's approval." Am. Wildlands, 260 F.3d at 1194 (citing 33 U.S.C. § 1313(c)(3)) [**6]. Should a state fail to make the required changes, the EPA must enact replacement standards that are consistent with the CWA and impose them upon the state. 33 U.S.C. § 1313(c)(3)-(4)(A). Thus, "states have the primary role, under § 303 of the CWA (33 U.S.C. § 1313), in establishing water

¹ **HN2** A "point source" is defined by the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

quality standards. EPA's sole function, in this respect, is to review those standards for approval." *Am. Wildlands*, 260 F.3d at 1194 (alterations omitted) (quoting *City of Albuquerque*, 97 F.3d at 425). Indeed, "Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states." *Id.* (quoting *City of Albuquerque*, 97 F.3d at 425).

Of particular importance to this case is the fact that HN7 the CWA does not require states to take regulator action to limit the amount of non-point water pollution introduced into its waterways. While the CWA requires states to designate water standards and identify bodies of water that fail to meet these standards, "nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources. [*7] " *American Wildlands*, 260 F.3d at 1197 [*1125] (quoting *American Wildlands v. Browner*, 94 F. Supp. 2d 1150, 1161 (D. Colo. 2000)).

B. The New Mexico Regulation

We turn now to the regulation that sparked this lawsuit. In 1999, HN8 the New Mexico Water Quality Control Commission ("WQCC") adopted revised water quality standards that, among other things, included a revised enforcement exemption for some pollutants that result from irrigation and flood control facilities. In relevant part the regulation states:

HN9 When changes in dissolved oxygen, temperature, dissolved solids, sediment or turbidity in a water of the state is [sic] attributable to natural causes or the reasonable operation of irrigation and flood control facilities that are not subject to federal or state water pollution control permitting [i.e., nonpoint source pollutants], numerical standards for temperature, dissolved solids content, dissolved oxygen, sediment or turbidity adopted under the Water Quality Act[, *N.M. Stat. Ann. § 74-6-1 et seq.*] do not apply.

N.M. Admin. Code tit. 20, § 6.4.12. Prior to this

regulation, New Mexico had a similar [**8] exemption that was limited to dissolved oxygen, sediment, and turbidity; the 1999 regulation added temperature and dissolved solids to the exemption. In January 2000, the WQCC forwarded N.M. Admin. Code tit. 20, § 6.4.12 to the EPA for its approval pursuant to the terms of the CWA. *See 33 U.S.C. § 1313(c)(2)*. On January 23, 2001, the EPA refused to approve N.M. Admin. Code tit. 20, § 6.4.12. The EPA sent the following letter explaining its reasoning:

The [regulation], in referring to the "reasonable operation and maintenance" of irrigation and flood control structures, requires that this activity be defined by regulation of the WQCC. Without a clear definition of what this exemption means and where it does and/or does not apply, *this provision is not acceptable because it could be interpreted as either consistent or inconsistent with the requirements of the CWA*. An interpretation of the underlying statutory provisions as precluding enforcement against listed activities (essentially nonpoint sources associated with the "reasonable operation and maintenance" of irrigation and flood control structures) may be acceptable as long as assurance [**9] is provided that the numeric criteria in question continue to apply to affected surface waters and will be considered in assessing water quality in surface waters of the state affected by such activities. It would be unacceptable if this provision means that exceedance of criteria due to such activities are simply ignored in assessing water quality.

...

[If] the New Mexico Water Quality Control Commission could provide an interpretation of the underlying statutory provisions [along the lines of the first interpretation, the regulation would be acceptable.] . . . EPA would reserve the right to [disapprove the regulation, however,] if the state does not adhere to this

interpretation.

R. at 207 (emphasis added).

In short, the EPA ruled that New Mexico need not limit the amount of non-point pollutants introduced into its waters; however, it must continue with all the CWA requirements such as setting water quality standards and listing waters that fail to meet these standards.

The Chairman of the WQCC responded to the EPA with a letter on behalf of the Commission, stating:

The Commission interprets this provision to preclude enforcement of the [**10] [*1126] specified numerical standards against listed activities; essentially non-point sources associated with the reasonable operation and maintenance of irrigation and flood control facilities. However, New Mexico measures, and will continue to measure, these numeric criteria for the purposes of assessing water quality in surface waters of the State affected by such activities. New Mexico will continue to assess the water quality of the surface waters of the State and will list all impaired waters, no matter what the cause, on the State's CWA § 303(d) list. Moreover, the Commission sees no other way to interpret this provision.

R. at 225. The EPA, relying upon the WQCC's letter, approved N.M. Admin. Code tit. 20, § 6.4.12.

C. Procedural History

Plaintiffs filed this case alleging that the EPA's approval of N.M. Admin. Code tit. 20, § 6.4.12 constituted an arbitrary and capricious action contrary to the Administrative Procedure Act, *see* 5 U.S.C. § 701 et seq., and the CWA. Plaintiffs also brought an Endangered Species Act claim, 16 U.S.C. § 1531 et seq., which is not raised on appeal. After holding that the Plaintiffs [**11] had standing to bring these claims, the District Court rejected the Plaintiffs' contentions. The court held that although N.M. Admin. Code tit. 20, § 6.4.12 is ambiguous, the EPA's reliance upon the WQCC's letter to

approve the regulation was not arbitrary and did not create reversible error. The Plaintiffs timely appeal the decision of the District Court.

II. STANDARD OF REVIEW

Although the parties and the District Court below express some confusion as to the standard of review in this case, the law is well-settled on this score.

HN10 "Our standard of review of the lower court's decision in an APA case is de novo." N.M. Cattle Growers Ass'n v. United States Fish & Wildlife Serv., 248 F.3d 1277, 1281 (10th Cir. 2001). We will not overturn an agency action unless it "fails to meet statutory, procedural or constitutional requirements, or unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Sac & Fox Nation v. Norton, 240 F.3d 1250, 1260 (10th Cir. 2001) (citing 5 U.S.C. § 706(2)(A)-(D)). More specifically, HN11 "we review the EPA's decision to approve state water quality standards [**12] under the arbitrary and capricious standard." Am. Wildlands, 260 F.3d at 1196. "We will accord *Chevron* deference to the EPA's interpretation of the CWA when it makes decisions to approve state water quality standards." Id. at 1197.

Here, the ultimate decision under review is the EPA's approval of N.M. Admin. Code tit. 20, § 6.4.12, rather than an interpretation of the CWA. As such, we review the EPA's approval under the arbitrary and capricious standard. *Chevron* deference does not apply.

III. DISCUSSION

The Plaintiffs advance three arguments on appeal. First, they assert that the plain language of N.M. Admin. Code tit. 20, § 6.4.12 is not ambiguous, contrary to the EPA and District Court's determination. Rather, the Plaintiffs urge that the plain meaning of the text is inconsistent with the CWA because the regulation does away with: (a) the development of TMDLs, (b) the implementation of standards for exempted sources, (c) the development of best management practices

for exempted sources, (d) the inclusion of exempted pollution in nonpoint pollution reports, and (e) the taking of essential pollution measures. The Plaintiffs therefore [**13] [*1127] argue that the EPA acted arbitrarily and capriciously in approving a regulation that unambiguously violates the CWA. Second, the Plaintiffs argue that even if N.M. Admin. Code tit. 20, § 6.4.12 is ambiguous, the EPA acted arbitrarily and capriciously in relying on WQCC's interpretation of it in a letter to the EPA. Third, the Plaintiffs contend that even if the EPA could potentially rely on WQCC's interpretation, defects remain because the letter does not specifically mention that WQCC will continue to conduct actions required by the CWA, such as developing TMDLs. We disagree.

The EPA determined that N.M. Admin. Code tit. 20, § 6.4.12 is ambiguous. HNI2 The regulation states that when specified changes in water quality result from the "reasonable operation of irrigation and flood control facilities . . . numerical standards for temperature, dissolved solids content, dissolved oxygen, sediment or turbidity adopted under the Water Quality Act do not apply." N.M. Admin. Code tit. 20, § 6.4.12. The Plaintiffs contend that the regulation's exemption of irrigation and flood control run-off from New Mexico's Water Quality Act clearly means that the state has attempted to exempt itself from [**14] the CWA.

We are not persuaded by the Plaintiff's argument. New Mexico's Water Quality Act establishes a broad, multi-agency, water quality, regulatory regime. See N.M. Stat. Ann. § 74-6-1 et seq. HNI3 The act requires many things, including: the setting of water quality standards, N.M. Stat. Ann. § 74-6-4(C); the taking of measurements of the states waters to determine if these standards are being met, *id.*; and the meting out of fines for polluters, N.M. Stat. Ann. § 74-6-10(A). As such, we cannot conclude that the only interpretation of the text of N.M. Admin. Code tit. 20, § 6.4.12 is that it precludes the setting of standards and taking measurements as required under the CWA. Indeed, the EPA could find that the regulation could be

read either as an attempt to bar the setting of water quality standards and the taking of measurements or as merely an exemption for irrigation and flood control run-off from the civil penalty provisions of N.M. Stat. Ann. § 74-6-10(A). Therefore, we reject the Plaintiffs' assertion that N.M. Admin. Code tit. 20, § 6.4.12 is contrary to the [**15] CWA on its face and hold that it was not arbitrary or capricious for the EPA to conclude that N.M. Admin. Code tit. 20, § 6.4.12 is ambiguous.

The Plaintiffs next claim that the WQCC's letter interpreting N.M. Admin. Code tit. 20, § 6.4.12 impermissibly "rewrote" the regulation because the agency did not comply with the CWA's notice and comment requirements in doing so. Because the EPA relied on an unlawful revision in approving that regulation, the Plaintiffs maintain, it too impermissibly "rewrote" N.M. Admin. Code tit. 20, § 6.4.12. In this way, the Plaintiffs argue, the EPA acted arbitrarily and capriciously when it approved the New Mexico regulation based on the WQCC's interpretation.

Although it is true that HNI4 the EPA may not effectively rewrite or amend existing state regulations, *see, e.g., Riverside Cement Co. v. Thomas, 843 F.2d 1246, 1248 (9th Cir. 1988)*, nor may it "escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation," Appalachian Power Co. v. E.P.A., 341 U.S. App. D.C. 46, 208 F.3d 1015, 1024 (D.C. Cir. 2000), neither scenario is present in this case. To [**16] the contrary, the letter from the WQCC simply contained an interpretation of an ambiguous regulation such that it complied with the requirements of the CWA. The EPA then relied on that interpretation in determining that it would approve the regulation. Consequently, [**128] the EPA's reliance on the WQCC's interpretation contained in the letter cannot be characterized as an impermissible rewriting of the regulation or as involving "a major substantive legal addition to a rule." Therefore, the EPA did not act arbitrarily and capriciously in approving the regulation,

particularly since the agency reserved the right to revoke approval if New Mexico interpreted the regulation in the future in a way that would not comply with the CWA.

Finally, the Plaintiffs argue that the WQCC's interpretation of N.M. Admin. Code tit. 20, § 6.4.12 constitutes an "unenforceable promise" and that New Mexico is free to reverse its position at any time in the future. The Plaintiffs, however, fail to direct this Court to a single source of New Mexico or federal administrative law supporting this argument. As a result, we decline to consider it. *See Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992).*

[**17] IV. CONCLUSION

The EPA did not act arbitrarily or capriciously in determining that N.M. Admin. Code tit. 20, § 6.4.12 was ambiguous. It also did not act arbitrarily or capriciously in relying on the WQCC's interpretation of that regulation to approve it while reserving the right to withdraw EPA approval should New Mexico not adhere to the same position in the future. We therefore AFFIRM.

Tab 3

Iowa League of Cities v. EPA

United States Court of Appeals for the Eighth Circuit
November 13, 2012, Submitted; March 25, 2013, Filed
No. 11-3412

Reporter

711 F.3d 844 *; 2013 U.S. App. LEXIS 5933 **; 43 ELR 20069; 76 ERC (BNA) 1495; 2013 WL 1188039

Iowa League of Cities, Petitioner v. Environmental Protection Agency, Respondent

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Iowa League of Cities v. EPA*, 2013 U.S. App. LEXIS 14034 (8th Cir., July 10, 2013)

Related proceeding at *Hall & Assocs. v. United States EPA*, 2014 U.S. Dist. LEXIS 178571 (D.D.C., Dec. 31, 2014)

Prior History: [**1] Petition for Review of an Order of the Environmental Protection Agency.

Core Terms

EPA, mixing, zones, regulations, secondary, effluent limitation, letters, binding, blending, agency's, requirements, promulgated, agency's action, procedures, legislative rule, bacteria, notice, parties, bypass, biological, facilities, flows, authorities, discharges, judicial review, pollutant, NPDES, treatment process, water quality, water quality standards

Case Summary

Procedural Posture

Petitioner municipal association sought direct appellate review of two letters sent by respondent Environmental Protection Agency (EPA) to a U.S. Senator. The association argued that these letters effectively set forth new regulatory requirements under the Clean Water Act (CWA), 33 U.S.C.S. §

1251 et seq., with respect to water treatment processes at municipally owned sewer systems.

Overview

The association asserted that the EPA lacked the statutory authority to impose the regulations, and violated the Administrative Procedures Act (APA), 5 U.S.C.S. § 500 et seq., by implementing them without first proceeding through the notice and comment procedures for agency rulemaking. The EPA insisted there was no procedural impropriety because the letters were general policy statements or, at most, interpretative rules. The court ruled that the letters could be considered "promulgations" for the purposes of establishing jurisdiction under 33 U.S.C.S. § 1369(b)(1)(E) because they had a binding effect on regulated entities. The first letter reflected a binding policy with respect to bacteria mixing zones. The second letter presented a binding policy on blending. The court ruled that, in the first letter, the EPA eviscerated state discretion to incorporate mixing zones into their water quality standards with respect to waters designated for primary contact recreation. Because the second letter had the effect of announcing a legislative rule with respect to blending peak wet weather flows, the EPA violated the APA's procedural requirements by not using notice and comment procedures.

Outcome

The court granted the petition for review and vacated both the mixing zone rule in the June 2011 letter and the blending rule in the September 2011 letter. The matter was remanded to the EPA for

further consideration.

LexisNexis® Headnotes

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Notice & Comment Requirements

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Standards of Review > Unlawful Procedures

HN1 The Administrative Procedures Act (APA), 5 U.S.C.S. § 500 et seq., empowers federal courts to hold unlawful and set aside agency action, findings, and conclusions if they fail to conform with any of six specified standards. Inter alia, a reviewing court may set aside agency action that has failed to observe those procedures required by law. 5 U.S.C.S. § 706(2)(D). Agencies must conduct "rule making" in accord with the APA's notice and comment procedures. 5 U.S.C.S. § 553(b), (c). However, only new "legislative" rules are required to be created pursuant to notice and comment rulemaking. 5 U.S.C.S. § 553(b), (c). Interpretative rules and general statements of policy are statutorily exempt from the procedural requirements applicable to rule making. 5 U.S.C.S. § 553(b)(3)(A).

Administrative Law > Judicial Review > Standards of Review > Exceeding Statutory Authority

HN2 5 U.S.C.S. § 706(2)(C) authorizes federal courts to set aside agency action that is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN3 The Clean Water Act, 33 U.S.C. § 1251 et

seq., forbids the "discharge of any pollutant"—defined as the addition of any pollutant to navigable waters from any point source—unless executed in compliance with the Act's provisions. 33 U.S.C.S. §§ 1311(a), 1362(12). A permit program called the National Pollution Discharge Elimination System (NPDES) plays a central role in federal authorization of permissible discharges. 33 U.S.C.S. § 1342. The Environmental Protection Agency (EPA) may issue an NPDES permit, but states also are authorized to administer their own NPDES programs. § 1342(b). The vast majority elect to do so. If a state chooses to operate its own permit program, it first must obtain EPA permission and then ensure that it issues discharge permits in accord with the same federal rules that govern permits issued by the EPA. § 1342(a); 40 C.F.R. § 122.41.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

HN4 A "point source" is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14). Municipal wastewater treatment facilities are point sources.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN5 Effluent limitations restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. The National Pollution Discharge Elimination System (NPDES) permit system serves to transform generally applicable effluent limitations into the obligations of the individual discharger. The Environmental Protection Agency (EPA) applies effluent limitations at the point of discharge into

navigable waters, known as "end-of-the-pipe," unless monitoring at the discharge point would be impractical or infeasible. 40 C.F.R. § 122.45(a), (h). The baseline effluent limitations are technology-based, 33 U.S.C.S. § 1311(b); 40 C.F.R. § 125.3(a), in that they set a minimum level of effluent quality that is attainable using demonstrated technologies. The EPA has interpreted this regime as precluding it from imposing any particular technology on a discharger.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN6 The technology-based effluent limitations applicable to publicly-owned treatment works, such as municipal sewer authorities, are based on a special set of rules known as the secondary treatment regulations. § 1311(b)(1)(B); 40 C.F.R. § 125.3(a)(1). The secondary treatment regulations also do not mandate the use of any specific type of technology to achieve their requisite levels of effluent quality. 48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983). When technology-based effluent limitations would fall short of achieving desired water quality levels, the EPA is authorized to devise additional, more stringent water quality-based effluent limitations for those particular point sources. 33 U.S.C.S. § 1312(a).

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN7 Publicly-owned treatment works are any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature that are owned by a state or municipality. 40 C.F.R. § 403.3(q).

Environmental Law > Water Quality > Clean Water Act > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge

Permits > Effluent Limitations

HN8 The Clean Water Act, 33 U.S.C.S. § 1251 et seq., is a program of state and federal cooperation, but state discretion is exercised against a backdrop of significant Environmental Protection Agency (EPA) authority over state-run National Pollution Discharge Elimination System (NPDES) programs. The EPA dictates the effluent limitations applicable to all permits, while states are in charge of categorizing their waterways in terms of designated uses and setting forth water quality standards for each type of waterway. 33 U.S.C.S. § 1313(c)(2). These standards supplement effluent limitations to ensure that overall water quality remains at an acceptable level. A major component of a state's water quality standards is the set of water quality criteria sufficient to support the designated uses of each waterbody. At least every three years, states must submit their water quality standards to the EPA for approval. § 1313(c)(1). The EPA must approve the standards within sixty days or disapprove them within ninety days. 66 Fed. Reg. 11,202, 11,215 (Feb. 22, 2001). States are also required to forward a copy of each permit application they receive to the EPA, which is afforded an opportunity to block the issuance of the permit. § 1342(d); 40 C.F.R. § 123.29.

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN9 States evaluate discharge permit applications under a mixture of federal regulations and their own water quality standards, crafted subject to federal approval.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN10 Water quality criteria are the threshold values against which ambient concentrations are compared to determine whether a waterbody exceeds the water quality standard. National Pollution Discharge Elimination System permits

must establish limits on any pollutant, where necessary to attain and maintain applicable water quality standards.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN11 One element of state water quality standards are policies regarding "mixing zones." The Environmental Protection Agency (EPA) has defined mixing zones as a limited area or volume of water where initial dilution of a discharge takes place and where numeric water quality criteria can be exceeded. In effect, a mixing zone allows the permit holder to create a higher concentration of pollutants in navigable waters near the immediate point of discharge, as long as the discharge is sufficiently diffused as it moves through the larger body of water. The requisite water quality criteria, then, need not be met at the end of the pipe. It is undisputed that in at least some instances, states are allowed to approve discharge permit applications that incorporate mixing zones. 40 C.F.R. § 131.13. But as one of its water quality standards, a state's policy on mixing zones remains subject to the triennial review of the EPA. 33 U.S.C.S. § 1313(c)(1). In addition, the EPA has the authority to veto any permit application incorporating what it views as an inappropriate mixing zone. 33 U.S.C.S. § 1342(d)(2).

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN12 Mixing zones are addressed in one of the regulations of the Environmental Protection Agency (EPA), 40 C.F.R. § 122.44(d)(1). Subparagraph (ii) of that regulation describes the procedures a state should apply when determining whether a discharge would cause—or contribute to causing—a body of water to deviate from the state's water quality criteria, thereby necessitating the imposition of water-quality based effluent limitations on that discharge (in addition to the default technology-based effluent limitations already in effect). 54 Fed. Reg. 23,868, 23,872 (June 2, 1989). In particular, state permitting

authorities should consider any dilution of the effluent in the receiving water, after considering mixing zones if applicable.

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN13 All issued permits must comply with federal regulations regarding "bypass," which is the intentional diversion of waste streams from any portion of a treatment facility. 40 C.F.R. § 122.41(m)(1). Bypass is generally prohibited unless there are no feasible alternatives. § 122.41(m)(4). The bypass rule is not itself an effluent standard, but instead it merely piggybacks existing requirements. 53 Fed. Reg. 40,562, 40,609 (Oct. 17, 1988). The rule's purpose is to ensure that users properly operate and maintain their treatment facilities pursuant to applicable underlying technology-based standards, by requiring incoming flows to move through the facility as it was designed to be operated. Like the more general secondary treatment regulations, the bypass rule does not require the use of any particular treatment method or technology.

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Environmental Law > Water Quality > Clean Water Act > General Overview

Governments > Courts > Authority to Adjudicate

Governments > Federal Government > Claims By & Against

HN14 The Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., waives sovereign immunity for suits seeking judicial review of an agency action made reviewable by statute. 5 U.S.C.S. § 704. The Clean Water Act, 33 U.S.C.S. § 1251 et seq., establishes a bifurcated jurisdictional scheme whereby courts of appeals have jurisdiction over some categories of challenges to Environmental Protection Agency action, and the district courts

retain jurisdiction over other types of complaints.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN15 Section 509(b)(1)(E) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., (33 U.S.C.S. § 1369(b)(1)(E)) vests the courts of appeals with exclusive jurisdiction to review the Environmental Protection Agency's action in approving or promulgating any effluent limitation or other limitation under 33 U.S.C.S. § 1311, 1312, 1316, or 1345.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN16 The Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., does not create federal subject matter jurisdiction. Rather, a federal court has federal question jurisdiction under 28 U.S.C.S. § 1331 over challenges to federal agency action.

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Governments > Legislation > Statute of Limitations > Time Limitations

HN17 The existence of subject-matter jurisdiction is a question of law that the court reviews de novo. In order to be timely filed, interested parties must file for review within 120 days from the date of the promulgation of an effluent limitation or other

limitation. 33 U.S.C.S. § 1369(b)(1). The 120-day window to challenge promulgations begins two weeks after a document is signed. 40 C.F.R. § 23.2.

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN18 When an agency raises a factual challenge to the United States Court of Appeals for the Eighth Circuit's jurisdiction under Fed. R. Civ. P. 12(b)(1), no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the court from evaluating the merits of the jurisdictional claims.

Administrative Law > Judicial Review > Reviewability > General Overview

Environmental Law > Water Quality > Clean Water Act > General Overview

HN19 The U.S. Supreme Court has recognized a preference for direct appellate review of agency action pursuant to the Administrative Procedures Act, 5 U.S.C.S. § 500 et seq. Moreover, the U.S. Supreme Court has interpreted broadly the direct appellate review provision in 33 U.S.C.S. § 1369(b)(1)(F), which authorizes review of agency action in issuing or denying a permit.

Administrative Law > Judicial Review > Reviewability > General Overview

HN20 An agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding. Thus, the court's functional analysis of whether an agency action constitutes a promulgation encompasses those words and deeds that bind legally or as a practical matter.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Administrative Law > Judicial

Review > Reviewability > Jurisdiction & Venue

HN21 Even if there were an implicit finality requirement applicable to agency actions made reviewable by statute, this would not affect federal jurisdiction; the requirements of the Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., are part of a party's cause of action and are not jurisdictional.

Administrative Law > Judicial
Review > Reviewability > General Overview

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

Environmental Law > Administrative Proceedings &
Litigation > Judicial Review

Environmental Law > Water Quality > Clean Water
Act > General Overview

Governments > Legislation > Statutory Remedies &
Rights

HN22 The Administrative Procedures Act (APA), 5 U.S.C.S. § 500 et seq., allows judicial review in two situations: Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. 5 U.S.C.S. § 704. The word "final" modifies the second use of "agency action," but not the first. While some courts have interpreted the phrase "agency action made reviewable by statute" as including an implied finality requirement, the United States Court of Appeals for the Eighth Circuit declines to conjure up a finality requirement for "agency actions made reviewable by statute" where none is located in the text of the APA, particularly where the U.S. Supreme Court has implied that the two phrases incorporate distinct requirements. The Clean Water Act, 33 U.S.C.S. § 1251 et seq., expressly makes specified agency actions reviewable, and the court's task therefore is to determine whether the asserted agency action falls within the statutory terms.

Administrative Law > Agency Rulemaking > General
Overview

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Binding Effect

HN23 If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or state permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes binding.

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Binding Effect

HN24 The mandatory language of an agency document alone can be sufficient to render it binding.

Administrative Law > Judicial
Review > Administrative Record > General Overview

Administrative Law > Judicial Review > Standards of
Review > Arbitrary & Capricious Standard of Review

HN25 When applying the arbitrary and capricious standard of review under 5 U.S.C.S. § 706(2)(A), the focal point for judicial review should be the administrative record already in existence. Therefore, if there is a contemporaneous administrative record and no need for additional explanation of the agency decision, the court will permit supplementation of the administrative record only where there is a "strong showing of bad faith or improper behavior. The rationale for this rule is that judicial review of the reasonableness of an agency's actions should concentrate upon the evidence available to the agency when making its decision. But where rulemaking masquerading as explication is alleged, the informality of the agency's decisionmaking process makes the possibility of a sparse "contemporaneous administrative record" more likely.

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Binding Effect

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

HN26 The time to seek direct appellate review begins to run not when the agency first floats its proposal to the public, but rather when the agency promulgates that announcement—in other words, when they make its substance binding.

Environmental Law > ... > Clean Water
Act > Coverage & Definitions > General Overview
Environmental Law > ... > Clean Water
Act > Coverage & Definitions > Discharges

HN27 The Clean Water Act, 33 U.S.C.S. § 1251 et seq., defines effluent limitations as any restriction established by a state or the Environmental Protection Agency on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters. 33 U.S.C.S. § 1362(11). The U.S. Supreme Court has referred to effluent limitations as direct restrictions on discharges. Other circuits have held that the expansiveness of the phrase "any restriction" encompasses both numerical and non-numerical effluent limitations.

Environmental Law > ... > Clean Water
Act > Coverage & Definitions > General Overview

HN28 An agency action is a "limitation" within the meaning of 33 U.S.C.S. § 1369(b)(1)(E) if entities subject to the permit requirements of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., face new restrictions on their discretion with respect to discharges or discharge-related processes.

Environmental Law > ... > Clean Water
Act > Coverage & Definitions > General Overview

HN29 The Environmental Protection Agency's position that bacteria mixing zones in waters designated for primary contact recreation should not be permitted is a restriction that directly affects the concentration of discharge from a point source

and therefore is an effluent limitation.

Civil Procedure > ... > Justiciability > Case &
Controversy Requirements > General Overview

Civil Procedure > ... > Justiciability > Case &
Controversy Requirements > Immediacy

Civil

Procedure > ... > Justiciability > Ripeness > Imminence

Civil

Procedure > ... > Justiciability > Ripeness > Tests for
Ripeness

HN30 The judicially created doctrine of ripeness flows from both the Article III cases and controversies limitations and also from prudential considerations for refusing to exercise jurisdiction. Ripeness is peculiarly a question of timing and is governed by the situation at the time of review, rather than the situation at the time of the events under review. A party seeking review must show both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Both of these factors are weighed on a sliding scale, but each must be satisfied to at least a minimal degree. Fitness rests primarily on whether a case would benefit from further factual development, and therefore cases presenting purely legal questions are more likely to be fit for judicial review. The hardship factor looks to the harm parties would suffer, both financially and as a result of uncertainty-induced behavior modification in the absence of judicial review. The court does not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them, but the injury must be certainly impending. The immediacy and the size of the threatened harm will also affect the interplay of these factors.

Administrative Law > Agency Rulemaking > General
Overview

Administrative Law > Judicial
Review > Reviewability > Ripeness

HN31 Whether an agency guidance document is a legislative rule is largely a legal, not a factual,

question, turning primarily upon the text of the document. As primarily legal questions, such challenges tend to present questions fit for judicial review. On the other hand, postponing a procedural challenge to an agency guidance document may be appropriate where further factual development regarding the agency's application of the document would aid the court's decision. This is so because the purpose of the ripeness doctrine is to prevent courts from entangling themselves in abstract disagreements over administrative policies.

Administrative Law > Judicial
Review > Reviewability > Standing

Constitutional Law > ... > Case or
Controversy > Standing > Elements

Evidence > Burdens of Proof > Allocation

HN32 If a litigant lacks U.S. Const. art. III standing to bring his claim, then the United States Court of Appeals for the Eighth Circuit has no subject matter jurisdiction over the suit. To show standing under Article III of the U.S. Constitution, a plaintiff must demonstrate (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury. When an association, rather than an individual permit applicant, is filing suit, it also must prove associational standing. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The association need not establish that all of its members would have standing to sue individually so long as it can show that any one of them would have standing.

Civil
Procedure > ... > Justiciability > Standing > General
Overview

Civil
Procedure > ... > Justiciability > Standing > Burdens

of Proof

HN33 Standing is to be determined as of the commencement of the suit. The party seeking judicial review bears the burden of persuasion and must support each element with the manner and degree of evidence required at the successive stages of litigation. Therefore, at the pleading stage a petitioner can move forward with general factual allegations of injury, whereas to survive a summary judgment motion, he must set forth by affidavit or other evidence specific facts.

Administrative Law > Judicial
Review > Reviewability > Standing

Civil

Procedure > ... > Justiciability > Standing > Burdens
of Proof

Civil Procedure > ... > Summary Judgment > Burdens
of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary
Judgment > Supporting Materials > General
Overview

HN34 Parties seeking direct appellate review of an agency action must prove each element of standing as if they were moving for summary judgment in a district court. When parties seek the type of relief available on a motion for summary judgment, they correspondingly should bear the responsibility of meeting the same burden of production, namely specific facts supported by affidavit or other evidence.

Administrative Law > Judicial
Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial
Review > Reviewability > Standing

Civil

Procedure > ... > Justiciability > Standing > Burdens
of Proof

Evidence > Burdens of Proof > Preponderance of
Evidence

HN35 When an agency raises a factual challenge to

subject matter jurisdiction by attacking the facts asserted by the plaintiff with respect to standing, the plaintiff must establish standing without the benefit of any inferences in its favor. Parties seeking to litigate in federal court have the burden of establishing jurisdiction, including standing, by a preponderance of the evidence.

Civil
Procedure > ... > Justiciability > Standing > General
Overview

HN36 Causation for standing purposes requires that the harm asserted be fairly traceable to the challenged action of the defendant.

Civil
Procedure > ... > Justiciability > Standing > Injury in
Fact

HN37 The violation of a procedural right can constitute an injury in fact so long as the procedures in question are designed to protect some threatened concrete interest of the petitioner that is the ultimate basis of his standing.

Administrative Law > Agency Rulemaking > General
Overview

Administrative Law > Agency Rulemaking > Notice
& Comment Requirements

Environmental Law > Water Quality > Clean Water
Act > General Overview

HN38 Notice and comment procedures for Environmental Protection Agency rulemaking under the Clean Water Act, 33 U.S.C.S. § 1251 et seq., are undoubtedly designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation.

Administrative Law > Judicial
Review > Reviewability > Standing

HN39 Where a challenger is the subject of agency action, there is ordinarily little question that the

action has caused him injury, and that a judgment preventing the action will redress it. This is particularly true for individuals asserting violations of procedural rights. If a petitioner is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. Correspondingly, redressability in this context does not require petitioners to show that the agency would alter its rules upon following the proper procedures.

Administrative Law > Judicial
Review > Reviewability > Questions of Law

Administrative Law > Judicial Review > Standards of
Review > De Novo Standard of Review

HN40 Much of the rationale for granting deference to administrative decisions is simply not applicable where the topic of review—compliance with Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., procedural requirements—is not a matter that Congress has committed to the agency's discretion. In other words, whether and when an agency must follow the law is not an area uniquely falling within its own expertise, and thus the agency's decision is less deserving of deference. Furthermore, because the categorization of an agency's action as a legislative or interpretative rule is largely a question of law, a de novo standard of review is consistent with the standard of review the United States Court of Appeals for the Eighth Circuit generally applies to questions of law in similar contexts.

Administrative Law > Judicial Review > Standards of
Review > Rule Interpretation

HN41 An agency's characterization of its rule is a relevant component of review and is a factor entitled to some deference.

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > General Overview

Administrative Law > Agency Rulemaking > Rule

Application & Interpretation > Binding Effect

HN42 The critical distinction between legislative and interpretative rules is that, whereas interpretative rules simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties, a legislative rule imposes new rights or duties. When an agency creates a new legal norm based on the agency's own authority to engage in supplementary lawmaking, as delegated from Congress, the agency creates a legislative rule. Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules. It follows from this distinction that interpretative rules do not have the force of law. Whether or not a binding pronouncement is in effect a legislative rule that should have been subjected to notice and comment procedures thus depends on whether it substantively amends or adds to, versus simply interpreting the contours of, a preexisting rule.

Administrative Law > Agency
Adjudication > Informal Agency Action

HN43 An agency's policy statements are not binding, either as a legal or practical matter.

Administrative Law > Agency
Rulemaking > Informal Rulemaking

HN44 Notice and comment procedures secure the values of government transparency and public participation, compelling the United States Court of Appeals for the Eighth Circuit to agree that the Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., notice and comment exemptions must be narrowly construed.

Business & Corporate Compliance > ... > Water
Quality > Clean Water Act > Water Quality Standards

HN45 The long-standing policy of the Environmental Protection Agency (EPA) toward bacteria mixing zones has been that states should

exercise their discretion—as set forth in 40 C.F.R. § 131.13—to adopt a definitive statement in their water quality standards on whether or not mixing zones are allowed. States are authorized to consider mixing zones in determining the types of standards necessary to preserve water quality. 40 C.F.R. § 122.44(d)(1)(ii). States do not enjoy complete discretion in creating a mixing zone policy because they operate within the shadow of EPA-crafted effluent limitations.

Administrative Law > Agency Rulemaking > General
Overview

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > General Overview

HN46 The hallmark of an interpretative rule or policy statement is that they cannot be independently legally enforced. It is the underlying legislative rules that drive compliance, and thus when an agency applies a newly announced interpretative rule or policy statement, there must be some external legal basis supporting its implementation.

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > General Overview

HN47 If a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Validity

Administrative Law > Judicial Review > Standards of
Review > Exceeding Statutory Authority

HN48 5 U.S.C.S. § 706(2)(C) authorizes courts to strike down as ultra vires agency rules promulgated without valid statutory authority.

Administrative Law > Judicial Review > Standards of
Review > General Overview

Administrative Law > Judicial Review > Standards of
Review > Deference to Agency Statutory

Interpretation

Act > Enforcement > General Overview

HN49 Appellate review under 5 U.S.C.S. § 706(2)(C) proceeds under the familiar Chevron framework. The court must first conduct an independent review of the statute and of its legislative history. Deference to the agency is appropriate only when a court finds the statute to be ambiguous. If confronted with an ambiguous statute, the court looks to whether the agency's construction of the statute is reasonable. Agency rules will survive ultra vires allegations so long as the court can reasonably conclude that the grants of authority in the statutory provisions cited by the government contemplate the issuance.

Environmental Law > ... > Clean Water
Act > Coverage & Definitions > Discharges

Environmental Law > ... > Clean Water
Act > Coverage & Definitions > Point Sources

Environmental Law > ... > Enforcement > Discharge
Permits > General Overview

Environmental Law > ... > Enforcement > Discharge
Permits > Effluent Limitations

HN50 The Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., permits the Environmental Protection Agency (EPA) to set effluent limitations based upon secondary treatment. 33 U.S.C.S. § 1311(b)(1)(B). But effluent limitations are restricted to regulations governing discharges from point sources into navigable waters. 33 U.S.C.S. § 1362(11). The EPA is authorized to administer more stringent water quality related effluent limitations, but the CWA is clear that the object of these limitations is still the discharges of pollutants from a point source. 33 U.S.C.S. § 1312(a). In turn, "discharge of pollutant" refers to the addition of any pollutant to navigable waters. § 1362(11).

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > Statutory Awards

Environmental Law > Administrative Proceedings &
Litigation > General Overview

Environmental Law > ... > Clean Water

HN51 33 U.S.C.S. § 1369(b)(3) authorizes courts, whenever appropriate, to award litigation costs to any prevailing or substantially prevailing party. To be a prevailing party entitled to attorneys' fees, a plaintiff must achieve at least some relief on the merits that effectuates a material alteration of the legal relationship of the parties. An award of litigation costs under 33 U.S.C.S. § 1369(b)(3) must also be "appropriate." Statutory provisions authorizing an award of litigation costs often serve to incentivize the achievement of statutory objectives, and therefore an award is usually appropriate when a party has advanced the goals of the statute invoked in the litigation.

Environmental Law > Water Quality > Clean Water
Act > General Overview

HN52 The goals of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., involve the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.S. § 1251(a).

Counsel: For Iowa League of Cities, Petitioner: Gary B. Cohen, John C. Hall, Philip D. Rosenman, HALL & ASSOCIATES, Washington, DC.

For Environmental Protection Agency, Respondent: Patricia K. Hirsch, U.S. ENVIRONMENTAL PROTECTION AGENCY, Washington, DC; Adam J. Katz, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Albany, NY; Martha R. Steincamp, U.S. ENVIRONMENTAL PROTECTION AGENCY, Kansas City, KS.

Judges: Before SMITH, BEAM, and GRUENDER, Circuit Judges.

Opinion by: GRUENDER

Opinion

[*854] GRUENDER, Circuit Judge.

The Iowa League of Cities ("League") seeks direct

appellate review of two letters sent by the Environmental Protection Agency ("EPA") to Senator Charles Grassley. The League argues that these letters effectively set forth new regulatory requirements with respect to water treatment processes at municipally owned sewer systems. According to the League, the EPA not only lacks the statutory authority to impose these regulations, but it violated the Administrative Procedures Act ("APA"), 5 U.S.C. § 500 et seq., by implementing them without first proceeding through the notice and comment procedures for agency rulemaking. We find that we have subject matter [**2] jurisdiction over the claims, and we vacate under APA section 706(2)(C), (D).

I. Background

The League previously sought our review in 2010 of six EPA documents, consisting of letters, internal memoranda, and a Federal Register notice, that allegedly constituted new regulatory requirements for water treatment processes. The EPA moved to dismiss, arguing that judicial review was premature because the documents were part of an ongoing agency decisionmaking process. An administrative panel of this court granted the EPA's motion to dismiss for lack of subject matter jurisdiction.

The League continued to perceive a conflict between the agency's official written policies and the expectations it was transmitting to the state entities that served as liaisons between the EPA and municipal wastewater treatment facilities. Consequently, the League enlisted the assistance of Senator Charles Grassley to obtain clarification from the EPA. The EPA sent two letters ("June 2011 letter" and "September 2011 letter") in response to Senator Grassley's inquiries. According to the EPA, these guidance letters merely discuss existing regulatory requirements. The League disagrees, viewing the letters as contradicting [**3] both the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq., and the EPA's lawfully promulgated regulations. As it did in 2010, the EPA

moved to dismiss for lack of subject matter jurisdiction. This time an administrative panel denied the motion but requested that the parties address the merits of all relevant jurisdictional and substantive arguments.¹

[*855] HNI The APA "empowers federal courts to 'hold unlawful and set aside agency action, findings, and conclusions' if they fail to conform with any of six specified standards." Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) (quoting 5 U.S.C. § 706(2)). *Inter alia*, a reviewing court may set aside agency action that has failed to observe those "procedure[s] required by law." § 706(2)(D). Agencies must conduct "rule making" in accord with the APA's notice and comment procedures. 5 U.S.C. § 553(b), (c). However, only new "legislative" rules are required to be created pursuant to notice and comment rulemaking. *See id.*; [**4] *see also Minnesota v. Ctrs. for Medicare & Medicaid Servs.*, 495 F.3d 991, 996 (8th Cir. 2007). "Interpretative rules"² and "general statements of policy" are statutorily exempt from the procedural requirements applicable to "rule making." *See § 553(b)(3)(A)*; *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99, 115 S. Ct. 1232, 131 L. Ed. 2d 106 (1995). The crux of the League's procedural claim is that the EPA's letters announced new legislative rules for water treatment processes at municipally owned sewer systems, thereby modifying the EPA's existing legislative rules. The EPA admits it did not engage in notice and comment procedures, but it insists there has been no procedural impropriety because the letters should be considered general policy statements or, at most, interpretative rules.

The League asks us to find not only that the EPA's

¹ Our ability to make a final decision on jurisdiction is unaffected by the rulings of either this administrative panel or the 2010 administrative panel. *See In re Rodriguez*, 258 F.3d 757, 758-59 (8th Cir. 2001) (per curiam).

² Some courts also use the phrase "interpretive" rules interchangeably with "interpretative" rules.

actions are procedurally invalid but also to go one step further and set aside the rules as imposing regulatory requirements that surpass the EPA's statutory authority. *See HN2 § 706(2)(C)* (authorizing federal courts to set aside agency action that is "in excess of statutory jurisdiction, [**5] authority, or limitations, or short of statutory right").

The two areas of regulation addressed in the challenged EPA letters are "mixing zones" and "blending." Our analysis first requires a discussion of the CWA's regulatory scheme and the water treatment processes at issue.

A. The Clean Water Act

HN3 The CWA forbids the "discharge of any pollutant"—defined as the "addition of any pollutant to navigable waters from any point source"³—unless executed in compliance with the Act's provisions. *33 U.S.C. §§ 1311(a), 1362(12)*. A permit program called the National Pollution Discharge Elimination System ("NPDES") plays a central role in federal authorization of permissible discharges. *See 33 U.S.C. § 1342*. The EPA may issue an NPDES permit, but states also are authorized to administer their own NPDES programs. *§ 1342(b)*. The vast majority elect to do so.⁴ If a state chooses to operate its own permit program, it first must obtain EPA permission and then ensure that it issues discharge permits in accord with the same [**856] federal rules that govern permits issued by the EPA. *§ 1342(a); 40 C.F.R. § 122.41*.

³ **HN4** A "point source" is "any discernible, confined and discrete conveyance, including but not limited [**6] 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)*. This case involves municipal wastewater treatment facilities, which both parties agree are point sources.

⁴ Iowa is one of forty-six states approved to administer an NPDES program. EPA, State Program Status, <http://cfpub1.epa.gov/npdes/statestats.cfm> (last visited Feb. 14, 2013).

Many of these rules are in the form of **HN5** "effluent limitations," which "restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources." *Arkansas v. Oklahoma, 503 U.S. 91, 101, 112 S. Ct. 1046, 117 L. Ed. 2d 239 (1992)* (citing *§§ 1311, 1314*). The NPDES permit system "serves to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger." *EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 205, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976)*. The EPA applies effluent limitations at the point of discharge into navigable waters, known as "end-of-the-pipe," unless monitoring at the discharge point would be "impractical or infeasible." [**7] *40 C.F.R. § 122.45(a), (h)*. The baseline effluent limitations are "technology-based," *§ 1311(b); 40 C.F.R. § 125.3(a)*, in that they set "a minimum level of effluent quality that is attainable using demonstrated technologies." EPA, NPDES Permit Writers' Manual 5-1 (2010).⁵ The EPA has interpreted this regime as "preclud[ing] [it] from imposing any particular technology on a discharger." *In re Borden, Inc.*, Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m), No. 78 (Feb. 19, 1980), at *2; *see also* NPDES Permit Writers' Manual 5-14, 5-15 ("Therefore, each facility has the discretion to select any technology design and process changes necessary to meet the performance-based discharge limitations and standards specified by the effluent guidelines."). **HN6** The technology-based effluent limitations applicable to publicly-owned treatment works ("POTWs"),⁶ such as municipal sewer authorities, are based on a special set of rules known as the "secondary treatment" regulations. *§ 1311(b)(1)(B); 40 C.F.R. § 125.3(a)(1)*; *see generally 40 C.F.R. § 133.102* (describing average

⁵ Available at http://www.epa.gov/npdes/pubs/pwm_2010.pdf.

⁶ **HN7** POTWs are "any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature" that are "owned by a State or municipality." *40 C.F.R. § 403.3(a)*.

monthly and weekly "minimum level[s] of effluent quality attainable by secondary treatment"). The [**8] secondary treatment regulations also do not mandate the use of any specific type of technology to achieve their requisite levels of effluent quality. *See 48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983)*. When technology-based effluent limitations would fall short of achieving desired water quality levels, the EPA is authorized to devise additional, more stringent water quality-based effluent limitations for those particular point sources. *33 U.S.C. § 1312(a)*.

Thus, *HN8* the CWA is a program of state and federal cooperation, but state discretion is exercised against a backdrop of significant EPA authority over state-run NPDES programs. The EPA dictates the effluent limitations applicable to all permits, while states are in charge of categorizing their waterways in terms of designated uses and setting forth "water quality standard[s]" for each type of waterway. *33 U.S.C. § 1313(c)(2)*. These standards supplement effluent limitations [**9] to ensure that overall water quality remains at an acceptable level. *Arkansas, 503 U.S. at 101*. A major component of a state's water quality standards is "the set of water quality criteria sufficient to support the designated uses of each waterbody."⁷ NPDES Permit Writers' Manual 6-4. [**857] At least every three years, states must submit their water quality standards to the EPA for approval. *§ 1313(c)(1)*. The EPA must approve the standards within sixty days or disapprove them within ninety days. *66 Fed. Reg. 11,202, 11,215 (Feb. 22, 2001)*. States are also required to forward a copy of each permit application they receive to the EPA, which is afforded an opportunity to block the issuance of the permit. *§ 1342(d); 40 C.F.R. § 123.29*. In sum, *HN9* states evaluate discharge permit applications

under a mixture of federal regulations and their own water quality standards, crafted subject to federal approval.

B. Bacteria Mixing Zones

HN11 One element of state water quality standards are policies regarding "mixing zones." The EPA has defined mixing zones as "[a] limited area or volume of water where initial dilution of a discharge takes place and where numeric water quality criteria can be exceeded." EPA, Water Quality Handbook Ch. 5.1 (1994) ("Handbook"); *see also* NPDES Permit Writers' Manual 6-15. In effect, a mixing zone allows the permit holder to create a higher concentration of pollutants in navigable waters near the immediate point of discharge, as long as the discharge is sufficiently diffused as it moves through the larger body of water. The requisite water quality criteria, then, need not be met at the end of the pipe. It is undisputed that in at least some instances, states are allowed to approve discharge permit applications that incorporate mixing [**11] zones. *See 40 C.F.R. § 131.13* ("States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones . . ."). But as one of its water quality standards, a state's policy on mixing zones remains subject to the triennial review of the EPA. *See § 1313(c)(1)*. In addition, the EPA has the authority to veto any permit application incorporating what it views as an inappropriate mixing zone. *See § 1342(d)(2)*.

HN12 Mixing zones are addressed in one of the EPA's regulations, *40 C.F.R. § 122.44(d)(1)*. Subparagraph (ii) of that regulation describes the procedures a state should apply when determining whether a discharge would cause—or contribute to causing—a body of water to deviate from the state's water quality criteria, thereby necessitating the imposition of water-quality based effluent limitations on that discharge (in addition to the default technology-based effluent limitations already in effect). *See 54 Fed. Reg. 23,868, 23,872*

⁷ *HN10* "Water [**10] quality criteria are the threshold values against which ambient concentrations are compared to determine whether a waterbody exceeds the water quality standard. . . . NPDES permits must establish limits on any pollutant, where necessary to attain and maintain applicable water quality standards." *54 Fed. Reg. 23,868, 23,872 (June 2, 1989)*.

(June 2, 1989). In particular, state permitting authorities should consider "any dilution of the effluent in the receiving water, after considering mixing zones if applicable." *Id.* [**12] Although some commentators responded to the proposal of subparagraph (ii) by requesting that the EPA prohibit mixing zones, the EPA subsequently reiterated that the "use of mixing zones raises issues that are more appropriately addressed in the state water quality standards adoption process," and therefore it would retain "the reference to mixing zones in *paragraph (d)(1)(ii)*." *Id.* The League portrays *40 C.F.R. § 122.44(d)(1)(ii)* as channeling any federal objections to mixing zones, including mixing zones for bacterial effluents ("bacteria mixing zones"), through the EPA's process of approving or rejecting state water quality standards.

The June 2011 letter admits that, pursuant to *40 C.F.R. § 131.13*, states "may, at [**858] their discretion, include mixing zone policies in their state water quality standards." Citing a 2008 memorandum from the Director of the EPA's Office of Science and Technology to a regional EPA director ("the King memorandum"), however, the June 2011 letter then recites "the EPA's long-standing policy" that all bacteria mixing zones in waters designated for "primary contact recreation" carry potential health risks and flatly states that they "should not be permitted." [**13] The letter further acknowledges that the EPA "does not have additional regulations specific to mixing zones," but it then refers the reader to the additional "recommendations regarding the use of mixing zones" in policy guidance such as the Handbook. The Handbook encourages states to incorporate a "definitive statement" into their water quality standards regarding "whether or not mixing zones are allowed" and, if they are, to "utilize a holistic approach to determine whether a mixing zone is tolerable." Ch. 5.1, 5.1.1. The Handbook cautions, however, that mixing zones must be utilized in ways that "ensure . . . there are no significant health risks, considering likely pathways of exposure." Ch. 5.1. Additionally, mixing zones "should not be permitted where they may endanger critical areas,"

such as "recreational areas." *Id.* From the League's perspective, states are able to approve bacteria mixing zones, even in waters designated as "primary contact recreation," so long as site-specific factors create scenarios in which there are no health risks and recreational areas are not endangered. The EPA argues that the June 2011 letter is consistent with the Handbook, which explicitly envisioned [**14] limitations on mixing zones in recreational areas.

C. Blending

The second contested regulatory area involves "blending." POTWs typically move incoming flows through a primary treatment process and then through a secondary treatment process. Most secondary treatment processes are biological-based, but the secondary treatment regulations do not "specify the type of treatment process to be used to meet secondary treatment requirements nor do they preclude the use of non-biological facilities."⁸ *68 Fed. Reg. 63,042, 63,046 (Nov. 7, 2003)*. At many POTWs, primary treatment capacity exceeds secondary treatment capacity. Biological-based processes in particular are sensitive to deviations in volume of flow and pollutant level. Correspondingly, during periods of rain and snow, large influxes of stormwater can overwhelm a facility's standard biological secondary treatment processes, potentially rendering them inoperable. *Id.* Blending can prevent this, by channeling a portion of "peak wet weather flows" around biological secondary treatment units and through non-biological units, recombining that flow with its counterpart that traveled through the biological units, and then discharging the combined [**15] stream. *Id. at 63,045*. Just like non-blended streams, the combined output must still comply with all applicable effluent limitations, including the water quality levels specified in the secondary treatment regulations. *Id. at 63,047*.

⁸ Biological-based systems use microorganisms to treat incoming flows. A facility can be designed to use non-biological treatment processes, such as chemical additives or physical filtration equipment, instead of or in conjunction with biological facilities.

Some members of the League wish to incorporate a method of treatment called ACTIFLO into the secondary treatment procedures at their wastewater treatment facilities. ACTIFLO units employ non-biological processes and are used as auxiliary secondary treatment units for peak wet weather flows.⁹ The parties disagree [*859] on the circumstances in which the CWA and EPA regulations permit the use of ACTIFLO. The League views ACTIFLO as a permissible technology within a POTW facility, as long as the overall output from the secondary treatment phase meets the effluent limitations imposed by the secondary treatment regulations. The EPA, on the other hand, views ACTIFLO as an impermissible "diversion" from traditional [*16] biological secondary treatment facilities.

HNI3 All issued permits must comply with federal regulations regarding "bypass," which is the "intentional diversion of waste streams from any portion of a treatment facility." 40 C.F.R. § 122.41(m)(1). Bypass is generally prohibited unless there are "no feasible alternatives." § 122.41(m)(4). The bypass rule "is not itself an effluent standard," but instead it "merely 'piggybacks' existing requirements." 53 Fed. Reg. 40,562, 40,609 (Oct. 17, 1988). The rule's purpose is to "ensure that users properly operate and maintain their treatment facilities . . . [pursuant to applicable] underlying technology-based standards," by requiring incoming flows [*17] to move through the facility as it was designed to be operated. *Id.* Like the more general secondary treatment regulations, the bypass rule does not require the use of any particular treatment method or technology. *Id.*; *see also NRDC. v. EPA, 822 F.2d 104, 123, 261 U.S. App. D.C. 372 (D.C. Cir. 1987)*.

⁹ ACTIFLO is a physical/chemical process that uses ballasted flocculation. "In ballasted flocculation or sedimentation, a metal salt coagulant is added to the excess wet weather flows to aggregate suspended solids. Then, fine-grained sand, or ballast, is added along with a polymer. The polymer acts like glue which bonds the aggregated solids and sand. The process increases the particles' size and mass which allows them to settle faster." EPA, Report to Congress: Impacts and Control of CSOs and SSOs 2 (2004).

In 2003, the EPA offered "a proposed interpretation of the bypass provision (40 CFR [§] 122.41(m)) as it applies to . . . blending." 68 Fed. Reg. at 63,049. Prior to this proposal, the EPA had "not established a national policy (either through rulemaking or through non-binding guidance to assist in the interpretation of the bypass regulation) regarding whether and under what circumstances wet weather blending at a POTW plant would not constitute a bypass." *Id. at 63,052*. The 2003 proposed policy would have "provide[d] guidance to EPA Regional and State permitting authorities . . . on how EPA intends to exercise its discretion in implementing the statutory and regulatory provisions related to discharges from POTWs where peak wet weather flow is routed around biological treatment units and then blended with the effluent from the biological units prior to discharge." *Id. at 63,051*. Going forward, blending "would [*18] not be a prohibited bypass and could be authorized in an NPDES permit" so long as certain enumerated conditions were met. *Id. at 63,049-50*. These conditions primarily focused on ensuring that the discharge met all applicable effluent limitations and water quality standards, that it passed through a primary treatment unit prior to discharge, and that a "portion of the flow [w]ould only be routed around a biological or advanced treatment unit when the capacity of the treatment unit is being fully utilized." *Id.* The EPA posted the proposed policy on its website and declared its consistency with the CWA. Implicitly, the 2003 policy seemed to view the secondary treatment phase as encompassing both traditional biological secondary treatment units and auxiliary non-biological treatments for peak wet weather flows, such as ACTIFLO. Accordingly, flows sent through ACTIFLO were not being intentionally "diverted" from a process they should have gone through; instead, these excess flows were simply designated to receive a different [*860] type of secondary treatment. The focus was on whether the water quality of the resulting combined discharge at the end of the secondary treatment phase met all applicable [*19] effluent limitations.

Two years later, the EPA abandoned the 2003 proposal. 70 Fed. Reg. 76,013, 76,015 (Dec. 22, 2005). The EPA acknowledged recent "confusion regarding the regulatory status of peak wet weather flow diversions around secondary treatment units at POTW treatment plants" and observed that they were treated only intermittently as bypasses. Id. at 76,015. The 2005 policy announced that this type of "diversion" was now considered a bypass and would be allowed only if there were "no feasible alternatives." Id. at 76,016. As of the creation of the EPA letters in 2011, the 2005 policy had not been finalized or otherwise officially adopted. As late as June 2010, the EPA continued to solicit input on the 2005 policy through notices in the Federal Register. See 75 Fed. Reg. 30,395, 30,401 (June 1, 2010).

During the spring of 2011, the League asked the EPA whether it could use "physical/chemical treatment processes, such as Actiflo . . . to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of [the bypass rule]." The June 2011 letter responded by summarizing the EPA's 2005 proposed policy without specifically addressing **[**20]** how the application of that policy would impact the use of ACTIFLO or similar processes. The League sought additional clarification on whether this response meant that ACTIFLO could be used only if there were no feasible alternatives, which the September 2011 letter answered in the affirmative. According to the EPA, ACTIFLO units fail to "provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." Because ACTIFLO by itself is not considered a satisfactory secondary treatment unit, the EPA views the practice of intentionally routing flows away from a facility's traditional biological secondary treatment units and through ACTIFLO as a bypass that would only be allowed upon a showing of no feasible alternatives.

The League argues that by prohibiting the use of ACTIFLO internally, as one element of a facility's

secondary treatment procedures, the EPA is effectively dictating treatment design, despite the agency's acknowledgment that the bypass rule and secondary treatment regulations do not allow for such determinations at the federal level. The League also claims that the EPA is effectively applying secondary treatment effluent **[**21]** limitations within a treatment facility; that is, it is applying effluent limitations to the individual streams exiting peak flow treatment units, instead of at the end of the pipe. The EPA responds that using ACTIFLO to process peak wet weather flows diverts water from biological secondary treatment units, and therefore subjecting its use to a no-feasible-alternatives analysis comports with the plain language of the bypass rule.

II. Jurisdiction

A. Direct appellate review

The League challenges the EPA's positions on bacteria mixing zones and blending, as set forth in the two letters, as new rules promulgated in violation of APA notice and comment requirements and as in conflict with the CWA. **HN14** The APA waives sovereign immunity for suits seeking judicial review of an "[a]gency action made reviewable by statute."¹⁰ 5 U.S.C. § 704. **[*861]** "The CWA establishes a bifurcated jurisdictional scheme whereby courts of appeals have jurisdiction over some categories of challenges to EPA action, and the district courts retain jurisdiction over other types of complaints." Nat'l Pork Producers Council v. EPA, 635 F.3d 738, 755 (5th Cir. 2011). The League invokes **HN15 CWA section 509(b)(1)(E)**, which vests the courts **[**22]** of appeals with exclusive jurisdiction to review the EPA's "action .

¹⁰ **HN16** The APA does not create federal subject matter jurisdiction. Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789, 792 (8th Cir. 1996). Rather, a federal court has federal question jurisdiction under 28 U.S.C. § 1331 over challenges to federal agency action. Ochoa v. Holder, 604 F.3d 546, 549 (8th Cir. 2010); see also Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 56, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993).

. . . in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." 33 U.S.C. § 1369(b)(1)(E). The EPA counters that we have no jurisdiction to review guidance letters and that, in any event, its positions are consistent with the CWA.

HN17 "The existence of subject-matter jurisdiction is a question of law that this court reviews de novo." ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters, 645 F.3d 954, 958 (8th Cir. 2011). In order to be timely filed, interested parties must file for review within 120 days from the date of the promulgation. § 1369(b)(1). The 120-day window to challenge promulgations begins two weeks after a document is signed. 40 C.F.R. § 23.2. Here, the letters were signed [**23] on June 30, 2011, and September 14, 2011, and therefore the time period to challenge the letters—should they be found to be promulgations—began on July 14, 2011, and September 28, 2011, respectively. The League filed for review on November 4, 2011, and thus its petition is timely.

We must consider, then, whether the act of sending the letters constituted an action "promulgating any effluent limitation or other limitation."¹¹ The EPA urges us to dismiss the case for lack of subject matter jurisdiction, disputing the factual basis for the League's characterization of the letters. **HN18** Because the EPA raises a factual challenge to our jurisdiction under Federal Rule of Civil Procedure 12(b)(1), "no presumptive truthfulness attaches to the [League's] allegations, and the existence of disputed material facts will not preclude [us] from evaluating . . . the merits of the jurisdictional claims." Osborn v. United States, 918 F.2d 724, 729-30 & n.6 (8th Cir. 1990) (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977).)

1. "[P]romulgating"

¹¹ The League did not contend that the EPA's letters were "actions . . . approving" effluent or other limitations, rather than promulgating them, and therefore [**24] we did not consider the matter.

Neither the Supreme Court nor this court has defined the circumstances in which an agency action can be considered a promulgation. Black's Law Dictionary defines "promulgate" as "(Of an administrative agency) to carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal." (8th ed. 2004). This narrow interpretation would allow direct appellate review only of rules formally promulgated through notice and comment procedures. Yet, **HN19** the Supreme Court has recognized a preference for direct appellate review of agency action pursuant to the APA. *See, e.g., Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 745, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985)* ("Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals."); *see also Nat'l Auto. Dealers [**862] Ass'n v. FTC, 670 F.3d 268, 399 U.S. App. D.C. 303, 305 (D.C. Cir. 2012); Jaunich v. Commodity Futures Trading Comm'n, 50 F.3d 518, 521 (8th Cir. 1995).* Moreover, the Supreme Court has interpreted [**25] broadly the direct appellate review provision in CWA section 509(b)(1)(F), which authorizes review of agency "action . . . in issuing or denying a permit." The Court viewed an EPA veto of a state-issued permit to be "functionally similar" to a direct denial of a permit application by the EPA itself, and therefore held that the petitioner could bring his challenge directly to a court of appeals under section 509(b)(1)(F). Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196, 100 S. Ct. 1093, 63 L. Ed. 2d 312 (1980) (per curiam). By analogy, we are persuaded that it would be more appropriate to interpret "promulgating" to include agency actions that are "functionally similar" to a formal promulgation. *See Modine Mfg. Corp. v. Kay, 791 F.2d 267, 271 (3d Cir. 1986)* (finding jurisdiction to review directly "the agency's interpretation of pretreatment standards applicable to indirect dischargers" because they constituted an action

"promulgating any effluent . . . pretreatment standard" under *CWA section 509(b)(1)(C)*; see also *NRDC v. EPA*, 673 F.2d 400, 405, 218 U.S. App. D.C. 9 (D.C. Cir. 1982) ("Our decision . . . follows the lead of the Supreme Court in according *section 509(b)(1)* a practical rather than a cramped construction.").

In considering [**26] jurisdictional statutes similar to *section 509(b)(1)(E)*, our colleagues on the District of Columbia Circuit have adopted a practical conception of whether an agency action constitutes a promulgation. That court has explained, "To determine whether a regulatory action constitutes promulgation of a regulation, we look to three factors: (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register . . . ; and (3) whether the action has binding effects on private parties or on the agency." *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545, 339 U.S. App. D.C. 73 (D.C. Cir. 1999) (internal citation omitted). *Molycorp* identifies the third factor as the "ultimate focus" of this test, and we agree that whether an agency announcement is binding on regulated entities or the agency should be the touchstone of our analysis. To place any great weight on the first two *Molycorp* factors potentially could permit an agency to disguise its promulgations through superficial formality, regardless of the brute force of reality. See also *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227-28, 377 U.S. App. D.C. 234 (D.C. Cir. 2007) (holding that it lacked jurisdiction to consider a purported agency "promulgation" [**27] because the document was not binding).

HN20 "[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding." *GE v. EPA*, 290 F.3d 377, 383, 351 U.S. App. D.C. 291 (D.C. Cir. 2002) (citations omitted). Thus, our functional analysis of whether an agency action constitutes a promulgation encompasses those words and deeds that bind legally or as a practical

matter. Cf. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) ("Agency statements can be binding upon the agency absent notice-and-comment rulemaking in certain circumstances."); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021, 341 U.S. App. D.C. 46 (D.C. Cir. 2000) ("[W]e have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect."). This includes statements prospectively restricting the agency's discretion, see *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111, 302 U.S. App. D.C. 38 (D.C. Cir. 1993), or having a "present-day binding effect" on regulated entities, thereby "conclusively disposing of certain issues," see *McLouth [*863] Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321, 267 U.S. App. D.C. 367 (D.C. Cir. 1988).¹²

¹²The [**28] EPA argues that no federal court has jurisdiction over this claim because these letters are not "final agency actions." **HN21** Even if there were an implicit finality requirement applicable to "[a]gency actions made reviewable by statute," this would not affect federal jurisdiction; the APA's requirements are part of a party's cause of action and are not jurisdictional. *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991) ("The judicial review provisions of the APA are not jurisdictional."); see also *Ochoa*, 604 F.3d at 549 (8th Cir. 2010); *Trudeau v. FTC*, 456 F.3d 178, 183-84, 372 U.S. App. D.C. 335 (D.C. Cir. 2006). In this case, analyzing whether an agency pronouncement is binding evokes considerations of finality. However, they arise not from the APA, but rather from the conditions placed on the CWA's grant of direct appellate jurisdiction. **HN22** The APA allows judicial review in two situations: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . ." **5 U.S.C. § 704**. The word "final" modifies the second use of "agency action," but not the first. While some courts have interpreted the phrase "[a]gency action made reviewable [**29] by statute" as including an implied finality requirement, see, e.g., *Appalachian Energy Grp. v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994); *Carter/Mondale Presidential Comm., Inc. v. Fed. Election Comm'n*, 711 F.2d 279, 285 n.9, 229 U.S. App. D.C. 1 (D.C. Cir. 1983), we decline to conjure up a finality requirement for "[a]gency actions made reviewable by statute" where none is located in the text of the APA, particularly where the Supreme Court has implied that the two phrases incorporate distinct requirements, see *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); *id.* at 891 ("Some statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even

Here, the letters can be considered "promulgations" for the purposes of establishing our jurisdiction under section 509(b)(1)(E) because they have a binding effect on regulated entities. HN23 "If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'" Appalachian Power Co., 208 F.3d at 1021. In particular, the court in Appalachian Power found that the contested agency guidance before it was binding because it reflected "a position [the EPA] plans to follow in reviewing State-issued permits, a position it will insist [*31] State and local authorities comply with in settling the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply." Id. at 1022. This reasoning persuades us that the June 2011 and September 2011 letters are binding as well.

First, the June 2011 letter reflects a binding policy with respect to bacteria mixing zones. In response to the League's 2010 challenge to the EPA's policy on mixing zones, the EPA submitted to this court a motion to dismiss, which described the King memorandum as nothing but "one office director's view of a regulatory [*864] requirement." But in the June 2011 letter to Senator Grassley, the EPA characterized the King memorandum as reflecting "the EPA's position." Although the EPA coyly continues to insist that the letter is the "consummation of nothing," something apparently

before the concrete effects normally required for APA review are felt."); see also Yankton Sioux Tribe v. Podhradsky, 606 F.3d 994, 1012 (8th Cir. 2010) ("[T]he 'cardinal canon' of statutory interpretation is 'that a legislature says in a statute what it means and means in a statute [*30] what it says there.'" (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992))). The CWA expressly makes specified agency actions reviewable, and our task therefore is to determine whether the asserted agency action falls within the statutory terms.

was consummated between 2010 and June 2011. Furthermore, the language used to express "the EPA's position"—"should not be permitted"—is the type of language we have viewed as binding because it "speaks in mandatory terms." Ubbelohde, 330 F.3d at 1028; see also Gen. Elec. Co., 290 F.3d at 383 (HN24 "[T]he mandatory language of a document alone can be [*32] sufficient to render it binding . . ."); cf. Catawba Cnty., N.C. v. EPA, 571 F.3d 20, 34, 387 U.S. App. D.C. 20 (D.C. Cir. 2009) (per curiam) (finding that an agency memo was not binding because it "'encouraged' states to address all nine factors EPA identified, but did not require them to do so"). The League's appendix includes several affidavits from representatives of municipal wastewater treatment facilities and the Iowa Department of Natural Resources, the state permitting authority.¹³ These individuals averred that they indeed have taken the June 2011 letter at face value, interpreting it as establishing a new

¹³ The League provided these affidavits in an unopposed appendix supplementing the EPA's [*33] administrative record. After oral argument, the League filed a motion to further supplement the record with additional affidavits from the Iowa and Kansas water permitting authorities. The EPA objects to the League's attempt to further supplement the record at this stage. The Supreme Court has explained that HN25 when applying the arbitrary and capricious standard of review under APA section 706(2)(A), "the focal point for judicial review should be the administrative record already in existence." Camp v. Pitts, 411 U.S. 138, 142, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973). Therefore, if "there is a contemporaneous administrative record and no need for additional explanation of the agency decision," we will permit supplementation of the administrative record only where there is a "strong showing of bad faith or improper behavior." Newton Cnty. Wildlife Ass'n v. Rogers, 141 F.3d 803, 807 (8th Cir. 1998) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)). The rationale for this rule is that judicial review of the reasonableness of an agency's actions should concentrate upon the evidence available to the agency when making its decision. See Robinette v. Comm'r, 439 F.3d 455, 459 (8th Cir. 2006). [*34] But where, as here, rulemaking masquerading as explication is alleged, the informality of the agency's decisionmaking process makes the possibility of a sparse "contemporaneous administrative record" more likely. While we question whether the Camp standard would necessarily apply to such challenges under APA section 706(2)(D), we need not decide the matter because we reached our conclusions without resort to the League's proposed supplementary materials. Therefore, we deny the League's motion to supplement the record.

prohibition on bacteria mixing zones, one by which they must abide in the permit application process. We agree that private parties have "reasonably [been] led to believe that failure to conform will bring adverse consequences," which tends to make the document binding as a practical matter. *See Gen. Elec. Co., 290 F.3d at 383* (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1328 (1992)).

The EPA asks us to believe that the June 2011 letter did not flatly prohibit the use of bacteria mixing zones in waters designated for primary contact recreation because although it intoned that states "should not" permit bacteria mixing zones in primary contact recreation areas, it nonetheless mentioned that under 40 C.F.R. § 131.13, states "may, at their discretion, include mixing zone policies in their state water quality standards." With respect to bacteria mixing zones in primary contact recreation areas, we struggle to spot the surviving state discretion. The [*865] letter instructs state permitting authorities to reject certain permit applications, regardless of the state's [**35] water quality standards. The EPA's protestations to the contrary are particularly unavailing where, as here, Iowa's water permitting authority has received communications from the EPA indicating that it would object to any permits that were inconsistent with the policy outlined in the EPA letters. In effect, the EPA asks us to agree that when it couches an interdiction within a pro forma reference to state discretion, the prohibition is somehow transformed into something less than a prohibition. We decline to accept such Orwellian Newspeak.

Second, the September 2011 letter presents a binding policy on blending. Although the June 2011 letter describes the "2005 draft Policy" on blending as merely "a viable path forward" that "has not been finalized," the September 2011 letter applies the 2005 policy to the League's proposed

use of ACTIFLO.¹⁴ In requiring ACTIFLO to pass a no-feasible-alternatives analysis, the EPA made clear that it "plans to follow [the 2005 policy] in reviewing State-issued permits," and "it will insist State and local authorities comply with [the 2005 policy] in settling the terms and conditions of permits issued to petitioners." *See Appalachian Power Co., 208 F.3d at 1022*. [**36] Just as it did in *Appalachian Power*, the EPA dissembles by describing the contested policy as subject to change. *See id. at 1022-23*. Yet, all regulations are susceptible to alteration. Hedging a concrete application of a policy within a disclaimer about hypothetical future contingencies does not insulate regulated entities from the binding nature of the obligations and similarly cannot serve to inoculate the agency from judicial review.

Accordingly, we hold that the June 2011 and September 2011 letters were promulgations for the purposes of CWA section 509(b)(1)(E).

¹⁴League Question: "Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a 'no feasible alternatives' demonstration?" EPA Response: "Yes." The EPA insists that this challenge is time-barred because the proper time to raise the challenge was in 2005. We find this contention unpersuasive because prior to the September 2011 letter, the EPA never indicated that the 2005 policy became final. For example, the June 1, 2010 Federal Register notice explained that the EPA was continuing to "solicit[] input from the general public concerning the impact of the proposed rule." 75 Fed. Reg. 30,395, 30,401 (June 1, 2010). Even the June 2011 letter explained that the agency was "continu[ing] to consider [**37] whether the 2005 Policy should be finalized or incorporated into the EPA's other potential wet weather rulemaking effort announced June 1, 2010 in the Federal Register." In contrast, the September 2011 letter simply applies the 2005 Policy to the regulated entities as if it had already been finalized. The EPA's approach to the period for seeking appellate review would eviscerate the direct appellate review provisions of the CWA by enabling an agency to announce consideration of a proposal and then wait 121 days before treating the proposal as binding. *Cf. CropLife Am. v. EPA, 329 F.3d 876, 884, 356 U.S. App. D.C. 192 (D.C. Cir. 2003)* (refusing to find that the petitioners' claim was time-barred "because the new rule clearly represents the first time that the agency has adopted an unequivocal, wholesale ban"). HN26 The time to seek direct appellate review begins to run not when the agency first floats its proposal to the public, but rather when the agency promulgates that announcement—in other words, when they make its substance binding.

2. "[A]ny [**38] effluent limitation or other limitation"

HN27 The CWA defines effluent limitations as "any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11). [**866] The Supreme Court has referred to effluent limitations as "direct restrictions on discharges." EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 204, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976). Other circuits have held that the expansiveness of the phrase "any restriction" encompasses both numerical and non-numerical effluent limitations. *See, e.g., Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502 (2d Cir. 2005) ("[W]e believe that the terms of the nutrient management plans constitute effluent limitations"); NRDC v. EPA, 656 F.2d 768, 775, 211 U.S. App. D.C. 179 (D.C. Cir. 1981) (finding an effluent limitation where, "[a]s a practical matter," agency action "restrict[s] the discharge of sewage by limiting the availability of a variance to a class of applicants").

The phrase "other limitation" leaves much to the imagination. The Fourth Circuit explained that it "construe[s] that term as a restriction on the [**39] untrammelled discretion of the industry . . . [as it existed] prior to the passage of the [CWA]." Va. Elec. & Power Co. (VEPCO) v. Costle, 566 F.2d 446, 450 (4th Cir. 1977). VEPCO found jurisdiction under section 509(b)(1)(E) because although the challenged regulations involved "structures," rather than "discharges of pollutants into the water," and therefore were not "effluent limitations," they were nonetheless "other limitations" because they "refer[red] to information that must be considered in determining the type of intake structures that individual point sources may employ." Id. at 449-50. Many of our sister circuits have adopted the VEPCO approach. *See, e.g., Friends of the Everglades v. EPA*, 699 F.3d 1280, 1287 (11th Cir. 2012) (finding no jurisdiction under

section 509(b)(1)(E) because challenged rule did the opposite of restricting industry discretion, by "free[ing] the industry from the constraints of the permit process"); Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1015-16 (9th Cir. 2008) (finding no jurisdiction under section 509(b)(1)(E) because the challenged regulations created "categorical and permanent exemptions" from "any limit imposed by" CWA permit requirements); [**40] NRDC, 673 F.2d at 402, 405 (finding jurisdiction under section 509(b)(1)(E) to review "a complex set of procedures for issuing or denying NPDES permits" that restricted industry discretion). We agree that HN28 an agency action is a "limitation" within the meaning of section 509(b)(1)(E) if entities subject to the CWA's permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes.

Applying this definition, we find that the contested letters involve "effluent or other limitations." HN29 The EPA's position that bacteria mixing zones in waters "designated for primary contact recreation . . . should not be permitted" is a restriction that directly affects the concentration of discharge from a point source and therefore is an effluent limitation. *See Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 986, 325 U.S. App. D.C. 76 (D.C. Cir. 1997) (per curiam) (finding jurisdiction under CWA section 509(b)(1)(E) to review "the prohibition in Guidance Procedure 3.C against using mixing zones for new and existing BCC discharges"). The rule regarding the use of blending is an "other limitation" because, as in VEPCO, it restricts the discretion of municipal sewer treatment plants [**41] in structuring their facilities.

As a result, both requirements for direct appellate review are satisfied here.¹⁵

¹⁵The EPA insists that as a result of finding its conduct here reviewable, there will be a chilling effect on the informal channels of communication between agencies and regulated entities. We acknowledge the great value in such modes of communication and encourage agencies to continue to utilize them. However, when agencies veer from merely advisory statements or interpretations into binding proclamations, they become susceptible to judicial review.

[*867] B. Ripeness

HN30 The judicially created doctrine of ripeness "flows from both the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." Neb. Pub. Power Dist. v. MidAm. Energy Co., 234 F.3d 1032, 1037 (8th Cir. 2000) (citing Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993)). "Ripeness is peculiarly a question of timing' and is governed by the situation at the time of review, rather than the situation at the time of the events under review." Id. at 1039 (quoting Anderson v. Green, 513 U.S. 557, 559, 115 S. Ct. 1059, 130 L. Ed. 2d 1050 (1995) (per curiam)). A party seeking review [**42] must show both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Pub. Water Supply Dist. No. 10 of Cass Cnty. v. City of Peculiar, 345 F.3d 570, 572-73 (8th Cir. 2003) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). Both of these factors are weighed on a sliding scale, but each must be satisfied "to at least a minimal degree." Neb. Pub. Power Dist., 234 F.3d at 1039.

Fitness rests primarily on whether a case would "benefit from further factual development," and therefore cases presenting purely legal questions are more likely to be fit for judicial review. Pub. Water Supply, 345 F.3d at 573. The hardship factor looks to the harm parties would suffer, both financially and as a result of uncertainty-induced behavior modification in the absence of judicial review. Neb. Pub. Power Dist., 234 F.3d at 1038. We do not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them, but the injury must be "certainly impending." Pub. Water Supply, 345 F.3d at 573 (quoting Paraquod, Inc. v. St. Louis Hous. Auth., 259 F.3d 956, 958-59 (8th Cir. 2001)). "The immediacy and the [**43] size of the threatened harm" will also affect the interplay of these factors. Neb. Pub. Power Dist., 234 F.3d at 1038.

This case hinges upon whether the EPA's letters constitute legislative rules. We agree with our colleagues who have commented that **HN31** "whether [a] Guidance Document is a legislative rule is largely a legal, not a factual, question, turning . . . primarily upon the text of the Document." Gen. Elec. Co. v. EPA, 290 F.3d at 380; see also Warder v. Shalala, 149 F.3d 73, 79 (1st Cir. 1998); Chief Probation Officers of Cal. v. Shalala, 118 F.3d 1327, 1330 (9th Cir. 1997). As primarily legal questions, such challenges tend to present questions fit for judicial review. On the other hand, postponing a procedural challenge to an agency guidance document may be appropriate where further factual development regarding the agency's application of the document would aid our decision. Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 812, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003). This is so because the purpose of the ripeness doctrine is to prevent courts "from entangling themselves in abstract disagreements over administrative policies." Abbott Labs., 387 U.S. at 148.

In this case, we are not wading into [**44] the abstract because the disagreements before us are quite concrete. Nothing about the proclamation that "the EPA's position, as stated in the [King] memorandum, is that [bacteria mixing [**868] zones in primary contact recreation waters] should not be permitted" indicates that the EPA's posture will vary based on each applicant's specific factual circumstances. Similarly, when asked if the use of "peak flow treatment processes" such as ACTIFLO would be subject to a "no feasible alternatives" demonstration, the EPA responded "Yes."¹⁶ The

¹⁶The September 2011 letter acknowledged that if ACTIFLO independently met secondary treatment requirements, then flows moving through ACTIFLO units [**45] instead of the facility's biological secondary treatment units would not be considered a bypass. However, the letter also stated that ACTIFLO failed to meet these requirements and that the EPA would "continue to explore in what circumstances use of [ACTIFLO-type] technologies is consistent with a determination that there are 'no feasible alternatives.'" During oral argument, counsel for EPA informed us that the use of newer, modified versions of ACTIFLO units "may

question is whether the statements are simply reminders of preexisting regulatory requirements or whether they create new regulatory obligations. Because such inquiries do not implicate contingent factual circumstances, this controversy is ripe for our review. See CropLife Am. v. EPA, 329 F.3d 876, 884, 356 U.S. App. D.C. 192 (D.C. Cir. 2003) (finding that petitioners presented a "purely legal question" that was ripe for review where "the EPA directive states unequivocally that the agency will not consider *any* third-party human studies").

The second ripeness factor, hardship to parties, is also present. Although the EPA portrays the harm as lurking, if at all, on the distant horizon, the threatened harm is more immediate, and it is certainly not speculative. League members must either immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money, investing significant resources in designing and utilizing processes that—if these letters are in effect new legislative rules—were viable before the publication of the [**46] letters but will be rejected when the letters are applied as written. See Neb. Pub. Power Dist., 234 F.3d at 1039 ("Delayed judicial resolution would only increase the parties' uncertainty, and would require [petitioners] to gamble millions of dollars on an uncertain legal foundation."). Postponing our review until the EPA has denied a permit application in accord with the letters renders a hardship on municipal water authorities, who already would have invested irretrievable funds into their applications. Cf. Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 164, 87 S. Ct. 1520, 18 L. Ed. 2d 697 (1967) (finding a challenged agency action not ripe for review where "no irremediable adverse consequences [would] flow from requiring a later challenge to this regulation"). Therefore, we find that denying judicial review would be a hardship to the parties and that this case evinces the requisite degree of ripeness. See Abbott Labs., 387 U.S. at 153

well satisfy the secondary treatment regulations." This type of belated backpedaling is insufficient to render these challenges so intertwined with hypothetical future conditions that they are unripe for review.

("Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure [**47] Act . . . must be permitted, absent a statutory bar or some other unusual circumstance . . ."); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201-02, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) (finding a challenge to an as-yet unimplemented statute ripe because "requir[ing] the industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship"); see also [**869] Sackett v. EPA, 566 U.S. , 132 S. Ct. 1367, 1374, 182 L. Ed. 2d 367 (2012) ("[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review . . .").

C. Article III Standing

HN32 If a litigant lacks Article III standing to bring his claim, then we have no subject matter jurisdiction over the suit. Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 934 (8th Cir. 2012). "To show standing under Article III of the U.S. Constitution, a plaintiff must demonstrate (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury." Young Am. Corp. v. Affiliated Computer Servs. (ACS), Inc., 424 F.3d 840, 843 (8th Cir. 2005) [**48] (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Because the League, rather than an individual permit applicant, is filing suit, it also must prove associational standing. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the

participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). The League need not establish that all of its members would have standing to sue individually so long as it can show that "any one of them" would have standing. See *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). The EPA concedes that the League meets the second and third elements of the associational standing test, and we agree. The only remaining element is whether any individual member would have standing to sue in its own right, which requires any League member to satisfy the three components that encompass the "irreducible constitutional minimum of standing." See *Am. Library Ass'n v. FCC*, 406 F.3d 689, 696, 365 U.S. App. D.C. 353 (D.C. Cir. 2005) [****49**] (quoting *Lujan*, 504 U.S. at 560).

HN33 "[S]tanding is to be determined as of the commencement of the suit." *Lujan*, 504 U.S. at 570 n.5. The party seeking judicial review bears the burden of persuasion and must support each element "with the manner and degree of evidence required at the successive stages of litigation." *Id.* at 561. Therefore, at the pleading stage a petitioner can move forward with "general factual allegations of injury," whereas to survive a summary judgment motion, he "must set forth by affidavit or other evidence specific facts." *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007) (quoting *Lujan*, 504 U.S. at 561). The Supreme Court has not addressed "the manner and degree of evidence required" when a petitioner is seeking appellate review of an administrative action, nor has this circuit addressed the matter. The District of Columbia Circuit has equated such a petition with a motion for summary judgment, in that both request a final judgment on the merits. *Sierra Club v. EPA*, 292 F.3d 895, 899, 352 U.S. App. D.C. 191 (D.C. Cir. 2002). Accordingly, **HN34** parties seeking direct appellate review of an agency action must prove each element of standing as if they were moving for summary [****50**] judgment in a district court. *Id.* Our colleagues on the Seventh Circuit

have also taken this approach. See *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 675 (7th Cir. 2008). This reasoning is sound; because parties in the League's position seek the type of relief [****870**] available on a motion for summary judgment, they correspondingly should bear the responsibility of meeting the same burden of production, namely "specific facts" supported by "affidavit or other evidence." See *Lujan*, 504 U.S. at 561.

HN35 The EPA raises a factual challenge to our subject matter jurisdiction by attacking the facts asserted by the League with respect to standing, and therefore the League must establish standing "without the benefit of any inferences in [its] favor." *Defenders of Wildlife, Friends of Animals & Their Env't v. Lujan*, 911 F.2d 117, 120 (8th Cir. 1990), rev'd on other grounds, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Parties seeking to litigate in federal court "have the burden of establishing jurisdiction," including standing, "by a preponderance of the evidence." *Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir. 1990). But see *Sierra Club*, 292 F.3d at 899 (imposing a burden of proof to establish elements of standing [****51**] to a "substantial probability" (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63, 342 U.S. App. D.C. 159 (D.C. Cir. 2000))). The League seeks to assert both a procedural and a substantive challenge to the letters. We address separately its standing to make each claim. See *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1483-84, 305 U.S. App. D.C. 125 (D.C. Cir. 1994).

With respect to the substantive challenges, as the foregoing discussion regarding hardship has indicated, the League members' affidavits evince the type of "concrete" and "actual or imminent" harm necessary to establish an injury in fact. See *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 1999) (en banc) ("[I]n many cases, ripeness coincides squarely with standing's injury in fact prong."). At least some members are currently operating under permits that allow them to utilize blending and bacteria mixing

zones in circumstances inconsistent with the EPA letters, which they must imminently rectify. *Cf. CropLife Am., 329 F.3d at 884* ("The disputed directive concretely injures petitioners, because it unambiguously precludes the agency's consideration of . . . studies that petitioners previously have been permitted to use to verify the safety [**52] of their products."). Moving into compliance will be costly. The League has therefore articulated an injury in fact. *See City of Waukesha v. EPA, 320 F.3d 228, 234, 355 U.S. App. D.C. 100 (D.C. Cir. 2003)* (per curiam) ("The administrative record shows that the City of Waukesha would face substantial costs if it was required to comply with the . . . regulations. EPA has not disputed that record evidence. This is sufficient for injury-in-fact."). **HN36** Causation for standing purposes requires that the harm asserted be "fairly traceable to the challenged action of the defendant." *Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 591 (8th Cir. 2009)* (quoting *Lujan, 504 U.S. at 560*). The EPA disputes causation because it argues that the letters are not binding. Because we have ruled otherwise, we find that the League has established causation. Finally, the League has shown that it is "'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Lujan, 504 U.S. at 561* (quoting *Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)*). If the rules were vacated as substantively unlawful, it is indeed likely that the members' injuries would be redressed.

With respect to [**53] the procedural challenge, namely that the EPA dodged the APA's notice and comment procedures and *de facto* implemented new legislative rules regulating members' activities under the CWA, **HN37** the violation of a procedural right can constitute an injury in fact "so long as the procedures in question are [**871] designed to protect some threatened concrete interest of [the petitioner] that is the ultimate basis of his standing." *Lujan, 504 U.S. at 573 n.8; see also Sierra Club v. Glickman, 156 F.3d 606, 616 (5th Cir. 1998)*. The League's members have a

concrete interest not only in being able to meet their regulatory responsibilities but in avoiding regulatory obligations above and beyond those that can be statutorily imposed upon them. **HN38** Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation. *See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 316, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979)* ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions [**54] be made only after affording interested persons notice and an opportunity to comment."). Thus, the League has established an injury in fact related to the EPA's purported procedural deficiencies.

Causation and redressability, and therefore standing to assert this procedural challenge, follow from these conclusions. **HN39** Where a challenger is the subject of agency action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan, 504 U.S. at 561-62*. This is particularly true for individuals asserting violations of procedural rights. *Id. at 572 n.7* ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). If a petitioner "is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA, 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007); see also Sierra Club v. EPA, 699 F.3d 530, 533, 403 U.S. App. D.C. 61 (D.C. Cir. 2012)* ("Having shown its members' [**55] redressable concrete interest, [a petitioner association] can assert violation of the APA's notice-and-comment requirements, as those procedures are plainly designed to protect the sort

of interest alleged. As to such requirements, [the petitioner association] enjoys some slack in showing a causal relation between its members' injury and the legal violation claimed."). Correspondingly, redressability in this context does not require petitioners to show that the agency would alter its rules upon following the proper procedures. Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 95, 351 U.S. App. D.C. 214 (D.C. Cir. 2002) ("If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter."); *see also* Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 247 n.4 (3d Cir. 2011) ("Even if the [U.S. Forest Service is correct on the merits], the Agreement nevertheless establishes—in violation of appellees' notice and comment rights—a new substantive rule This suffices for standing purposes."); Pye v. United States, 269 F.3d 459, 471 & n.7 (4th Cir. 2001). The League's [**56] remaining burden as to standing is met because "there is some possibility that the requested relief," namely remanding to the EPA for application of notice and comment procedures, would "prompt the [EPA] to reconsider the decision that allegedly harmed" League members. *See* Massachusetts, 549 U.S. at 518.

We conclude that the League has standing to assert its claims. Having resolved [**872] all jurisdictional questions, we now turn to the merits of the League's petition for review.

III. Merits of Procedural Challenge

A. Standard of Review

The parties disagree over the appropriate standard of review to be applied where, as here, an appellate court reviews challenges to agency procedural compliance under § 706(2)(D). The League urges us to follow the Ninth Circuit, which "reviews de novo the agency's decision not to follow the APA's notice and comment procedures . . . [.] because

complying with the notice and comment provisions when required by the APA 'is not a matter of agency choice.'" Reno-Sparks Indian Colony v. EPA, 336 F.3d 899, 909 n.11 (9th Cir. 2003) (quoting Sequoia Orange Co. v. Yeutter, 973 F.2d 752, 757 n.4 (9th Cir. 1992)). The EPA argues its characterization of the letters is entitled [**57] to a deferential abuse of discretion review. Our prior decisions have not clearly announced a standard of review, other than to note that the agency's characterization of its rule as legislative or interpretative, "while not dispositive, is entitled to deference." Drake v. Honeywell, Inc., 797 F.2d 603, 607 (8th Cir. 1986). *But see* United States v. Hacker, 565 F.3d 522, 524 (8th Cir. 2009) (stating in dicta that challenges to procedural compliance under the APA present "a question of law, which we review de novo"), *abrogated on other grounds by* Bond v. United States, 564 U.S. , 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011); South Dakota v. Ubbelohde, 330 F.3d 1014, 1028 (8th Cir. 2003) ("Where a policy statement purports to create substantive requirements, it can be a legislative rule regardless of the agency's characterization.").

We agree with our colleagues on the Ninth Circuit that HN40 much of the rationale for granting deference to administrative decisions is simply not applicable where the topic of our review—compliance with APA procedural requirements—is not a matter that Congress has committed to the agency's discretion. In other words, whether and when an agency must follow the law is not an area [**58] uniquely falling within its own expertise, and thus the agency's decision is less deserving of deference. *Cf.* Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 120 n.14 (1st Cir. 2002) ("We are unaware of any line of cases that allows an agency to make a binding determination that it has complied with specific requirements of the law. . . . As to the so-called 'specialized experience' of the agency, it would appear that it is the courts that qualify for such a title on an issue of legislative interpretation."). Furthermore, because the categorization of an agency's action as a legislative or interpretative rule is largely a question of law, a

de novo standard of review is consistent with the standard of review we generally apply to questions of law in similar contexts. See Qwest Corp. v. Minn. PUC, 427 F.3d 1061, 1064 (8th Cir. 2005).

At least two circuits in addition to the Ninth Circuit have expressly announced a *de novo* standard of review when distinguishing between legislative rules and other types of agency action. See Meister v. Dep't of Agric., 623 F.3d 363, 370 (6th Cir. 2010); Warder, 149 F.3d at 79. We adopt a *de novo* standard of review as well. This is not to [*59] say that the agency's label is to be ignored. As discussed above, **HN41** an agency's characterization of its rule is a relevant component of our review and is a factor entitled to some deference. Our posture in this regard mirrors similar comments made by other courts of appeals. See Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565, 239 U.S. App. D.C. 408 (D.C. Cir. 1984) ("[T]he agency's own label, while relevant, is not dispositive.") (en [*873] banc); accord Prof'ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995); La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175, 1178 (1st Cir. 1992); Metro. Sch. Dist. of Wayne v. Davila, 969 F.2d 485, 489 (7th Cir. 1992); Friedrich v. HHS, 894 F.2d 829, 834-35 (6th Cir. 1990); Lewis-Mota v. Sec'y of Labor, 469 F.2d 478, 481-82 (2d Cir. 1972).

HN42 The critical distinction between legislative and interpretative rules is that, whereas interpretative rules "simply state what the administrative agency thinks the statute means, and only 'remind' affected parties of existing duties," a legislative rule "imposes new rights or duties." Nw. Nat'l Bank v. U.S. Dep't of the Treasury, 917 F.2d 1111, 1117 (8th Cir. 1990) (quoting Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n, 874 F.2d 205, 207 (4th Cir. 1989)).

[**60] When an agency creates a new "legal norm based on the agency's own authority" to engage in supplementary lawmaking, as delegated from Congress, the agency creates a legislative rule. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 95, 326

U.S. App. D.C. 422 (D.C. Cir. 1997). Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules. See Ubbelohde, 330 F.3d at 1028; Martin v. Gerlinski, 133 F.3d 1076, 1079 (8th Cir. 1998); Syncor Int'l Corp., 127 F.3d at 94-95. It follows from this distinction that interpretative rules do not have "the force of law."¹⁷ Shalala v. St. Paul-Ramsey Med. Ctr., 50 F.3d 522, 527 n.4 (8th Cir. 1995). Whether or not a binding pronouncement is in effect a legislative rule that should have been subjected to notice and comment procedures thus depends on whether it substantively amends or adds to, versus simply interpreting the contours of, a preexisting rule. See U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 34-35, 365 U.S. App. D.C. 149 (D.C. Cir. 2005).

Identifying where a contested rule lies on the sometimes murky spectrum between legislative rules and interpretative rules can be a difficult task, but it is not just an exercise in hair-splitting formalism. As agencies expand on the often broad language of their enabling statutes by issuing layer upon layer of guidance documents and interpretive memoranda, formerly flexible strata may ossify into rule-like rigidity. An agency potentially can avoid judicial review through the tyranny of small decisions. **HN44** Notice and comment procedures secure the values of government transparency and public participation, compelling us to agree with the suggestion that "[t]he APA's notice and comment exemptions must be narrowly construed." Prof'ls & Patients for Customized Care, 56 F.3d at 596 [*62] (quoting United States v. Picciotto, 875

¹⁷ The EPA insists the letters are neither legislative nor interpretative rules but rather constitute policy statements. [*61] **HN43** Policy statements are not binding, either as a legal or practical matter. See NRDC v. EPA, 643 F.3d 311, 321, 395 U.S. App. D.C. 397 (D.C. Cir. 2011) ("To begin with, because the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy; it is a rule."). Because we have determined that the letters evince binding rules regarding bacteria mixing zones and blending, neither can be characterized as a policy statement.

F.2d 345, 347, 277 U.S. App. D.C. 312 (D.C. Cir. 1989)); see also *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 201 (2d Cir. 2010).

B. Bacteria Mixing Zones

Since at least 1994, **HN45** the EPA's long-standing policy toward bacteria mixing zones has been that states should exercise their "discretion"—as set forth in *40 C.F.R. § 131.13*—to adopt a "definitive statement" in their water quality standards "on whether or not mixing zones are [*874] allowed." Handbook Ch. 5.1, 5.1.1. States are authorized to consider mixing zones in determining the types of standards necessary to preserve water quality. *40 C.F.R. § 122.44(d)(1)(ii)*. States do not enjoy complete discretion in creating a mixing zone policy because they operate within the shadow of EPA-crafted effluent limitations. The Handbook interprets certain instances of mixing zones as inconsistent with EPA regulations: states should not draft water quality standards that allow point source dischargers to utilize mixing zones in ways that "may endanger critical areas," such as recreational areas, or pose "significant health risks." Ch. 5.1. Notably, no preexisting regulation establishes that *all* bacteria [*63] mixing zones in recreational areas necessarily "may endanger critical areas" or create "significant health risks."¹⁸ In fact, under the Handbook, whether a mixing zone causes such a state of affairs was to be determined based on a "holistic approach." *Id.*

Yet, when now asked if a state "[m]ay . . . approve a bacteria mixing zone for waters designated for

body contact recreation," the EPA flatly proclaims that such mixing zones "should not be permitted." The June 2011 letter tells state permitting [*64] authorities that mixing zones in primary contact recreation areas are necessarily inconsistent with achieving the water quality levels required by federal regulations. The EPA eviscerates state discretion to incorporate mixing zones into their water quality standards with respect to this type of body of water. In effect, the EPA has created a new effluent limitation: state permitting authorities no longer have discretion to craft policies regarding bacteria mixing zones in primary contact recreation areas. Instead, such mixing zones are governed by an effluent limitation that categorically forbids them. To be sure, in 1994 the EPA stated that as its "understanding of pollutant impacts on ecological systems evolves, cases could be identified where no mixing zone is appropriate." Handbook Ch. 5.1.1. It seems that the EPA's understanding of pollutant impacts has so evolved, and it has now identified an entire class of cases "where no mixing zone is appropriate." However, the effect of the EPA applying its more developed understanding of pollutant impacts is to promulgate a new effluent limitation that state permitting authorities must follow. See *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235, 298 U.S. App. D.C. 288 (D.C. Cir. 1992) [*65] ("Thus, a rule is legislative if it attempts 'to supplement [a statute,] not simply to construe it.'") (alteration in original). In short, the June 2011 letter creates a new legal norm for bacteria mixing zones based on the EPA's authority to promulgate effluent limitations.

HN46 The hallmark of an interpretative rule or policy statement is that they cannot be independently legally enforced. It is the underlying legislative rules that drive compliance, and thus when an agency applies a newly announced interpretative rule or policy statement, there must be some external legal basis supporting its implementation. See *St. Paul-Ramsey Med. Ctr.*, 50 F.3d at 528 n.4; *Profls & [*875] Patients for Customized Care*, 56 F.3d at 596. The EPA has not

¹⁸The EPA's own guidance also belies any interpretation of its preexisting legislative rules as categorically prohibiting the use of mixing zones in waters designated for primary recreational contact. See EPA, Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews 5 (2001) (describing how states may alter their water quality standards to apply bacteria water quality criteria "at the beach or at the point of contact rather than at the end-of-pipe or at the edge of the mixing zones"); EPA, Guidance on Application of State Mixing Zone Policies in EPA-Issued NPDES Permits 1 (1996) ("Thus, individual state law and policy determine whether or not a mixing zone is permitted.").

cited any preexisting effluent limitation or lawfully promulgated legislative rule that supplies the basis for the prohibition on bacteria mixing zones in primary contact recreation areas. This reinforces our conclusion that this new legal norm is a legislative rule and that the EPA violated the APA when it bypassed notice and comment procedures. Accordingly, we vacate the EPA's new rule banning bacteria mixing zones in all waters designated for primary contact [****66**] recreation as promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

C. Blending

The EPA contends that the letters simply reflect an interpretation of the bypass rule, which it has been considering since 2005. *See 70 Fed. Reg. at 76,015* (describing the 2005 policy as "the Agency's interpretation" of the bypass rule). To be sure, a legislative rule is not created simply because an agency "supplies crisper and more detailed lines than the authority being interpreted." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112, 302 U.S. App. D.C. 38 (D.C. Cir. 1993). Nevertheless, the EPA's new blending rule is a legislative rule because it is irreconcilable with both the secondary treatment rule and the bypass rule. *See Nat'l Family Planning & Reprod. Health Ass'n*, 979 F.2d at 235 (**HN47** "If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." (alteration in original) (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 *Duke L.J.* 381, 396 (1985))).

The September 2011 letter simply applies the 2005 [****67**] draft Policy to the proposed use of ACTIFLO as if the 2005 draft were an existing obligation of regulated entities. However, the record indicates that prior to 2005, the EPA had not viewed the use of a process such as ACTIFLO as an inevitable trigger of a no-feasible-alternatives

requirement. The 2005 draft Policy characterized itself as "significantly different" from the EPA's 2003 proposal on blending. 70 Fed. Reg. at 76,014. The 2003 proposal, in turn, corresponds to what the record indicates is the reality on the ground: widespread use by POTWs of blending peak wet weather flows. The 2005 draft Policy acknowledges that blending previously had been "permitted at [POTWs] without consideration of the bypass regulation criteria." 70 Fed. Reg. at 76,015. In a response to a 2002 Freedom of Information Act ("FOIA") request, the EPA admitted to "the use of federal funds under the Construction Grants Program to build facilities that were designed to blend effluent from primary treatment processes with effluent from biological treatment processes during peak wet weather events."¹⁹ In a 2004 report to Congress, the EPA praised the use of blending processes like ACTIFLO to deal with peak wet [****68**] weather flows with no reference to a no-feasible-alternatives requirement. Various Iowa municipal water authorities have averred that the Iowa Department of Natural Resources has approved permits—with no objection from the EPA and no imposition of a no-feasible-alternatives requirement—allowing cities to construct facilities utilizing non-biological peak flow secondary treatment processes.

Municipalities chose to use ACTIFLO and analogous blending methods as an exercise [****876**] of their discretion under the bypass rule, *see 53 Fed. Reg. at 40,609*, and secondary treatment rule, *see 48 Fed. Reg. at 52,259*, to select the particular technologies they deemed best suited to achieving the applicable secondary treatment requirements. However, the September 2011 letter severely restricts the use of "ACTIFLO systems that do not include a biological component" because the EPA does not "consider[] [them to be] secondary treatment units." The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW

¹⁹ FOIA request submitted by John Hall to the EPA on October 25, 2001; response dated April 5, 2002, No. HQ-RIN-00459-02.

designs a secondary [**69] treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

The EPA's new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. 40 C.F.R. § 122.45(h). There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. See 40 C.F.R. § 133.100-102. But the blending rule applies effluent limitations within facilities' secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units "do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." If streams move around traditional biological secondary treatment processes and through a non-biological unit that [**70] "is itself a secondary treatment unit," then the system would not need to meet the restrictive no-feasible-alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged.

Because the September 2011 letter had the effect of announcing a legislative rule with respect to blending peak wet weather flows, the EPA violated the APA's procedural requirements by not using notice and comment procedures. We also vacate this new rule because it is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

IV. Merits of substantive challenge

Even if the EPA's legislative rules had been promulgated through the proper procedural channels, the League argues they nonetheless should be "set aside . . . [as] in excess of statutory jurisdiction, authority, . . . or short of statutory right." 5 U.S.C. § 706(2)(C). HN48 This subsection of the APA authorizes courts to strike down as ultra vires agency [**71] rules promulgated without valid statutory authority. United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1257 (8th Cir. 1998). The League urges us to find that the EPA exceeded its statutory authority under the CWA by prohibiting mixing zones outside the state water quality standard adoption process and by using the blending prohibition to dictate facility treatment design and apply effluent limitations internally, rather than at the end of the pipe. HN49 Appellate review under APA section 706(2)(C) proceeds under the familiar Chevron framework. See Clark v. U.S. Dep't of Agric., 537 F.3d 934, 939 (8th Cir. 2008). We first "conduct an independent review of the statute and of its legislative history." Ark. AFL-CIO v. [**877] FCC, 11 F.3d 1430, 1441 n.9 (8th Cir. 1993) (en banc). "Deference to the agency is appropriate only when a court finds the statute to be ambiguous." Id.; see also Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). If confronted with an ambiguous statute, we look to whether [**72] the agency's construction of the statute is reasonable. Ark. AFL-CIO, 11 F.3d at 1441. Agency rules will survive ultra vires allegations so long as we can "reasonably conclude that the grants of authority in the statutory provisions cited by the government contemplate the issuance." O'Keefe, 132 F.3d at 1257.

We find our circuit in the same position as the District of Columbia Circuit, which recently observed that its "case law provides little direction

on whether, having determined to vacate on procedural grounds, we should nonetheless address substantive claims." *NRDC v. EPA*, 643 F.3d 311, 321, 395 U.S. App. D.C. 397 (D.C. Cir. 2011); cf. *U.S. Steel Corp. v. EPA*, 649 F.2d 572, 577 (8th Cir. 1981). The decision implicates competing tensions, both compelling. If we choose to vacate solely on procedural grounds, regulated entities who have already spent considerable time crossing the hot shoals of regulatory uncertainty must continue to do so. On the other hand, should we move to the merits of whether the EPA's legislative rules reflect an arbitrary and capricious interpretation of the CWA, we short-circuit the APA's notice and comment procedures and preclude interested parties from participating in the agency's [*73] analytic process. Cf. *Smiley v. Citibank, N.A.*, 517 U.S. 735, 741, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996) ("[T]he notice-and-comment procedures of the Administrative Procedure Act [are] designed to assure due deliberation.").

In a recent case, the District of Columbia Circuit found the "interest in preserving the integrity of the notice and comment process" outweighed "concern[s] about delay" where the EPA's rule was not "obviously preclude[d]" by the relevant enabling act. See *NRDC*, 643 F.3d at 321. Here, too, we conclude that the EPA's new mixing zone rule is not obviously precluded by the plain meaning of any applicable CWA provisions. Therefore, should the EPA wish to institute this rule, it may seek to do so using the appropriate procedures.

However, the blending rule clearly exceeds the EPA's statutory authority and little would be gained by postponing a decision on the merits. As discussed above, the September 2011 letter applies effluent limitations to a facility's internal secondary treatment processes, rather than at the end of the pipe. *HN50* The CWA permits the EPA to set "effluent limitations based upon secondary treatment." 33 U.S.C. § 1311(b)(1)(B). But effluent limitations are restricted to regulations governing

[**74] "discharges from point sources into navigable waters." 33 U.S.C. § 1362(11). The EPA is authorized to administer more stringent "water quality related effluent limitations," but the CWA is clear that the object of these limitations is still the "discharges of pollutants from a point source." 33 U.S.C. § 1312(a). In turn, "discharge of pollutant" refers to the "addition of any pollutant to navigable waters." § 1362(11). The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so. See also *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 996, 325 U.S. App. D.C. 76 (D.C. Cir. 1997) ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a [*878] 'point source'; it is not authorized to regulate the pollutant levels in a facility's internal waste stream."). Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority.

V. Conclusion

For the foregoing reasons, we deny the EPA's motion [*75] to dismiss and grant the League's petition for review. We vacate both the mixing zone rule in the June 2011 letter and the blending rule in the September 2011 letter as procedurally invalid. Further, we vacate the blending rule as in excess of statutory authority insofar as it would impose the effluent limitations of the secondary treatment regulations internally, rather than at the point of discharge into navigable waters. We remand to the EPA for further consideration.²⁰

²⁰ The League also requested attorneys' fees under *HN51 CWA section 509(b)(3)*, which authorizes courts, "whenever . . . appropriate," to award litigation costs to any "prevailing or substantially prevailing party." To be a prevailing party entitled to attorneys' fees, a plaintiff must achieve at least some relief on the merits that effectuates a "material alteration of the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604, 121 S. Ct. 1835,

End of Document

149 L. Ed. 2d 855 (2001) (quoting Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)); see also Sierra Club v. City of Little Rock, 351 F.3d 840, 845 (8th Cir. 2003) (applying Buckhamon to a claim for attorneys' [**76] fees under the CWA). The League is clearly a prevailing party, even on the basis of its procedural challenge alone. See Chem. Mfrs. Ass'n v. EPA, 885 F.2d 1276, 1279 (5th Cir. 1989) (describing "substantive significance" of a remand on procedural grounds). An award of litigation costs under section 509(b)(3) must also be "appropriate." Statutory provisions authorizing an award of litigation costs often serve to incentivize the achievement of statutory objectives, and therefore "an award is usually 'appropriate' when a party has advanced the goals of the statute invoked in the litigation." *Id.*; see also Saint John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist., 574 F.3d 1054, 1061 (9th Cir. 2009); NRDC v. EPA, 512 F.2d 1351, 1357, 168 U.S. App. D.C. 111 (D.C. Cir. 1975). **HN52** The CWA's goals involve the restoration and maintenance of the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The League, however, was largely vindicating its own rights, rather than the purposes of the CWA, and it has neglected to brief us on why an award of attorneys' fees would otherwise be "appropriate." Therefore, we decline to award litigation costs under CWA section 509(b)(3).

Tab 4

Nat'l Env'tl. Dev. Ass'ns Clean Air Project v. EPA

United States Court of Appeals for the District of Columbia Circuit

January 17, 2014, Argued; May 30, 2014, Decided

No. 13-1035

Reporter

752 F.3d 999 *; 410 U.S. App. D.C. 50 **; 2014 U.S. App. LEXIS 10047 ***; 44 ELR 20123; 78 ERC (BNA) 1943; 2014 WL 2219065

NATIONAL ENVIRONMENTAL
DEVELOPMENT ASSOCIATION'S CLEAN AIR
PROJECT, PETITIONER v. ENVIRONMENTAL
PROTECTION AGENCY, RESPONDENT

Prior History: [***1] On Petition for Review of Action of the United States Environmental Protection Agency.

Core Terms

Directive, regulations, facilities, agency's action, regional, regional office, agency's, adjacent, Air, implementing, requirements, policies, own regulation, judicial review, determinations, companies, enforcing, pollution, contends, interrelated, Consistency, competitive, procedures, binding, argues, quotations, circuits, violates, petition for review, inconsistencies

Case Summary

Overview

HOLDINGS: [1]-An association of resource extraction and manufacturing companies that were subject to permitting requirements under the Clean Air Act ("CAA") had standing to challenge a directive the EPA issued in December 2012, which stated that the EPA would follow the U.S. Court of Appeals for the Sixth Circuit's decision in Summit Petroleum Corp. v. EPA when it issued operating permits to entities that did business in states that were in the Sixth Circuit but would not follow the Sixth Circuit's decision when it issued operating permits to entities that did business in other states,

because the directive placed companies that did business outside the Sixth Circuit at a competitive disadvantage; [2]-The directive was invalid because it was contrary to EPA's own regulations, which required the EPA to maintain national uniformity in measures implementing the CAA.

Outcome

The court of appeals granted the association's petition for review and vacated the EPA's Summit Directive.

LexisNexis® Headnotes

Environmental Law > Air Quality > Nonattainment Areas

Environmental Law > Air Quality > Operating Permits

HNI Under Title V of the Clean Air Act ("CAA"), *42 U.S.C.S. §§ 7661-7671q*, every "major source" of pollution is required to obtain an operating permit for a fixed term. *42 U.S.C.S. § 7661a(a)*. Title V operating permits impose emission limitations, standards, monitoring requirements, compliance schedules, and other conditions on covered sources of pollution. *42 U.S.C.S. § 7661c*. A source is considered "major" if it emits a certain amount of pollution. *42 U.S.C.S. § 7602(j)*. The CAA also requires New Source Review permits for a new or modified major source within an area not in attainment with National Ambient Air Quality Standards, if the source emits a certain amount of pollutants. *42 U.S.C.S. §§ 7502(c)(5) and 7503*. Under regulations promulgated by the

Environmental Protection Agency, multiple pollutant-emitting activities are considered to be a single stationary source if they are, inter alia, "adjacent." 40 C.F.R. §§ 71.2 and 52.21(b)(5)-(6).

Environmental Law > Air
Quality > Enforcement > Administrative Proceedings

HN2 The directive which the Director of the Environmental Protection Agency's ("EPA's") Office of Air Quality and Standards wrote to Regional Air Directors of each of the ten EPA regions in December 2012 to explain the applicability of the United States Court of Appeals for the Sixth Circuit's decision in Summit Petroleum Corp. v. EPA is plainly contrary to the EPA's own regulations, which require the EPA to maintain national uniformity in measures implementing the Clean Air Act, and to identify and correct regional inconsistencies by standardizing criteria, procedures, and policies. 40 C.F.R. § 56.3(a), (b).

Environmental Law > Air
Quality > Enforcement > Administrative Proceedings

HN3 Pursuant to the Environmental Protection Agency's ("EPA's") authority under the Clean Air Act ("CAA"), 42 U.S.C.S. § 7601, EPA regulations entitled "Regional Consistency" provide that it is EPA's policy to (a) assure fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the CAA, and (b) provide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the CAA. 40 C.F.R. § 56.3(a), (b). The EPA's "Regional Consistency" regulations specifically apply to EPA employees in EPA Headquarters to the extent that they are responsible for developing the procedures to be employed or policies to be followed by Regional Offices in implementing and enforcing the CAA. 40 C.F.R. § 56.2(b). In addition, a responsible official in a Regional Office shall seek concurrence from the

appropriate EPA Headquarters office on any interpretation of the CAA, or rule, regulation, or program directive when such interpretation may result in inconsistent application among the Regional Offices of the CAA, or rule, regulation, or program directive. 40 C.F.R. § 56.5(b).

Environmental Law > Air Quality > Operating
Permits

HN4 The Clean Air Act requires any "major source" of air pollution to obtain an operating permit. A "major" source is any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant. 42 U.S.C.S. § 7602(j). In determining whether a facility emits pollutants at a level to qualify as a "major" source, the Environmental Protection Agency aggregates emissions from multiple facilities that are (1) under common control, (2) belong to the same major industrial grouping, and (3) are located on one or more contiguous or adjacent properties. 40 C.F.R. §§ 71.2, 52.21(b)(5)-(6).

Civil
Procedure > ... > Justiciability > Standing > General
Overview

Constitutional Law > ... > Case or
Controversy > Standing > Elements

HN5 As the United States Supreme Court explained in *Lujan v. Defenders of Wildlife*, the irreducible constitutional minimum of standing contains three elements. First, a plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An

association has standing to bring suit on behalf of its members if at least one member would have standing to sue in its own right, the interests the association seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires that an individual member of the association participate in the law suit.

Civil

Procedure > ... > Justiciability > Standing > Injury in Fact

HN6 In a standing analysis, the historical baseline is not the only possible measure of injury.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN7 The Clean Air Act provides for judicial review of "final action taken" by the Environmental Protection Agency. 42 U.S.C.S. § 7607(b)(1). In order to be "final," an agency action must (1) mark the consummation of the agency's decisionmaking process, and (2) be one by which rights or obligations have been determined, or from which legal consequences will flow. An agency action may be final even if the agency's position is subject to change in the future. This is hardly surprising because many agency actions are subject to reconsideration. If an agency action announces a binding change in its enforcement policy which immediately affects the rights and obligations of regulated parties, then the action is likely final and subject to review.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Environmental Law > Administrative Proceedings &

Litigation > Judicial Review

HN8 The Environmental Protection Agency ("EPA") has undisputed legal authority to prescribe rules to determine whether a facility constitutes a "major" source under the Clean Air Act. And the EPA has uncontested authority to adopt and enforce policies regarding how the various Regional Offices of the agency must implement and enforce the statute and its accompanying rules. The directive which the Director of the EPA's Office of Air Quality and Standards wrote to Regional Air Directors of each of the ten EPA regions in December 2012 to explain the applicability of the United States Court of Appeals for the Sixth Circuit's decision in *Summit Petroleum Corp. v. EPA* addresses both matters and announces a new enforcement regime in response to the Sixth Circuit's decision. In this light, there can be little doubt that the Summit Directive reflects final agency action that is subject to judicial review.

Civil

Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

HN9 Even when an agency has taken final action, a court may refrain from reviewing a challenge to the action if the case is unripe for review. The ripeness inquiry springs from the Article III case or controversy requirement that prohibits courts from issuing advisory opinions on speculative claims. In other words, if a claim challenging final agency action is not concrete, it may be unfit for judicial review without regard to whether the complaining party has standing to pursue the claim. In determining the fitness of an issue for judicial review, the United States Court of Appeals for the District of Columbia Circuit looks to see whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > Unlawful Procedures

Environmental Law > Air

Quality > Enforcement > Administrative Proceedings

HN10 Judicial review of an agency's interpretation of its own regulations is governed by 5 U.S.C.S. § 706(2)(A), which requires courts to set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. And it is undisputed that the arbitrary and capricious standard of review applies to Environmental Protection Agency ("EPA") actions taken under the Clean Air Act. Pursuant to this standard, a court accords substantial deference to an agency's views. Thus, an agency interpretation of its own regulations that does not violate the Constitution or a federal statute must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. In other words, deference to an agency's interpretation of its regulation is required unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN11 It is axiomatic that an agency is bound by its own regulations. Although it is within the power of an agency to amend or repeal its own regulations, an agency is not free to ignore or violate its regulations while they remain in effect. Thus, an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations.

Environmental Law > Air

Quality > Enforcement > Administrative Proceedings

HN12 The Environmental Protection Agency's ("EPA's") regulations state in clear terms that it is EPA's regulatory policy to assure fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the Clean Air Act ("CAA") and to provide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the CAA. 40 C.F.R. § 56.3(a), (b). The regulations also provide that officials in the Regional Offices shall assure that actions taken under the CAA are as consistent as reasonably possible with the activities of other Regional Offices. 40 C.F.R. § 56.5(a)(2). And they specifically apply to officials in EPA Headquarters who are responsible for developing the policies governing the implementation and enforcement of the CAA. 40 C.F.R. § 56.2.

Environmental Law > Air

Quality > Enforcement > Administrative Proceedings

HN13 The references to "Parts 51 and 58" in 40 C.F.R. § 56.4 in no way dilute the broader "Regulatory Consistency" mandates found in 40 C.F.R. §§ 56.1, 56.2, 56.3, and 56.5, which are not limited to Parts 51 and 58. 40 C.F.R. § 56.5 states without limitation that the Environmental Protection Agency's ("EPA's") regional officials will assure that actions taken under the Clean Air Act ("CAA") are carried out fairly and in a manner that is consistent with the CAA and EPA policy as set forth in the EPA's rules and program directives, and that these actions [r]e as consistent as reasonably possible with the activities of other Regional Offices. 40 C.F.R. § 56.5(a)(1), (2). The regulations also state that a responsible official in a Regional Office shall seek concurrence from the appropriate EPA Headquarters office on any interpretation of the CAA, or rule, regulation, or program directive when such interpretation may result in inconsistent application among the Regional Offices of the CAA or rule, regulation, or program directive. 40 C.F.R. § 56.5(b). These

regulations, taken together, strongly articulate the EPA's firm commitment to national uniformity in the application of its permitting rules.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

Environmental Law > Air

Quality > Enforcement > Administrative Proceedings

HNI14 The doctrine of intercircuit nonacquiescence does not allow the Environmental Protection Agency ("EPA") to ignore the plain language of its own regulations. An agency is not free to ignore or violate its regulations while they remain in effect. Therefore, an agency may not refuse to acquiesce if doing so violates its own regulations. 40 C.F.R. § 56.3 not only states that the EPA will establish uniform criteria for implementing the Clean Air Act, but will also identify and correct inconsistencies in such criteria. 40 C.F.R. § 56.3(b). This implies that the EPA was obligated to respond to the United States Court of Appeals for the Sixth Circuit's decision in *Summit Petroleum Corp. v. EPA* in a manner that eliminated regional inconsistency, not preserved it.

Counsel: Gregory G. Garre argued the cause for petitioner. On the briefs was Leslie Sue Ritts.

Kim Smaczniak, Attorney, Environmental Defense Section, U.S. Department of Justice, argued the cause for respondent. With her on the brief were Robert G. Dreher, Acting Assistant Attorney General, Environment and Natural Resources Division and Michael Horowitz, Attorney, U.S. Environmental Protection Agency.

Judges: Before: TATEL, Circuit Judge, and EDWARDS and WILLIAMS, Senior Circuit Judges. Opinion for the Court filed by Senior Circuit Judge EDWARDS.

Opinion by: EDWARDS

Opinion

[**53] [*1002] EDWARDS, *Senior Circuit Judge*:

HNI Under Title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7671q, every "major source" of pollution is required to obtain an operating permit for a fixed term. *Id.* § 7661a(a). Title V operating permits impose emission limitations, standards, monitoring requirements, compliance schedules, and other conditions on covered sources of pollution. *See id.* § 7661c. A source is considered "major" if it emits a certain amount of pollution. *Id.* § 7602(j). The Act also requires New Source Review (NSR) permits for a new or modified major [***2] source within an area not in attainment with National Ambient Air Quality Standards, if the source emits a certain amount of pollutants. *Id.* §§ 7502(c)(5), 7503. Under regulations promulgated by the Environmental Protection Agency ("EPA"), multiple pollutant-emitting activities are considered to be a single stationary source if they are, *inter alia*, "adjacent." 40 C.F.R. § 71.2, § 52.21(b)(5)-(6).

In applying agency regulations, EPA has stated that determinations as to whether two or more facilities are "adjacent" should be based on the functional interrelationships of the facilities, and not simply the physical distance between the facilities. In *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012), however, the Sixth Circuit reversed an EPA determination that a natural gas plant and associated wells were one "source" for the purpose of Title V permitting. The court held that "EPA's determination that the physical requirement of adjacency can be established through mere functional relatedness [*1003] [**54] is unreasonable and contrary to the plain meaning of the term 'adjacent.'" *Id.* at 735. It therefore found arbitrary and capricious EPA's decision to treat the company's operations as one [***3] source subject to Title V permitting. *Id.* at 740-41.

In December 2012, two months after EPA's petition for rehearing was denied in *Summit Petroleum*, the Director of EPA's Office of Air Quality and Standards wrote a directive to the Regional Air Directors of each of the ten EPA regions "to

explain the applicability of the decision by the [Sixth] Circuit Court of Appeals." *Applicability of the Summit Decision to EPA Title V and NSR Source Determinations* (Dec. 21, 2012), reprinted in Joint Appendix ("J.A.") 1-2 ("*Summit Directive*"). The *Summit Directive* states that "EPA may no longer consider interrelatedness in determining adjacency when making source determination decisions in its title V or NSR permitting decisions in areas under the jurisdiction of the [Sixth] Circuit." *Id.* at 1, reprinted in J.A. 1. The *Summit Directive* further states that:

Outside the [Sixth] Circuit, at this time, the EPA does not intend to change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions. In permitting actions occurring outside of the [Sixth] Circuit, the EPA will continue to make source determinations on a case-by-case basis using the three factor [***4] test in the NSR and title V regulations at 40 CFR 52.21(b)(6) . . .

Id. This case involves a challenge to the *Summit Directive*.

Petitioner — an association of resource extraction and manufacturing companies subject to permitting requirements under the CAA — claims that the *Summit Directive* injures its members who are located outside the Sixth Circuit. According to Petitioner, facilities outside the Sixth Circuit are now at a competitive disadvantage. Petitioner contends that by establishing inconsistent permit criteria applicable to different parts of the country, the *Summit Directive* violates the CAA and EPA regulations.

EPA argues that the petition for review should be dismissed for three threshold reasons: (1) Petitioner lacks Article III standing because the alleged injury is entirely speculative. (2) The *Summit Directive* is not subject to judicial review because it is not a final agency action. (3) Petitioner's claim is not ripe for review because it does not raise a concrete issue that is fit for judicial review. And on the merits,

EPA maintains that neither the CAA nor EPA regulations require it to ensure national uniformity in response to a judicial decision.

We hereby grant [***5] the petition for review and vacate the *Summit Directive*. We find no merit in EPA's arguments in opposition to Petitioner's claims. The *Summit Directive* creates a standard that gives facilities located in the Sixth Circuit a competitive advantage. It therefore causes competitive injury to Petitioner's members located outside of the Sixth Circuit. The *Directive* is a final agency action because it sets forth EPA's binding and enforceable policy regarding permit determinations. And Petitioner's claim is ripe for review because it presents a purely legal issue that will not benefit from further factual development.

On the merits, we hold that HN2 the *Summit Directive* is plainly contrary to EPA's own regulations, which require EPA to maintain national uniformity in measures implementing the CAA, and to "identify[] and correct[]" regional inconsistencies by "standardizing criteria, procedures, and policies." 40 C.F.R. § 56.3(a), (b). We need not decide whether the *Summit Directive* also contravenes the requirements of the CAA.

[*1004] [**55] I. BACKGROUND

HN3 Pursuant to the agency's authority under the CAA, 42 U.S.C. § 7601, EPA regulations entitled "Regional Consistency" provide that:

It is EPA's policy to:

- (a) Assure [***6] fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the act; [and]
- (b) Provide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the act

40 C.F.R. § 56.3(a), (b). The agency's "Regional

Consistency" regulations specifically apply to "EPA employees in Headquarters to the extent that they are responsible for developing the procedures to be employed or policies to be followed by Regional Offices in implementing and enforcing the act." *Id.* § 56.2(b). In addition, "[a] responsible official in a Regional Office shall seek concurrence from the appropriate EPA Headquarters office on any interpretation of the Act, or rule, regulation, or program directive when such interpretation may result in inconsistent application among the Regional Offices of the act or rule, regulation, or program directive." *Id.* § 56.5(b).

As noted above, HN4 the CAA requires any "major source" of air pollution to obtain an operating permit. A "major" source is "any stationary facility or source of air pollutants [***7] which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." 42 U.S.C. § 7602(j). In determining whether a facility emits pollutants at a level to qualify as a "major" source, EPA aggregates emissions from multiple facilities that are (1) under common control, (2) belong to the same major industrial grouping, and (3) "are located on one or more contiguous or adjacent properties." 40 C.F.R. § 71.2, 52.21(b)(5)-(6). Under the third requirement, EPA has long followed a general policy of "determin[ing] whether two facilities are 'adjacent' based on a 'common sense' notion of a source and the functional interrelationship of the facilities, rather than simply on the physical distance between the facilities." Summit Petroleum, 690 F.3d at 739 (quotations omitted).

In *Summit Petroleum*, petitioners challenged the aggregation of emissions from multiple facilities that EPA deemed "truly interrelated," even though the facilities were not located on contiguous, bordering properties. *Id.* at 741. The Sixth Circuit held that EPA's policy of considering functionally interrelated facilities "adjacent" when the facilities do not share a physical border violates [***8] the plain meaning of the word "adjacent." *Id.* at 744. In response to the *Summit Petroleum* decision, the

Director of EPA's Office of Air Quality Control Standards issued the *Summit* Directive explaining that EPA would no longer apply the functionally interrelated standard to facilities located in areas within the jurisdiction of the Sixth Circuit. *Summit* Directive, *reprinted in* J.A. 1. However, "[i]n permitting actions occurring outside of the [Sixth] Circuit, the EPA will continue to make source determinations on a case-by-case basis using the three factor test in the NSR and title V regulations at 40 CFR 52.21(b)(6)." *Id.* Petitioner claims that the *Summit* Directive violates EPA's "Regional Consistency" regulations, which say that "[i]t is EPA's policy to . . . [a]ssure fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the act." 40 C.F.R. § 56.3(a).

[*1005] [**56] II. ANALYSIS

A. Threshold Issues

1. Standing

The first issue before the court is Petitioner's standing. If Petitioner lacks standing, as EPA contends, then this court lacks jurisdiction to address the petition for review.

HN5 As the Supreme Court explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992):

[T]he [***9] irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury

will be redressed by a favorable decision.

Id. at 560-61 (quotations and citations omitted). An association has standing to bring suit on behalf of its members if at least one member would have standing to sue in its own right, the interests the association seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires that an individual member of the association participate in the law suit. *Sierra Club v. EPA*, 292 F.3d 895, 898, 352 U.S. App. D.C. 191 (D.C. Cir. 2002).

EPA argues that Petitioner lacks standing because the harm that it alleges is conjectural [***10] and hypothetical, not imminent. EPA also argues that Petitioner has not suffered any harm caused by the *Summit* Directive, so there is no injury that can be redressed by a favorable decision from this court. These arguments fail.

Petitioner's members include companies in the oil and gas industry, as well as others in manufacturing sectors that operate facilities regulated under the Act. A number of these members operate facilities outside of the jurisdiction of the Sixth Circuit and, therefore, they remain subject to EPA's functionally interrelated permitting standard. The *Summit* Directive thus puts these companies at a competitive disadvantage vis-à-vis companies operating facilities located within the Sixth Circuit.

EPA contends that these alleged injuries are speculative because whether any particular facility qualifies as a "major" source depends on a number of factors, evaluated on a case-by-case basis. EPA's argument is shortsighted. Even if functional interrelatedness is not dispositive in a particular permit decision, the potential that certain facilities outside the Sixth Circuit *may* be considered "major" sources based on functional interrelatedness imposes an additional regulatory [***11] burden on these facilities because they must undergo EPA's case-specific assessment of whether they are functionally interrelated. Similar facilities within the Sixth Circuit will not be so burdened because emissions from these facilities

will not be aggregated unless they are physically adjacent. *See* Br. for Pet'r at 20 ("[U]nder this divergent regulatory scheme, companies with shale gas leases outside of the Sixth Circuit are placed at significant competitive disadvantage because they face additional permitting requirements and the ambiguity and delay that comes along with the 'case-by-case' determinations called for by the *Summit* Directive."); Reply Br. for Pet'r at 9 ("[M]embers operating outside the Sixth Circuit have to wait longer and pay more to do the same thing that, by virtue [*1006] [**57] of the *Summit* Directive, their competitors within the Sixth Circuit can now do immediately. That concrete competitive injury is sufficient to give this suit the real-world basis that Article III demands.").

EPA also contends that the *Summit* Directive did not cause Petitioner's alleged injury and, therefore, the alleged injury will not be redressed by vacating the *Summit* Directive. Br. for Resp't at 21-22.

[***12] EPA argues that the Directive could not have caused injury because it did not change the regulatory burdens imposed on sources outside of the Sixth Circuit. Thus, according to EPA, Petitioner's members with operations outside the Sixth Circuit "face . . . nothing more than the status quo they faced prior to the memorandum." *Id.* at 21. This argument fails because it ignores the reality that, even though the regulatory burdens remain unchanged outside the Sixth Circuit, the *Summit* Directive will increase the *relative* regulatory obligations and costs for companies outside the Sixth Circuit.

EPA's action has caused injury because the *Summit* Directive has binding legal effect. The consequences of the agency's action must, for causation purposes, be assessed not by reference to the status quo ante but instead to other actions EPA could have taken. Petitioner need not show that the *Summit* Directive rendered them worse off than the status quo ante. They may alternatively show that, had the EPA taken the course of action that they claim the law required, they would have been better off. *See Nat'l Ass'n of Home Builders v. U.S. Army*

Corps of Eng'rs, 663 F.3d 470, 475, 398 U.S. App. D.C. 308 (D.C. Cir. 2011) (noting [***13] that, **HN6** in standing analysis, "the historical baseline is not the only possible measure of injury"). As we explain below, EPA could have responded to the *Summit Petroleum* decision in several ways that would have avoided affording a competitive advantage to sources within the Sixth Circuit. Therefore, vacating the *Summit* Directive could redress Petitioner's injury because it will remove the binding legal rule that subjects its members to unequal treatment.

2. Final Agency Action

HN7 The CAA provides for judicial review of "final action taken" by EPA. 42 U.S.C. § 7607(b)(1). EPA argues that the *Summit* Directive does not reflect a final agency action and, therefore, it is not subject to review. We disagree.

In order to be "final," an agency action must (1) "mark the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (quotations omitted); NRDC v. EPA, 643 F.3d 311, 319, 395 U.S. App. D.C. 397 (D.C. Cir. 2011) (final agency action "announces a binding change in the law"). EPA contends that the *Summit* Directive is not the consummation of its decisionmaking process [***14] because, by its terms, the directive explains that EPA is still "assessing what additional actions may be necessary," and "EPA's deliberations surrounding the matter are ongoing." Br. for Resp't at 23. We find no merit in these arguments.

An agency action may be final even if the agency's position is "subject to change" in the future. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022, 341 U.S. App. D.C. 46 (D.C. Cir. 2000) ("[A]ll laws are subject to change . . . [t]he fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the

moment." (citation omitted)); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1372, 182 L. Ed. 2d 367 (2012) ("The mere possibility that an agency might reconsider . . . does not suffice to make an otherwise final agency action nonfinal."). [***1007] [***58] This is hardly surprising because many agency actions are subject to reconsideration. If an agency action announces a binding change in its enforcement policy which immediately affects the rights and obligations of regulated parties, then the action is likely final and subject to review. *See EDWARDS, ELLIOTT, & LEVY, FEDERAL STANDARDS OF REVIEW* 137-141 (2d ed. 2013).

The *Summit* Directive is not merely a policy statement [***15] or an interpretative rule that is unreviewable because it "does not establish a binding norm and is not finally determinative of the issues or rights to which it is addressed." *Id.* at 157. The record establishes that the *Summit* Directive provides firm guidance to enforcement officials about how to handle permitting decisions. It therefore clearly "reflect[s] a settled agency position which has legal consequences for [regional officials] administering their permit programs and for companies . . . who must obtain Title V permits." Appalachian Power Co., 208 F.3d at 1023. Indeed, the finality and legal consequences of the *Summit* Directive were made plain when the EPA relied on the directive in a permit decision involving a company located outside the jurisdiction of the Sixth Circuit. Approval and Promulgation of Federal Implementation Plan for Oil and Natural Gas Well Production Facilities; Fort Berthold Indian Reservation (Mandan, Hidatsa, and Arikara Nation), North Dakota, 78 Fed. Reg. 17836, 17842 & n.10 (March 22, 2013). EPA explained that the Sixth Circuit's version of the adjacency test did not apply to facilities in North Dakota because they were outside of the jurisdiction of [***16] the Sixth Circuit. *Id.* And EPA cited the *Summit* Directive to support its action. *Id.*

EPA also cites Indep. Equip. Dealers Ass'n v. EPA, 372 F.3d 420, 362 U.S. App. D.C. 53 (D.C. Cir.

2004), in support of its claim that the *Summit* Directive is not reviewable because it simply restates the agency's longstanding interpretation of its regulations. Br. for Resp. at 24. The holding of *Independent Equipment Dealers*, however, gives no aid to EPA's position here. In *Independent Equipment Dealers*, the court ruled that a letter written by an EPA official was unreviewable because it was "purely informational." 372 F.3d at 427. The letter "neither announced a new interpretation of the regulations nor effected a change in the regulations themselves." *Id.* Importantly, the letter compelled no one to do anything and had "no binding effect whatsoever" on agency officials or on regulated parties. *Id.* The *Summit* Directive plainly differs from the letter at issue in *Independent Equipment Dealers* because it *compels* agency officials to apply different permitting standards in different regions of the country.

HN8 EPA has undisputed legal authority to prescribe rules to determine whether a facility constitutes a "major" source under the [***17] CAA. And EPA has uncontested authority to adopt and enforce policies regarding how the various regional offices of the agency must implement and enforce the statute and its accompanying rules. The *Summit* Directive addresses both matters and announces a new enforcement regime in response to the Sixth Circuit's decision. In this light, there can be little doubt here that the *Summit* Directive reflects final agency action that is subject to judicial review.

3. Ripeness

HN9 "Even when an agency has taken final action, a court may refrain from reviewing a challenge to the action if the case is unripe for review. The ripeness inquiry springs from the Article III case or controversy requirement that prohibits courts from issuing advisory opinions on speculative claims. In other words, if a [*1008] [**59] claim challenging final agency action is not concrete, it may be unfit for judicial review without regard to whether the

complaining party has standing to pursue the claim." EDWARDS, ELLIOTT, & LEVY, FEDERAL STANDARDS OF REVIEW 141 (2d ed. 2013) (citing *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 87 S. Ct. 1520, 18 L. Ed. 2d 697 (1967); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 138, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974)). "In determining the fitness of an issue for [***18] judicial review we look to see whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204, 331 U.S. App. D.C. 353 (D.C. Cir. 1998) (quotations omitted).

EPA argues that this case is not ripe for review because "it is entirely speculative how EPA's interpretation . . . will impact any source, or category of sources, in particular." Br. for Resp. at 27. Therefore, according to EPA, "we need to wait for the action to be applied to see what its effect will be." *Id.* (quotations and alterations omitted). EPA contends that, in some cases, treating functionally interrelated facilities as a single source may subject those facilities to the "major" source permit requirement, while in others it may not, depending on other factors that are considered on a case-by-case basis. *Id.* at 27-28. EPA also points out that, in some cases, treating a group of facilities as a single source may result in greater regulatory flexibility, as opposed to additional regulatory requirements. *Id.* at 27. EPA's argument misses the point. Petitioner's challenge in this case [***19] presents a purely legal question of whether EPA's final action adopting a non-uniform enforcement regime violates the strictures of the CAA or EPA regulations. It is unnecessary to wait for the *Summit* Directive to be applied in order to determine its legality.

B. Merits

1. Standard of Review

HN10 "Judicial review of an agency's interpretation

of its own regulations is governed by 5 U.S.C. § 706(2)(A), which requires courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" EDWARDS, ELLIOTT, & LEVY, FEDERAL STANDARDS OF REVIEW 199 (2d ed. 2013) (citing Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 377, 118 S. Ct. 818, 139 L. Ed. 2d 797 (1998); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994)). And it is undisputed that the arbitrary and capricious standard of review applies to EPA actions taken under the Clean Air Act. See, e.g., Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496-97, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004) (applying the "default standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)" to a petition for review under the Clean Air Act).

Pursuant to this standard, a court accords "substantial deference" to an agency's views. . . . [***20] . . . Thus, an agency interpretation [of its own regulations] that "does not violate the Constitution or a federal statute . . . must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." Stinson v. United States, 508 U.S. 36, 45, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993). "In other words," deference to an agency's interpretation of its regulation is required "unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." Thomas Jefferson Univ., 512 U.S. at 512.

EDWARDS, ELLIOTT, & LEVY, FEDERAL STANDARDS OF REVIEW 199 (2d ed. 2013).

[*1009] [**60] HNI1 It is "axiomatic," however, "that an agency is bound by its own regulations." Panhandle Eastern Pipe Line Co. v. FERC, 613 F.2d 1120, 1135, 198 U.S. App. D.C. 387 (D.C. Cir. 1979) (holding that an agency does not have authority to "play fast and loose with its own

regulations"). "Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect." U.S. Lines, Inc. v. Fed. Mar. Comm'n, 584 F.2d 519, 526 n.20, 189 U.S. App. D.C. 361 (D.C. Cir. 1978). Thus, an agency action may be set [***21] aside as arbitrary and capricious if the agency fails to "comply with its own regulations." Environmental, LLC v. FCC, 661 F.3d 80, 85, 398 U.S. App. D.C. 213 (D.C. Cir. 2011).

2. The Summit Directive

The essence of Petitioner's argument is that the Summit Directive must be vacated because it violates EPA's "Regional Consistency" regulations without purporting to amend those regulations. We agree.

As noted above, HNI2 the applicable regulations state in clear terms that it is EPA's regulatory policy to "assure fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the act" and to "[p]rovide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the act." 40 C.F.R. § 56.3(a), (b) (emphasis added). The regulations also provide that officials in the regional offices "shall assure that actions taken under the act . . . [a]re as consistent as reasonably possible with the activities of other Regional Offices." Id. § 56.5(a)(2) (emphasis added). And they specifically apply to officials in EPA headquarters who are responsible [***22] for developing the policies governing the implementation and enforcement of the CAA. Id. § 56.2.

EPA argues that these regulations "targeted particular aspects of the Act that presented consistency problems" but do not "require that EPA officials maintain perfect uniformity in the application of criteria, procedure and policies in

implementing and enforcing the Act." Br. for Resp't at 35. In support of this reading, EPA points out that section 56.4 requires the Administrator to ensure uniform enforcement of Parts 51 and 58, which pertain to state implementation plans and air quality monitoring programs not at issue in this case. *Id.* Thus, according to EPA, because the *Summit* Directive did not violate these "specific regulatory obligations," *id.* at 36, the directive cannot be said to violate agency regulations. EPA's argument attempts to prove too much.

It is true that section 56.4 states that "[t]he Administrator shall include, as necessary, with any rule or regulation proposed or promulgated under Parts 51 and 58 of this chapter mechanisms to assure that the rule or regulation is implemented and enforced fairly and uniformly by the Regional Offices." 40 C.F.R. § 56.4(a). But HNI13 the references [***23] to "Parts 51 and 58" in section 56.4 in no way dilute the broader "Regulatory Consistency" mandates found in sections 56.1, 56.2, 56.3, and 56.5, which are not limited to Parts 51 and 58. Section 56.5, for example, states without limitation that EPA's regional officials will "assure that actions taken under the act . . . [are] carried out fairly and in a manner that is consistent with the Act and Agency policy as set forth in the Agency rules and program directives," and that these actions "[a]re as consistent as reasonably possible with the activities of other Regional Offices." *Id.* § 56.5(a)(1), (2). The regulations also state that "[a] responsible official in a Regional Office shall seek [*1010] [**61] concurrence from the appropriate EPA Headquarters office on any interpretation of the Act, or rule, regulation, or program directive when such interpretation may result in inconsistent application among the Regional Offices of the act or rule, regulation, or program directive." *Id.* § 56.5(b). These regulations, taken together, strongly articulate EPA's firm commitment to national uniformity in the application of its permitting rules. And there is no indication that EPA intended to exempt variance [***24] created by a judicial decision.

EPA responds that the "general policy statements in Part 56" should not be read "as mandating that EPA adopt the interpretation of the circuit court that first addresses a legal matter." Br. for Resp't at 36. "It is absurd," according to EPA, "to suggest that EPA would have used a general policy statement to constrain as important an agency function as its discretion to independently assess the dictates of the statutes and regulations it is charged with administering." *Id.* (citations and quotations omitted). EPA's overblown characterization of Petitioner's position is misguided.

Any problems that EPA now faces as a result of Petitioner's action are attributable to the agency's decision to issue a directive that is plainly contrary to the agency's own "Regional Consistency" rules. EPA seems to assume that under Petitioner's position, the agency would be limited to one course of action — follow the *Summit Petroleum* decision in all regions of the country. But there are several other alternatives that might be available to EPA that would not violate its uniformity regulations.

First, EPA might be able to revise its regulations for aggregating emissions from [***25] multiple facilities, so as to require aggregation when facilities are functionally interrelated, rather than "adjacent." Second, EPA could have appealed the Sixth Circuit decision in *Summit Petroleum* to the Supreme Court, which it did not do. See Johnson v. U.S. R.R. Ret. Bd., 969 F.2d 1082, 1092, 297 U.S. App. D.C. 82 (D.C. Cir. 1992) ("When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court."). And, finally, EPA might also revise its uniformity regulations to account for regional variances created by a judicial decision or circuit splits.

EPA contends that, because the Act allows review of EPA's regional actions by different circuits, 42 U.S.C. § 7607(b)(1), the CAA contemplates divergence between circuits and, thus, permits the agency to apply varied standards in different circuits. In support of the claim that the Act and its

regulations allow regional variance resulting from decisions in different circuits, EPA invokes the doctrine of intercircuit nonacquiescence. Br. for Resp't at 30-31, 36 (citing Indep. Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248, 1261, 320 U.S. App. D.C. 107 (D.C. Cir. 1996) (Rogers, J., dissenting) [***26] ("[A]fter one circuit has disagreed with its position, an agency is entitled to maintain its independent assessment of the dictates of the statutes and regulations it is charged with administering, in the hope that other circuits, the Supreme Court, or Congress will ultimately uphold the agency's position.")); see also Am. Tel. & Tel. Co. v. FCC, 978 F.2d 727, 737, 298 U.S. App. D.C. 230 (D.C. Cir. 1992) (referring to agency's "right to refuse to acquiesce" in decisions of circuit courts). EPA contends that "[t]o compel an agency to follow the adverse ruling of a particular court of appeals would be to give that court undue influence in the intercircuit dialogue by diminishing the opportunity for other courts of proper venue to consider, and possibly sustain, the agency's position." Br. for Resp't at 31 (quoting Samuel Estreicher and Richard L. Revesz, Nonacquiescence [*1011] [**62] by Federal Administrative Agencies, 98 YALE L.J. 679, 764 (1989)).

We need not determine whether the CAA allows EPA to adopt different standards in different circuits. Since EPA's regulations preclude the *Summit* Directive by requiring uniformity, there is no need for us to address whether the Act does.

HNI14 The doctrine of intercircuit nonacquiescence [***27] does not allow EPA to ignore the plain language of its own regulations. As noted above, "[an] agency is not free to ignore or violate its regulations while they remain in effect." U.S. Lines, Inc., 584 F.2d at 526 n.20. Therefore, an agency may not refuse to acquiesce if doing so violates its own regulations. Section 56.3 not only states that EPA will establish uniform criteria for implementing the Act, but also identify and correct inconsistencies in such criteria. 40 C.F.R. § 56.3(b). This implies that EPA was obligated to respond to

the *Summit Petroleum* decision in a manner that eliminated regional inconsistency, not preserved it. EPA's current regulations preclude EPA's inter-circuit nonacquiescence in this instance, and the *Summit* Directive is therefore contrary to law.

III. CONCLUSION

For the reasons set forth above, we grant the petition for review and vacate the *Summit* Directive.

End of Document

Tab 5

NRDC v. EPA

United States Court of Appeals for the District of Columbia Circuit

May 12, 2011, Argued; July 1, 2011, Decided

No. 10-1056

Reporter

643 F.3d 311 *; 395 U.S. App. D.C. 397 **; 2011 U.S. App. LEXIS 13390 ***; 41 ELR 20223; 72 ERC (BNA) 2185

NATURAL RESOURCES DEFENSE COUNCIL,
PETITIONER v. ENVIRONMENTAL
PROTECTION AGENCY, RESPONDENT.
AMERICAN CHEMISTRY COUNCIL, ET AL.,
INTERVENORS

Prior History: [***1] On Petition for Review of a Final Action of the Environmental Protection Agency.

Core Terms

attainment, nonattainment, Air, alternatives, requirements, regions, deadline, ozone, notice, controls, stringent, implementation plan, air quality, sources, vacate, rulemaking, classification, emission, severe, agency's action, task force, regulations, Pollution, penalties, qualifies, Ambient, approve, argues, alternative program, regional director

Case Summary

Procedural Posture

Petitioner environment organization filed a petition for review of a final action by respondent Environmental Protection Agency (EPA) as to a guidance document that addressed obligations of regions still in nonattainment of a now-revoked ozone air quality standard under the Clean Air Act. Numerous industry groups intervened in support of the EPA.

Overview

The guidance document gave nonattainment areas flexibility to choose between the statutorily mandated program and an equivalent program alternative. The court held that the environment organization had standing because certain members were injured by the EPA's guidance. The court ruled that the guidance document qualified as a legislative rule that the EPA was required to issue through notice and comment rulemaking. Since the EPA did not meet the notice and comment requirements, the EPA violated the Administrative Procedure Act. The document could not be considered a mere statement of policy because it bound the EPA regional directors. Nothing in the statute, prior regulations, or case law authorized the EPA to accept alternatives. Likewise, nothing prior to the guidance entitled a state to have the EPA evaluate a proposed alternative for equivalency rather than reject it outright. The attainment alternative violated the plain language of § 172(e) of the Clean Air Act, *42 U.S.C.S. § 7502(e)*, that required that any alternative be not less stringent than applicable controls.

Outcome

The court granted the petition for review and vacated the guidance.

LexisNexis® Headnotes

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

HN1 The Clean Air Act requires the Environmental Protection Agency to establish national ambient air quality standards (NAAQS) for certain criteria pollutants, including ozone. 42 U.S.C.S. § 7409(a). Regions in nonattainment of those standards are subject to additional restrictions over and above the Act's implementation requirements. These additional restrictions appear in Title I, Part D of the Act. Subpart 1 contains general nonattainment regulations that pertain to every pollutant for which a NAAQS exists. Subpart 2, added by the Clean Air Act Amendments of 1990, addresses ozone. That latter subpart classifies nonattainment areas as either marginal, moderate, serious, severe, or extreme, 42 U.S.C.S. § 7511(a)(1), giving areas with worse air quality extra time to come into compliance in exchange for imposing more stringent standards. Subpart 2 also contains provisions designed to encourage these regions to meet their deadlines.

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > State
Implementation Plans

HN2 Section 185 of the Clean Air Act directs states to impose fees on all major stationary sources in severe and extreme nonattainment areas that miss their deadlines. 42 U.S.C.S. § 7511d(a). Under § 185, such states must submit implementation plans, and if a state fails to do so, the Environmental Protection Agency must collect the fees itself. § 7511d(a), (d). In addition, states failing to submit adequate implementation plans may incur penalties, including loss of federal highway funding. 42 U.S.C.S. § 7509(b)(1).

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > Nonattainment
Areas

HN3 Section 172(e) of the Clean Air Act provides

that, where the Environmental Protection Agency relaxes a national ambient air quality standard, it shall promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation. 42 U.S.C.S. § 7502(e).

Environmental Law > Air
Quality > Enforcement > Administrative Proceedings

Environmental Law > Administrative Proceedings &
Litigation > Judicial Review

Environmental Law > Administrative Proceedings &
Litigation > Jurisdiction

HN4 Section 307(b)(1) of the Clean Air Act gives the United States Court of Appeals for the District of Columbia exclusive jurisdiction over challenges to final Environmental Protection Agency actions. 42 U.S.C.S. § 7607(b)(1).

Civil
Procedure > ... > Justiciability > Standing > Burdens
of Proof

Civil
Procedure > ... > Justiciability > Standing > Injury in
Fact

HN5 To demonstrate that a member would have standing to sue in her own right for organizational standing, an organization must establish that she has suffered injury, caused by the defendant's action, that is redressable through a claim.

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

HN6 To be final, an agency action must (1) mark the consummation of the agency's decisionmaking process and (2) be one by which rights or obligations have been determined, or from which legal consequences will flow. Finality is a necessary feature of fitness for review.

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

Environmental Law > Air Quality > State
Implementation Plans

HN7 For the purposes of finality, it is irrelevant how the interpretation will apply to any individual state's implementation plan-approval process.

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

Administrative Law > Judicial
Review > Reviewability > Questions of Law

Administrative Law > Judicial
Review > Reviewability > Ripeness

HN8 A purely legal claim in the context of a facial challenge is presumptively reviewable.

Administrative Law > Judicial
Review > Reviewability > General Overview

Environmental Law > Air
Quality > Enforcement > Administrative Proceedings

Environmental Law > Administrative Proceedings &
Litigation > Judicial Review

HN9 The U.S. Congress has emphatically declared a preference for immediate review with respect to Clean Air Act rulemaking.

Administrative Law > Agency Rulemaking > Notice
& Comment Requirements

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Validity

HN10 5 U.S.C.S. § 553 requires that legislative rules, but not policy statements or interpretive rules, be issued only after notice and comment.

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Validity

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

HN11 Policy statements are binding on neither the public nor the agency. The inquiries into whether an agency action was final and whether the agency action was a rule are essentially the same.

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Validity

HN12 Where in the absence of a rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, the rule is legislative.

Governments > Legislation > Interpretation

HN13 First, always, is the question whether the U.S. Congress has directly spoken to the precise question at issue.

Environmental Law > Air Quality > General
Overview

Environmental Law > Administrative Proceedings &
Litigation > Judicial Review

Governments > Courts > Judicial Precedent

HN14 Where the Environmental Protection Agency violates the Clean Air Act's plain language as interpreted by court precedent, that is the end of the matter.

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > Nonattainment
Areas

HN15 Section 172(e) of the Clean Air Act, 42 U.S.C.S. § 7502(e), does not condition its strict distaste for backsliding on the Environmental Protection Agency (EPA)'s determinations of expediency; the EPA must determine its procedures after it has identified what findings must be made under the Act.

Environmental Law > Air Quality > General
Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Governments > Legislation > Interpretation

HNI16 If the Environmental Protection Agency disagrees with the Clean Air Act's requirements, it should take its concerns to the U.S. Congress. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by the United States Court of Appeals for the District of Columbia.

Counsel: Paul Cort argued the cause for petitioner. With him on the briefs was Deborah Reames.

Stephanie J. Talbert, Attorney, U.S. Department of Justice, argued the cause for respondent. With her on the brief were John C. Cruden, Deputy Assistant Attorney General and Sara Schneeberg, Attorney, U.S. Environmental Protection Agency. Thomas A. Lorenzen, Attorney, U.S. Department of Justice, entered an appearance.

Barbara Baird argued the cause for intervenor South Coast Air Quality Management District. With her on the brief was Kurt R. Wiese.

Leslie Sue Ritts, Claudia M. O'Brien, Charles H. Knauss, Sandra P. Franco, Thomas G. Echikson, Rachel D. Gray, and Adam J. White were on the brief for intervenors for respondent American Chemistry Council, et al. Richard P. Sobiecki and Stacey L. VanBelleghem entered an appearance.

Judges: Before: ROGERS, TATEL, and GRIFFITH, Circuit Judges. Opinion for the Court filed by Circuit Judge TATEL.

Opinion by: TATEL

Opinion

[*313] [*399] Opinion for the Court filed by *Circuit Judge TATEL*.

TATEL, *Circuit Judge*: Yet again we face a challenge to the Environmental Protection Agency's

regulation of ozone under the Clean Air Act. At issue [***2] this time is an EPA "guidance document" addressing obligations of regions still in nonattainment of a now-revoked ozone air quality standard. Petitioner argues that the Guidance amounts to a legislative rule issued in violation of the Administrative Procedure Act's notice and comment requirement and that its substantive content is contrary to law. Firing nearly all the arrows in its jurisdictional quiver, EPA argues that petitioner lacks standing, that the Guidance does not qualify as final agency action, and that petitioner's claims are unripe for judicial review. As we explain in this opinion, all three arrows miss their target. On the merits, we conclude that the Guidance qualifies as a legislative rule that EPA was required to issue through notice and comment rulemaking and that one of its features—the so-called attainment alternative—violates the Clean Air Act's plain language. We therefore grant the petition for review and vacate the Guidance.

I.

HNI The Clean Air Act requires EPA to establish national ambient air quality standards (NAAQS) for certain criteria pollutants, including ozone. *42 U.S.C. § 7409(a)*. Regions in nonattainment of those standards are subject to "additional restrictions [***3] over and above the [Act's] implementation requirements." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). These additional restrictions appear in Title I, Part D of the Act. "Subpart 1 contains general nonattainment regulations that pertain to every pollutant for which a NAAQS exists. . . . Subpart 2, added by the Clean Air Act Amendments of 1990, addresses ozone." *Id.* (internal citations omitted). That latter subpart classifies nonattainment areas as either "marginal," "moderate," "serious," "severe," or "extreme," *42 U.S.C. § 7511(a)(1)*, giving areas with worse air quality extra time to come into compliance in exchange for imposing more stringent standards. *Id.* (listing [*314] [*400] classifications and attainment dates). Subpart 2 also contains

provisions designed to encourage these regions to meet their deadlines. Central to this case, one of those provisions, HN2 section 185, directs states to impose fees on all major stationary sources in severe and extreme nonattainment areas that miss their deadlines. *Id.* § 7511d(a). Under section 185, such states must submit implementation plans, and if a state fails to do so, EPA must collect the fees itself. *Id.* § 7511d(a), (d). In addition, states [***4] failing to submit adequate implementation plans may incur penalties, including loss of federal highway funding. *Id.* § 7509(b)(1).

Until 1997, EPA had in place a 1-hour ozone NAAQS prohibiting average hourly concentrations from exceeding .12 parts per million. The 1990 amendments, including the table specifying nonattainment classifications and attainment deadlines, incorporate that 1-hour standard. *Id.* § 7511(a)(1). In 1997, however, EPA found the 1-hour standard insufficient to "protect the public health," *id.* § 7409(b), and so promulgated an 8-hour standard of .08 parts per million. National Ambient Air Quality Standards for Ozone: Final Rule, 62 Fed. Reg. 38,856, 38,863 (July 18, 1997) (codified at 40 C.F.R. pt. 50) ("1997 Ozone Rule"). Because the .12 parts per million 1-hour standard roughly corresponds to a .09 parts per million 8-hour standard, the revision changed not only "the measuring stick [but also] the target." S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 892, 374 U.S. App. D.C. 121 (D.C. Cir. 2006). Overall, the 8-hour standard is more protective of public health and "generally even more effective in limiting 1-hour exposures . . . than is the . . . 1-hour standard." 1997 Ozone Rule, [***5] 62 Fed. Reg. at 38,863. That said, EPA acknowledged that "it is possible that an 8-hour standard alone could allow for high 1-hour exposures of concern." *Id.* Accordingly, to ease the transition to the new standard, EPA determined that the requirements of Subpart 2, including section 185, would apply only to nonattainment under the 1-hour standard, which would remain in place until all areas achieved attainment. *Id.* at 38,873. The 8-hour standard would be implemented only under Subpart 1, a part

of the statute that leaves EPA substantial regulatory flexibility.

Reviewing the 1997 rule in *Whitman v. American Trucking Ass'ns*, the Supreme Court observed that even though Subpart 2 expressly relies on the 1-hour standard, EPA remained free to revise the NAAQS. 531 U.S. at 484. Given this, the Court recognized that the statute left several gaps for EPA to fill as it implemented revised NAAQS. *Id.* at 483-84 (identifying three specific gaps related to classification and attainment deadlines). The Court nonetheless held that EPA's exemption of the 8-hour standard from the Subpart 2 requirements violated the statute. *Id.* at 484-86. According to the Court, Congress intended Subpart 2 to "eliminate[] [***6] [the] regulatory discretion" that Subpart 1 allowed and that EPA's reading was impermissible because it "render[ed] Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory." *Id.* at 484. "A plan reaching so far into the future," the Court explained, "was not enacted to be abandoned the next time the EPA reviewed the ozone standard." *Id.* at 485.

Following *American Trucking*, EPA tried again to reconcile Subpart 2 with the new 8-hour standard. See Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1, 69 Fed. Reg. 23,951 (Apr. 30, 2004) (codified at 40 C.F.R. pts. 50, 51, 81). In a 2004 rulemaking, the agency determined that Subpart 2 would apply only to areas in [*315] [***401] nonattainment of both the 1-hour and the 8-hour standards, but that the 1-hour standard would be withdrawn in full one year after the 8-hour standard's effective date. Pursuant to this new scheme, 76 of the 122 then-non-attaining areas would be subject only to Subpart 1. S. Coast, 472 F.3d at 892. Addressing one of the gaps the Supreme Court identified in *American Trucking*—relating to regional classification under the 8-hour standard—EPA noted that because net air quality [***7] had improved since 1990, some areas would have a lower classification under the 8-hour standard than they had had under the 1-hour standard. *Id.* at 890. For instance, although Baton

Rouge had been a severe nonattainment area under the 1-hour standard, it was in only marginal nonattainment of the 8-hour standard. *See id. at 899*. Rather than allow such regions to loosen existing implementation standards, EPA interpreted section 172(e)—a Subpart 1 "anti-backsliding" provision that applies "[i]f the administrator *relaxes* a [NAAQS]," 42 U.S.C. § 7502(e) (emphasis added)—to apply as well where NAAQS were made more stringent. *See Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1, 69 Fed. Reg. at 23,972* (concluding that Congress intended "that such controls not be weakened where the NAAQS is made more stringent"). HNS Section 172(e) provides that where EPA relaxes a NAAQS, it "shall . . . promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). Accordingly, the 2004 Rule announced that Subpart 2 "applicable controls" had to remain in place for areas that had been in nonattainment under the 1-hour standard and were in attainment or a lower classification of nonattainment under the 8-hour standard. *S. Coast, 472 F.3d at 890*. For Baton Rouge, for instance, controls applicable to severe nonattainment regions would continue to apply despite the fact that the city qualified as a marginal nonattainment area under the new standard. Sorting through the various Subpart 2 provisions, EPA determined that some were applicable controls and others, including section 185 fees, were not. *Id.*

In *South Coast Air Quality Management District v. EPA*, we rejected a challenge to EPA's withdrawal of the 1-hour standard but vacated the portions of the rule exempting areas in nonattainment of only the 8-hour standard from Subpart 2 strictures. *Id. at 892-95*. [***9] At the least, we held, Subpart 2 must apply for areas with 8-hour concentrations exceeding .09 parts per million, the 8-hour equivalent of the 1-hour standard on which

Congress relied in enacting Subpart 2. *Id. at 892-94*. For areas with 8-hour concentrations between .08 parts per million (the new standard) and .09 parts per million, we found that EPA's sole reason for excluding these areas from Subpart 2—to create regulatory flexibility and thus "maximize its own discretion"—contradicted the "clear intent of Congress." *Id. at 894-95*. We also concluded that although EPA's interpretation of section 172(e) was reasonable, the same could not be said for its exclusion of section 185 fees from "applicable controls." *Id. at 900, 902-03*. We explained: "[a]s Congress set the penalty deadline well into the future, giving states and industry ample notice and sufficient incentives to avoid the penalties, they were 'applicable' before they were actually imposed . . . , [and] [b]ecause these penalties were designed to constrain ozone pollution, they are controls that section 172(e) requires to be retained." *Id. at 903*. Responding to EPA's [*316] [**402] argument that enforcement would be impractical because the [***10] penalty calculation relied on the no-longer-measured 1-hour standard, we warned that "section 172(e) does not condition its strict distaste for backsliding on EPA's determinations of expediency; EPA must determine its procedures *after* it has identified what findings must be made under the Act." *Id.* In sum, we ruled that pursuant to section 172(e)'s anti-backsliding principles, an area subject to section 185 penalties due to its classification under the now-defunct 1-hour standard must apply those penalties as an "applicable control" if the area missed its attainment deadline under the 1-hour standard.

Now before us is EPA's latest attempt to reconcile the 8-hour standard with Subpart 2. This time its effort relates only to the application of section 185 fees to the eight regions in severe or extreme nonattainment of the 1-hour standard: Baltimore, Baton Rouge, Houston, New York City, Sacramento, the San Joaquin Valley, the South Coast Air Basin (CA), and the Southeast Desert (CA). Because attainment deadlines for the eight regions have now expired, all are in the process of developing section 185 implementation plans.

Faced with the prospect of hefty fees, industry groups complained [***11] to EPA that because they already had in place the best available emission control technology, they could reduce emissions and thus avoid fees only by cutting production. *Report of the US EPA Clean Air Act Advisory Committee Task Force on section 185 of the Clean Air Act 3* (May 12, 2009) (included at J.A. 56). Moreover, they asserted, because section 185 set such a low emissions threshold for major stationary sources, the fees would apply to many small businesses, as well as to hospitals and schools. *Id.* at 4. Lastly, they alleged that stationary sources contribute far less to overall air pollution today than they did in 1990 and face far higher marginal costs for further reduction than do mobile sources. *Id.* at 3.

To address these concerns, the Clean Air Act Advisory Committee, a body created by the 1990 Amendments to advise EPA on scientific and industry developments relevant to rule making, established a task force that generated a list of section 185 alternatives including shifting costs to mobile sources and implementing market-based programs. Environmental organizations participating in the task force submitted an "Alternative Opinion" criticizing the policy rationales of the industry [***12] groups and asserting that the statute allowed no alternatives. The Committee submitted the task force report to EPA along with the following question: "Is it legally permissible under either section 185 or 172(e) for a State to exercise the discretion identified in [the options listed in this letter]?" Letter from Eddie Terrill & Robert Wyman, Co-chairs of the Section 185 Task Force, to Elizabeth Craig, Acting Assistant Administrator, Office of Air & Radiation (May 16, 2009) ("*Task Force Letter*") (included at J.A. 51).

In response, EPA issued a "Guidance" document aimed at Regional Air Division Directors—the agency officials directly responsible for implementation plan approval. That January 5, 2010, document explains to Directors that

[i]n the implementation rule for the 1997 ozone NAAQS, EPA determined that although section 172(e) does not directly apply where EPA has strengthened the NAAQS, as it did in 1997, it was reasonable to apply the same principle for the transition from the 1-hour NAAQS to the 1997 8-hour NAAQS. As part of applying the principle in section 172(e) for purposes of the transition from the 1-hour standard to the 1997 8-hour standard, EPA can either require states [***13] [*317] [**403] to retain programs that applied for purposes of the 1-hour standard, or alternatively can allow states flexibility to adopt alternative programs, but only if such alternatives are 'not less stringent' than the mandated program.

Memorandum from Stephen D. Page, Director, Office of Air Quality Planning & Standards to Regional Air Division Directors 3 (Jan. 5, 2010) ("*Fee Program Guidance*") (included at J.A. 66). In other words, EPA believes 1-hour nonattainment areas have flexibility to choose between the statutorily mandated program and an equivalent—i.e., the program alternative.

In addition to that alternative, the Guidance explains, regions attaining either the 1-hour or the 8-hour standard can avoid section 185 fees through an "attainment alternative." Specifically, in such regions the existing 8-hour implementation controls would qualify as a "not less stringent" alternative to section 185 fees. *Id.* at 3-4. In other words, a region satisfying the 8-hour standard would have no obligation to pay section 185 fees even though it remained in nonattainment of the 1-hour standard. The Guidance sets forth two justifications for the attainment alternative. First, "it would unfairly penalize [***14] sources in these areas to require that fees be paid after an area has attained the 8-hour standard due to permanent and enforceable emission reductions because the fees were imposed due to a failure to meet the applicable attainment deadline for the 1-hour standard, not any failure to achieve the now applicable 8-hour standard by its attainment date." *Id.* at 4. Second, because EPA no

longer redesignates areas under the 1-hour standard, "relief from the 1-hour fee program requirements under the terms of the statute is an impossibility, since the conditions the statute envisioned for relieving an area of its fee program obligation"—reclassification as in attainment of the 1-hour standard—"no longer can exist." *Id.*

As to both the program and attainment alternatives, the Guidance explains that approval of individual alternatives would occur on a case-by-case basis. Specifically, if after preliminarily assessing a proposal, EPA were to find the alternative satisfactory, it would proceed with notice and comment to finalize that finding. *Id.* at 3.

On March 5, 2010, the Natural Resources Defense Council (NRDC) filed a petition for review of the Guidance pursuant to HN4 Clean Air Act section 307(b)(1), [***15] which gives this court exclusive jurisdiction over challenges to final EPA actions. 42 U.S.C. § 7607(b)(1). NRDC argues that EPA violated the Administrative Procedure Act by issuing the Guidance without notice and comment and that both the program and attainment alternatives violate the Clean Air Act. In response, EPA argues that NRDC lacks standing, that the Guidance fails to qualify as final agency action, and that NRDC's challenges are unripe for review. On the merits, EPA contends that the Guidance is either a policy statement or an interpretive rule and, in either case, is exempt from the notice and comment requirement. It also defends both alternatives as permissible exercises of statutory gapfilling. Numerous industry groups and the South Coast Air Quality Management District have intervened in support of EPA.

II.

NRDC argues that it has "organizational standing" due to alleged injuries suffered by two of its members. Sierra Club v. EPA, 292 F.3d 895, 898, 352 U.S. App. D.C. 191 (D.C. Cir. 2002) (listing three requirements of organizational standing, only one of which—that at least one member would

have standing to sue in her own right—is at issue in this [*318] [**404] case); *see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* [***16] (HN5 to demonstrate that a member would have standing to sue in her own right, the organization must establish that she has suffered injury, caused by the defendant's action, and redressable through this claim). Both members live in 1-hour nonattainment areas (one in the Houston area, which has an attainment deadline of November 15, 2007, and the other in the San Joaquin Valley, which has a deadline of November 15, 2010), and both assert that local ambient ozone levels have adversely affected their health and forced them to reduce time they spend outside. *See* Marilyn McGill Aff. ¶¶ 2, 6; Gaylee Amend Aff. ¶¶ 2, 6-8; *see also 42 U.S.C. § 7511(a)(1); Approval and Promulgation of Implementation Plans; Texas; Houston/Galveston Nonattainment Area; Ozone, 66 Fed. Reg. 57,160 (Nov. 14, 2001)* (codified at 40 C.F.R. pt. 52) (approving plan for Houston, a severe nonattainment area, to achieve attainment by 2007); Clean Air Act Reclassification; San Joaquin Valley Nonattainment Area, 69 Fed. Reg. 20,550 (Apr. 16, 2004) (codified at 40 C.F.R. pt. 81) (reclassifying the San Joaquin Valley as an extreme nonattainment area and therefore pushing the attainment deadline to 2010 from 2005). According to [***17] NRDC, the Guidance exacerbates these injuries by delaying or suspending future air quality improvements. Any such effect, EPA counters, is purely hypothetical because it may never approve an alternative.

In our view, the Guidance injures NRDC's members in three independent ways. First, the Guidance caused several nonattainment areas, including Houston and the San Joaquin Valley, to abandon plans to submit section-185-compliant implementation plans, thus delaying, at the very least, implementation of section 185, which in turn delays the reduction of ambient ozone and harms NRDC members. *See* Elena Craft Aff. ¶¶ 7-9; Sarah Jackson Aff. ¶¶ 6-12. Second, even in the San Joaquin Valley, where the attainment deadline

had not yet passed at the time NRDC filed this petition, the Guidance had a present, concrete effect because it eliminated section 185's powerful incentive for major stationary sources to reduce emissions before the deadline. *See S. Coast*, 472 F.3d at 903 (explaining that even where a nonattainment deadline has yet to pass, section 185 is currently applicable because it incentivizes emission reductions before fees are implemented). Third, because the Guidance replaces a brightline [***18] section 185 requirement with a flexible standard, it is likely to result in lengthier rulemaking processes. And because an order vacating the Guidance would require Houston and the San Joaquin Valley to submit section-185-compliant state implementation plans (or, if they failed to do so, because EPA itself would be obligated to implement section 185, *see 42 U.S.C. § 7511d(d)*), these injuries are all redressable. *See* Recording of Oral Arg. at 31:05-09 (counsel for EPA clarifying that were we to vacate the Guidance, nonattainment regions would remain obligated to submit SIPs under existing deadlines and would not receive extensions related to future rulemakings); *Lujan*, 504 U.S. at 562 (explaining that where "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation [of a third party]" the critical question is how the third party would respond to an order declaring the government's action illegal).

EPA nonetheless insists that the Guidance causes no injury because any approved alternative program will, by definition, be "not less stringent" than section 185 fees. Of course, this argument carries absolutely no weight with respect to the attainment alternative [***19] for which the Guidance [*319] [**405] requires no equivalency analysis. The argument is also unpersuasive with respect to the program alternative. To begin with, it is possible that a plan EPA might legitimately find equivalent to a section 185 penalty (and which we would thus uphold on the merits) could nonetheless be so meaningfully different as to cause cognizable Article III injury. In any event, even assuming that a resulting program were perfectly equivalent, the

delay in improving air quality would still injure NRDC members. EPA's argument also proves far too much. Were EPA to prevail, although NRDC might well have standing to bring an as-applied challenge to any particular "not less stringent" determination, no one would have standing to challenge EPA's authority to allow alternatives in the first place. Especially given that Congress enacted Subpart 2 for the very purpose of curtailing EPA discretion, *see Am. Trucking*, 531 U.S. at 484-86, it would be ironic indeed if the application of standing doctrine allowed EPA to effectively maintain that very discretion. Neither precedent nor logic requires us to adopt such a counterintuitive approach to standing.

The next two jurisdictional issues—finality [***20] and ripeness—turn on the same question: whether the Guidance announces a binding change in the law. *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (explaining that *HN6* to be final, the action must (1) "mark the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow" (internal quotation marks omitted)); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (identifying finality as a necessary feature of fitness for review). It did. Prior to issuing the Guidance, neither the statute nor EPA regulations nor case law authorized EPA regional directors to approve implementation plans containing alternatives to section 185 fees. Conceding as much with respect to regulations and case law, EPA argues that section 172(e) expressly authorizes alternatives in this specific context. We disagree. Although section 172(e) does allow EPA to sanction alternatives where it *relaxed* the NAAQS, nothing in the statute expressly addresses situations where, as here, EPA *strengthened* the NAAQS. Accordingly, while section 172(e) expressly [***21] contemplates alternatives, its application in this context requires interpretation—a point EPA acknowledges elsewhere when it asserts that "there is a gap in the statute that the

EPA must fill." Resp't's Br. 34. This is all the more so with respect to the attainment alternative: because section 172(e) protects against backsliding from an *old* standard, nothing in it hints that a state could escape from its strictures by satisfying a *new* standard.

EPA insists that the Guidance changed nothing because prior to its issuance, a regional director could have considered an alternative. Perhaps so, but that director also retained discretion, now withdrawn by the Guidance, to reject the alternative solely for failing to comply with section 185. Indeed, this is essentially what happened when the San Joaquin Valley Unified Air Pollution Control District submitted a section 185 plan that exempted certain major stationary sources. After notice and comment, EPA rejected the plan for failure to comply with section 185, explaining that because San Joaquin never characterized the plan as an alternative, EPA had no need to "take a final position regarding whether it could approve a substitute program [***22] for the program specified under [Clean Air Act] section 185." Revisions to the California State Implementation Plan, San Joaquin Valley United Air Pollution Control District, 75 Fed. Reg. 1716, 1717-18 (Jan. 13, 2010). In other words, had San Joaquin asked EPA to treat its proposal as an alternative, the regional director might have performed an equivalency analysis or determined that alternatives were categorically unacceptable. Post-Guidance, however, the director may no longer reject a plan on the latter ground. The permissibility of alternatives is now a closed question, and the Guidance leaves to future rulemakings only the issue of whether a specific proposed alternative satisfies the program or attainment option.

The Guidance's language supports the conclusion that EPA has definitively interpreted section 172(e) as permitting alternatives. The Guidance explains that "EPA is electing to consider alternative programs to satisfy the section 185 fee program [implementation plan] revision requirement," and

the document announces that "[i]f [EPA's] preliminary assessment indicates that the alternative program is not less stringent, we would issue a notice in the Federal Register proposing [***23] to make such a determination." *Fee Program Guidance* at 3. By contrast, with regard to approvability of individual plans, the document expressly reserves discretion for future administrative action: "The remainder of this memorandum describes the circumstances under which we believe we can approve an alternative program that is 'no less stringent.' These interpretations will only be finalized through . . . notice-and-comment rulemaking to address the fee program obligations associated with each applicable nonattainment area." *Id.*

In sum, then, the Guidance altered the legal regime by resolving the question posed by the Clean Air Act Advisory Committee: "Is it legally permissible under either section 185 or 172(e) for a State to exercise the discretion identified in [the options listed in this letter]?" *Task Force Letter*. Answering that question affirmatively, the Guidance binds EPA regional directors and thus qualifies as final agency action. Bennett, 520 U.S. at 177-78; see also Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020-23, 341 U.S. App. D.C. 46 (D.C. Cir. 2000) (explaining that HN7 for the purposes of finality, it is irrelevant how the interpretation will apply to any individual state's SIP-approval [***24] process). Moreover, because the Guidance is final, and because the issue raised by NRDC is purely legal, the question before us is fit for judicial review. See Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 215, 377 U.S. App. D.C. 234 (D.C. Cir. 2007) (HN8 "[A] purely legal claim in the context of a facial challenge is presumptively reviewable." (internal quotations marks and ellipses omitted)); see also Abbott Labs., 387 U.S. at 149 (describing the fitness requirement). And because HN9 "Congress has emphatically declared a preference for immediate review" with respect to Clean Air Act rulemaking, we have no need to consider the ripeness test's second element, namely, the hardship to the parties of withholding review.

Cement Kiln Recycling Coal., 493 F.3d at 215; see also *Natural Res. Def. Council v. EPA*, 22 F.3d 1125, 1133, 306 U.S. App. D.C. 43 (D.C. Cir. 1994) (finding such congressional intent in the sixty day time limit in the Clean Air Act judicial review provision—the same provision governing review in this case—and concluding, therefore, that the court need not consider hardship).

III.

Given that the Guidance document changed the law, the first merits question—whether the Guidance is a legislative rule that required notice and [***25] comment—is easy. See *HNI10* 5 U.S.C. § 553 (requiring that [***321] [***407] legislative rules, but not policy statements or interpretive rules, be issued only after notice and comment). To begin with, because the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy; it is a rule. *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94, 326 U.S. App. D.C. 422 (D.C. Cir. 1997) ("*HNI11* [P]olicy statements are binding on neither the public nor the agency." (internal citation omitted)); see also *Cement Kiln Recycling Coal.*, 493 F.3d at 226 & n.14 (finding that the inquiries into whether the agency action was final and whether the agency action was a rule were essentially the same). Moreover, contrary to EPA's alternative argument, this rule is not interpretive; it is legislative. As we explained above, nothing in the statute, prior regulations, or case law authorizes EPA to accept alternatives to section 185. Likewise, nothing prior to the Guidance entitled a state to have EPA evaluate a proposed alternative for equivalency rather than reject it outright. Accordingly, the Guidance qualifies as a legislative rule that EPA had no authority to issue without notice and comment. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112, 302 U.S. App. D.C. 38 (D.C. Cir. 1993) [***26] (stating that *HNI12* where "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties," the

rule is legislative).

Having concluded that EPA issued the Guidance in violation of the Administrative Procedure Act's notice and comment requirement, we could simply vacate and end this opinion. NRDC, however, urges us to resolve its substantive claims, arguing that "a ruling on these questions is in the interest of judicial and administrative economies." Pet'r's Br. 26. Our case law provides little direction on whether, having determined to vacate on procedural grounds, we should nonetheless address substantive claims. Compare *Sprint Corp. v. FCC*, 315 F.3d 369, 377, 354 U.S. App. D.C. 288 (D.C. Cir. 2003) (remanding without reaching substantive claims), and *Syncor Int'l Corp.*, 127 F.3d at 96 (same), with *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 4-6, 8, 335 U.S. App. D.C. 85 (D.C. Cir. 1999) (reaching statutory claims but declining to evaluate arbitrary and capricious challenges), *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206, 377 U.S. App. D.C. 356 (D.C. Cir. 2007) (vacating a portion of a rule both because [***27] agency failed to provide an opportunity for comment and because agency failed to provide adequate explanation), and *Ala. Power Co. v. FERC*, 160 F.3d 7, 11, 333 U.S. App. D.C. 77 (D.C. Cir. 1998) (finding it appropriate to proceed to petitioner's argument that agency lacked authority to take challenged action after having found that agency failed to follow required procedure in taking that action).

In deciding how to proceed here, we keep in mind two competing interests. On the one hand, we must avoid prejudging the notice and comment process, the very purpose of which is to give interested parties the opportunity to participate in rulemaking and to ensure that the agency has before it all relevant information. *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1140-41, 313 U.S. App. D.C. 51 (D.C. Cir. 1995). On the other hand, were we to vacate the Guidance without passing on the validity of the two alternatives, we could exacerbate the very delay that is injuring NRDC's members.

Evaluating the program alternative in light of these considerations, we believe that the interest in preserving the integrity of the notice and comment process strongly outweighs any concern about delay. Because neither the statute nor our case law obviously precludes [***28] that alternative, we believe that by weighing in now we would unfairly prejudice any future notice and comment process.

[*322] [**408] The attainment alternative presents a very different situation. Because it violates the statute's plain language and our precedent, nothing would be gained by postponing a decision on the merits. Indeed, doing so would exacerbate the delay that is harming NRDC.

We begin with the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (**HNI3**) "First, always, is the question whether Congress has directly spoken to the precise question at issue."). *Section 172(e)*'s plain language requires that any alternative be "not less stringent than applicable controls." Recall that under the attainment alternative, an area need achieve only one or the other of the two NAAQS, meaning that an area in attainment of the 8-hour standard may treat its 8-hour implementation plan as an alternative to section 185 fees for 1-hour nonattainment. Although it is theoretically possible that controls in place to meet the 8-hour standard in a particular region could be equivalent to the section 185 penalties under the 1-hour standard, EPA does not purport to draw such [***29] a conclusion. Instead, EPA equates the purpose of retaining section 185 as an anti-backsliding measure (to achieve attainment) with the purpose of 8-hour attainment controls (to achieve attainment). But it ignores the fact that to satisfy section 172(e), the alternative must be "not less stringent" than the applicable control required to attain the superseded standard. In other words, those two attainments are of different standards.

The attainment alternative also exceeds several of the limits to EPA's gapfilling discretion that we identified in *South Coast*. See *Sierra Club v. EPA*,

479 F.3d 875, 878, 880, 375 U.S. App. D.C. 228 (D.C. Cir. 2007) (per curiam) (explaining that **HNI4** where EPA violates "the Clean Air Act's plain language as interpreted by [our precedent]" that is "'the end of the matter'" (quoting *Chevron, 467 U.S. at 842*)). First, we held that applicable controls "must be enforced under the one-hour NAAQS." *S. Coast, 472 F.3d at 903*. Expressly contradicting that directive, the attainment alternative requires enforcement of section 185 in only a subset of the 1-hour nonattainment regions—those also in nonattainment of the 8-hour standard. Second, we explained that the purpose of maintaining "applicable [***30] controls" under the 1-hour standard was not to achieve attainment of the new standard, but rather to prevent backsliding from the old standard. *Id. at 900* ("Considered as a whole, the Act reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter. Even if EPA set requirements that proved too stringent and unnecessary to protect public health, EPA was forbidden from releasing states from these burdens."). In other words, the Act creates a one-way ratchet, "plac[ing] states onto a one-way street whose only outlet is attainment" of the NAAQS—even NAAQS EPA has subsequently replaced. *Id.* Because the attainment alternative allows violations of the 1-hour standard to continue, it makes the ratchet two-way—a clear violation of the statute. Finally, we rejected EPA's argument that because it would no longer be making attainment findings under the 1-hour standard, it could refrain from enforcing section 185 on regions in severe and extreme nonattainment of that standard. Repeating this argument here, EPA tells us that because it "no longer promulgates redesignations for the 1-hour standard because that standard has been revoked . . . relief [***31] from the 1-hour fee program requirements under the terms of the statute is an impossibility, since the conditions the statute envisioned for relieving an area of its fee program obligation [*323] [**409] no longer can exist." *Fee Program Guidance* at 4. In *South Coast*, however, we explained that "**HNI5** section 172(e)

does not condition its strict distaste for backsliding on EPA's determinations of expediency; EPA must determine its procedures *after* it has identified what findings must be made under the Act." 472 F.3d at 903. The same is true here.

In concluding that EPA has once again "failed to heed the restrictions on its discretion set forth in the [Clean Air] Act," S. Coast, 472 F.3d at 886, we recognize that EPA believes "it would unfairly penalize sources in these areas to require that fees be paid after an area has attained the 8-hour standard due to permanent and enforceable emission reductions because the fees were imposed due to a failure to meet the applicable attainment deadline for the 1-hour standard, not any failure to achieve the now applicable 8-hour standard by its attainment date." *Fee Program Guidance* at 4. But as we have said before, HNI16 "[i]f the Environmental Protection Agency disagrees [***32] with the Clean Air Acts' requirements . . . , it should take its concerns to Congress. . . . In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court." Sierra Club, 479 F.3d at 884.

IV.

For the foregoing reasons, we grant the petition for review and vacate the Guidance.

So ordered.

Tab 6

NRDC v. United States EPA

United States Court of Appeals for the Ninth Circuit

February 12, 2015; March 11, 2015, Filed

No. 13-70544

Reporter

779 F.3d 1119 *; 2015 U.S. App. LEXIS 3824 **; 45 ELR 20051; 80 ERC (BNA) 1089

NATURAL RESOURCES DEFENSE COUNCIL and COMMUNITIES FOR A BETTER ENVIRONMENT, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency; JARED BLUMENFELD, Regional Administrator, Region IX, U.S. Environmental Protection Agency, Respondents, NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT, Respondents-Intervenors.

Core Terms

controls, stringent, relaxed, strengthened, pollution, Air, nonattainment, one-hour, air quality, approve, programs, anti-backsliding, sources, revision, ozone, alternatives, attainment, stationary, requirements, principles, regions, revoked, severe, alternative program, ambient air quality, implementation plan, collecting fees, amendments, promulgate, emissions

Case Summary

Overview

HOLDINGS: [1]-The EPA properly approved and incorporated into California's state implementation plan under the Clean Air Act a rule that EPA found to be not less stringent than the penalty program under *42 U.S.C.S. § 7511d*. It was reasonable to find that *42 U.S.C.S. § 7502(e)* applied equally

when the national ambient air quality standards were strengthened rather than relaxed.

Outcome

Petition for review denied.

LexisNexis® Headnotes

Business & Corporate

Compliance > ... > Environmental Law > Air Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > Nonattainment Areas

HN1 The Environmental Protection Agency (EPA) has reasonably found that § 172(e) (*42 U.S.C.S. § 7502(e)*) of the Clean Air Act (CAA) contains an ambiguous gap. EPA's interpretation of that ambiguity is reasonable — i.e., that the CAA's anti-backsliding provision, allowing for not less stringent alternative controls, applies when air quality standards have been strengthened as well as when they have been relaxed.

Business & Corporate

Compliance > ... > Environmental Law > Air Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > Nonattainment Areas

Environmental Law > Air Quality > State Implementation Plans

HN2 The Clean Air Act (CAA) requires that the Environmental Protection Agency (EPA) establish primary and secondary national ambient air quality standards (NAAQS) for pollutants, including

ozone, determining what levels of these may safely be in the air. CAA §§ 108-109, 42 U.S.C.S. §§ 7408-7409. Areas where the air quality meets or exceeds the NAAQS (i.e., where pollutant levels are low) have attained the NAAQS, and so are known as "attainment areas," while areas with pollutant levels greater than prescribed in the NAAQS are "nonattainment areas." CAA § 107, 42 U.S.C.S. § 7407. States with nonattainment areas must work to reach attainment by developing State Implementation Plans (SIPs) that plot out the path to better air; EPA in turn must ensure that each SIP complies with the CAA. CAA § 110, 42 U.S.C.S. § 7410.

Environmental Law > Air Quality > Nonattainment Areas

Environmental Law > ... > Emission Standards > Stationary Emission Sources > General Overview

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN3 When the Clean Air Act (CAA) was amended in 1990, areas designated as "severe" or "extreme" nonattainment areas under the national ambient air quality standards that were then in place became subject to penalties to provide incentives for major polluters to reduce volatile organic compound emissions. Section 185 (42 U.S.C.S. § 7511d), the CAA provision that effectuates these penalties, sets forth the general rule that each "major stationary source" located in a severe or extreme nonattainment area must pay this penalty, and also prescribes specifically how penalties must be calculated and collected. 42 U.S.C.S. § 7511d.

Environmental Law > Air Quality > State Implementation Plans

Environmental Law > Air Quality > Nonattainment Areas

Environmental Law > ... > Emission Standards > Stationary Emission Sources > General Overview

HN4 See 42 U.S.C.S. § 7511d.

Business & Corporate Compliance > ... > Environmental Law > Air Quality > National Ambient Air Quality Standards

HN5 For years, the Environmental Protection Agency (EPA) set the national ambient air quality standards (NAAQS) using a one-hour average measurement standard. Revisions to the National Ambient Air Quality Standards for Photochemical Oxidants, 44 Fed. Reg. 8,202 (Feb. 8, 1979) codified the one-hour standard. In 1997, after much review, EPA determined that it would start using a standard in which the NAAQS was set by an average over eight hours. NAAQS for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997). The previous one-hour NAAQS, translated arithmetically to the new eight-hour NAAQS, would have been 0.09 parts per million (ppm), but under the eight-hour standard going forward, the NAAQS would allow only 0.08 ppm of ozone in the air. The new standard thus both changed the measuring scheme — going from a one-hour average to eight hours — and was marginally more stringent. Originally, EPA planned to just phase out the one-hour standard, but it subsequently revoked that standard entirely.

Business & Corporate Compliance > ... > Environmental Law > Air Quality > National Ambient Air Quality Standards

HN6 The 1990 revisions of the Clean Air Act (CAA) relied on the one-hour national ambient air quality standards (NAAQS) in setting certain classifications, but the amendments did contemplate that EPA could change the NAAQS based upon its review of the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health that the pollutant may cause. In particular, § 172(e) (42 U.S.C.S. § 7502(e)) of the CAA guards against backsliding in air quality in the wake of changes to the NAAQS.

Business & Corporate Compliance > ... > Environmental Law > Air Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > Nonattainment Areas

HN7 See 42 U.S.C.S. § 7502(e).

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

HN8 Even if the national ambient air quality standards are "relaxed," which would reflect a view that more pollutants can be in the air than previously thought, states are still not allowed to loosen their air pollution controls.

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards
Environmental Law > Air Quality > Nonattainment
Areas

HN9 The anti-backsliding requirements for regions designated nonattainment under the one-hour national ambient air quality standards (NAAQS) is all that is left of that NAAQS, and those requirements must be kept in order to effectuate the Environmental Protection Agency's (EPA's) purpose of continuous improvement of air quality with no retreat. Therefore, EPA cannot define "controls" to exclude § 185 (42 U.S.C.S. § 7511d) of the Clean Air Act. CAA § 172(e)'s (42 U.S.C.S. § 7502(e)'s) anti-backsliding principle must be respected. Section 172(e) applies even though the new NAAQS are stricter, rather than relaxed as provided for in the statute's text. Thus § 172(e) applies when standards are strengthened as well as when they are relaxed.

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards
Environmental Law > Air Quality > Nonattainment
Areas

HN10 While § 172(e) (42 U.S.C.S. § 7502(e)) of the Clean Air Act does not expressly apply when the national ambient air quality standards have been

strengthened, the Environmental Protection Agency can permissibly interpret it to apply.

Environmental Law > Air Quality > State
Implementation Plans

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > Nonattainment
Areas

HN11 The South Coast Air Quality Management District (California) (SCAQMD) adopted Rule 317, "Clean Air Act Non-Attainment Fee," on February 4, 2011. Rule 317 is intended to provide alternative "not less stringent" controls to what is required in the anti-backsliding measures of § 185 (42 U.S.C.S. § 7511d) of the Clean Air Act. Under Rule 317, SCAQMD must (1) calculate the fees that would have been assessed under § 185; (2) conduct an annual equivalency demonstration to prove that Rule 317 is generating at least the same amount of funds into the equivalency account as § 185 fees would have done; (3) collect additional fees if there is any shortfall in the equivalency account. Rule 317 does not assess fees on "major stationary sources," unlike § 185. Rather, the rule collects fees from "qualified programs" that are surplus to the state implementation plan for the one-hour national ambient air quality standards and are designed to result in direct volatile organic compound or NOx reductions or future reductions. These programs are generally aimed at reducing emissions from mobile sources, which account for over 80% of the emissions polluting the South Coast's air. The fees collected by Rule 317 are also required to be used to improve air quality, a requirement that § 185 lacks.

Environmental Law > Air Quality > State
Implementation Plans

HN12 The Environmental Protection Agency has issued a final rule approving South Coast Air Quality Management District Rule 317's incorporation into California's state implementation

plan. Revisions to the California State Implementation Plan, South Coast Air Quality Management District, 77 Fed. Reg. 74,372.

Environmental Law > Air Quality > Enforcement > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

HNI3 As the Clean Air Act itself does not specify a standard of review, a court reviews any regulations promulgated in connection with it under the standard prescribed by the Administrative Procedure Act. Accordingly, the court will hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.S. § 706(2)(A). The court reviews the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubberstamp administrative decisions that are inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HNI4 A court uses the Chevron framework to review an agency's interpretation of a statute that it administers. The first of Chevron's two steps investigates whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If the 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.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HNI5 Chevron's first step is a textual inquiry in which the court must determine whether, in a given statute, Congress has directly spoken to the precise question at issue.

Business & Corporate Compliance > ... > Environmental Law > Air Quality > National Ambient Air Quality Standards
Environmental Law > Air Quality > Nonattainment Areas

HNI6 Section 172(e) (42 U.S.C.S. § 7502(e)) of the Clean Air Act (CAA) does not directly apply, either to impose CAA § 185 (42 U.S.C.S. § 7511d) fees or do anything else, because it does not provide for what happens in any context except when the national ambient air quality standards (NAAQS) has been "relaxed." In other words, Congress has not directly spoken to the issue of what happens when the NAAQS have been strengthened.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HNI7 If a statute is silent or ambiguous with respect to the specific issue, a court proceeds to Chevron's second step, and determines whether the agency's answer is based on a permissible construction of the statute.

Business & Corporate Compliance > ... > Environmental Law > Air Quality > National Ambient Air Quality Standards
Environmental Law > Air Quality > Nonattainment Areas
Environmental Law > Air Quality > State Implementation Plans

HNI8 The Environmental Protection Agency (EPA) says, as it has since 2004, that the language of § 172(e) (42 U.S.C.S. § 7502(e)) of the Clean Air Act (CAA) applies equally to the context of the

national ambient air quality standards (NAAQS) being strengthened as to the context of it being relaxed. Further, EPA has concluded, since § 172(e) allows controls which are not less stringent than the controls applicable before the NAAQS were strengthened, a "not less stringent" control can be some program other than a strict application of CAA § 185's (42 U.S.C.S. § 7511d's) fees from major stationary sources. This interpretation, and EPA's approval of South Coast Air Quality Management District (California) Rule 317 based on it, is reasonable, both textually and as a matter of policy and congressional intent.

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards
Environmental Law > Air Quality > Nonattainment
Areas
Environmental Law > Air Quality > State
Implementation Plans

HN19 There is no language in the Clean Air Act (CAA) limiting the scope of § 172(e) (42 U.S.C.S. § 7502(e)) to prevent it from applying to controls such as § 185 (42 U.S.C.S. § 7511d), or otherwise restricting its application, but Congress did so limit other subsections of § 172. CAA § 172(d), 42 U.S.C.S. § 7502(d) requires that state implementation plan revisions comply with CAA § 110; CAA § 182(a), 42 U.S.C.S. § 7511a(a), restricts application of § 172(c)(9). Since it is clear that Congress knew how to limit § 172, and limited some subsections of the statute but not § 172(e), a court can reasonably presume that Congress did not mean to limit the application of § 172(e) to provide for alternatives to § 185.

Governments > Legislation > Interpretation

HN20 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.

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards
Environmental Law > Air Quality > Nonattainment
Areas

HN21 The requirement of § 172(e) (42 U.S.C.S. § 7502(e)) of the Clean Air Act (CAA) for "not less stringent" controls to prevent backsliding applies not only when the national ambient air quality standards (NAAQS) are relaxed but also when they are strengthened. There was no ambiguity in the word "control," and it encompasses everything in the CAA designed to limit ozone levels, including § 185 (42 U.S.C.S. § 7511d). To be "applicable" within the meaning of § 172(e), a control need not be currently enforced. Because § 185 is designed to constrain pollution, it is an applicable "control." Pursuant to § 172(e), when the standard is relaxed, or strengthened, the Environmental Protection Agency is required to promulgate controls "not less stringent" than the penalty provisions of § 185.

Environmental Law > Air Quality > State
Implementation Plans

HN22 Every program that the Environmental Protection Agency (EPA) approves must be tied to § 185 (42 U.S.C.S. § 7511d) of the Clean Air Act (CAA) and other relevant Subpart 2 controls by being "not less stringent than" them. This means EPA must assess each proposed alternative program for its stringency and compare — whether on the basis of fees or some other metric — the alternative program's claimed outcomes to the outcomes projected for Subpart 2 controls. EPA's interpretation of CAA § 172(e) (42 U.S.C.S. § 7502(e)) to give it authority to make this assessment and approve proper "not less stringent" alternatives is therefore reasonable.

Environmental Law > Air Quality > State
Implementation Plans

HN23 The Environmental Protection Agency (EPA) has the authority to approve alternatives to Clean Air Act (CAA) § 185 (42 U.S.C.S. § 7511d)

fee programs that are "not less stringent." Noting that the rulemaking record shows that South Coast Air Quality Management District (California) (SCAQMD) constructed Rule 317 to collect an equivalent amount of fees to what it would collect with § 185 program, so that Rule 317 is "not less stringent than" a § 185 fee program, EPA's approval of Rule 317 into California's state implementation plan was a proper exercise of its authority under CAA § 172(e) (*42 U.S.C.S. § 7502(e)*) to approve such alternative, not less stringent, programs.

Summary:

[**1] SUMMARY**

Environmental Law

The panel denied a petition for review of an order of the United States Environmental Protection Agency approving the South Coast Air Quality Management District's Rule 317 as a revision to California's State Implementation Plan for the Clean Air Act.

The EPA approved the rule pursuant to § 172(e) of the Clean Air Act after finding that the pollution controls it imposed were "not less stringent than" § 185 of the Clean Air Act, which requires that major stationary sources of pollution in severely polluted areas pay fees for their emissions.

Applying *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), deference, the panel held that the EPA reasonably found that § 172(e) contained an ambiguous gap. The panel also held that the EPA's interpretation of that ambiguity was reasonable — i.e., that the Clean Air Act's anti-backsliding provisions, allowing for not less stringent alternative controls, applied when air quality standards have been strengthened as well as when they have been relaxed.

Counsel: Paul Cort (argued) and Adriano Martinez, Earthjustice, San Francisco, California, for Petitioners.

Heather Gange (argued) and [**2] Sam Hirsch, Acting Assistant Attorney General, United States Environmental Protection Agency, Environmental Defense Section, Environment & Natural Resources Division; Kara Christenson and David Coursen, United States Equal Protection Agency, Office of General Counsel, Washington, D.C., for Respondents.

Kurt Weise, General Counsel, Barbara Baird (argued), Chief Deputy Counsel, William Wong, Principal Deputy Counsel, and Megan Lorenz Angarita, Senior Deputy Counsel, South Coast Air Quality Management District, Diamond Bar, California, for Respondent-Intervenor South Coast Air Quality Management District.

Annette Ballatore-Williamson (argued), District Counsel, and Jessica Hafer Fierro, Assistant District Counsel, San Joaquin Valley Unified Air Pollution Control District, Fresno, California, for Respondent-Intervenor San Joaquin Valley Unified Air Pollution Control District.

Leslie Sue Ritts, Ritts Law Group, PLLC, Alexandria, Virginia, for Respondent-Intervenor National Environmental Development Association's Clean Air Project.

Curtis L. Coleman, Law Offices of Curtis L. Coleman, Los Angeles, California, for Amicus Curiae Southern California Alliance of Publicly Owned Treatment Works.

Robert [**3] Wyman, Jr. and John Heintz, Latham & Watkins LLP, Los Angeles, California, for Amici Curiae Los Angeles Chamber of Commerce, Los Angeles County Business Federation, California Council for Environmental and Economic Balance, the California Small Business Alliance, and Regulatory Flexibility Group.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Judges: Before: Mary M. Schroeder, Senior Circuit

Judge, Barry G. Silverman, Circuit Judge, and Marvin J. Garbis, Senior District Judge.* Opinion by Judge Silverman.

Opinion by: Barry G. Silverman

Opinion

[*1120] On Petition for Review of an Order of the Environmental Protection Agency

SILVERMAN, Circuit Judge:

Petitioners Natural Resources Defense Council and Communities for a Better Environment petition for review of the United States Environmental Protection Agency's approval of the South Coast Air Quality Management District's Rule 317 as a revision to California's State Implementation Plan for the Clean Air Act. EPA approved the rule pursuant to § 172(e) of the CAA after finding that the pollution controls it imposes are "not less stringent than" § 185 of the CAA, which requires that major stationary sources of pollution in [*1121] severely polluted [**4] areas pay fees for their emissions.

Everyone agrees that § 172(e) of the CAA (the so-called "anti-backsliding" provision) allows EPA to approve alternate pollution controls that are "not less stringent than the controls" already in effect when a national primary ambient air quality standard is *relaxed*. But what is EPA's authority when the standard is *tightened*? May EPA approve "not less stringent" standards then, too? Section 172(e) doesn't say one way or the other.

Petitioners do not argue that Rule 317 is weaker than the controls that existed before. (The controls in Rule 317 are, in fact, *more* stringent.) Rather, petitioners' argument is statutory, not factual. They argue that EPA lacked the statutory authority to approve *any* alternative rule (even one imposing more stringent controls) because, they assert, §

172(e) unambiguously applies only when air quality standards are relaxed, not when they are tightened.

Applying the deference called for by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), we hold today that *HN1* EPA reasonably found that § 172(e) contains an ambiguous gap. We also hold that EPA's interpretation of that ambiguity was reasonable — i.e., that the CAA's anti-backsliding provision, allowing for not less stringent alternative controls, applies when air quality standards have been [**5] strengthened as well as when they have been relaxed. We deny the petition for review.

I. Background

A. Clean Air Act Background

HN2 The Clean Air Act requires that EPA establish primary and secondary national ambient air quality standards ("NAAQS") for pollutants, including ozone, determining what levels of these may safely be in the air. CAA §§ 108—109, *42 U.S.C. §§ 7408—7409*. Areas where the air quality meets or exceeds the NAAQS (i.e., where pollutant levels are low) have attained the NAAQS, and so are known as "attainment areas," while areas with pollutant levels greater than prescribed in the NAAQS are "nonattainment areas." CAA § 107, *42 U.S.C. § 7407*. States with nonattainment areas must work to reach attainment by developing State Implementation Plans ("SIPs") that plot out the path to better air; EPA in turn must ensure that each SIP complies with the CAA. CAA § 110, *42 U.S.C. § 7410*.

HN3 When the CAA was amended in 1990, areas designated as "severe" or "extreme" nonattainment areas under the NAAQS that was then in place became subject to "penalties to provide incentives for major polluters to reduce VOC [volatile organic compound] emissions." *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 888, 374 U.S. App.

* The Honorable Marvin J. Garbis, Senior District Judge for the U.S. District Court for the District of Maryland, sitting by designation.

D.C. 121 (D.C. Cir. 2006) ("*South Coast*"). Section 185, the CAA provision that effectuates these penalties, sets forth the general rule that each "major stationary source" located [**6] in a severe or extreme nonattainment area must pay this penalty, and also prescribes specifically how penalties must be calculated and collected. 42 U.S.C. § 7511d.¹

HN5 [*1122] For years, EPA set the NAAQS using a one-hour average measurement standard. See Revisions to the National Ambient Air Quality Standards for Photochemical Oxidants, 44 Fed. Reg. 8,202 (Feb. 8, 1979) (codifying one-hour standard). In 1997, after much review, EPA determined that it would start using a standard in which the NAAQS was set by an average over eight hours. NAAQS for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) [**7]. The previous one-hour NAAQS, translated arithmetically to the new eight-hour NAAQS, would have been 0.09 parts per million (ppm), but under the eight-hour standard going forward, the NAAQS would allow only 0.08 ppm of ozone in the air. "The new standard thus both changed the measuring scheme" — going from a one-hour average to eight hours — "and was marginally more stringent." South Coast, 472 F.3d at 888. Originally, EPA planned to just phase out the one-hour standard, but it subsequently revoked that standard entirely.

¹ 42 U.S.C. § 7511d reads in full:

(a) General rule

HN4 Each implementation plan revision required under section 7511a(d) and (e) of this title (relating to the attainment plan for Severe and Extreme ozone nonattainment areas) shall provide that, if the area to which such plan revision applies has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date, each major stationary source of VOCs located in the area shall, except as otherwise provided under subsection (c) of this section, pay a fee to the State as a penalty for such failure, computed in accordance with subsection (b) of this section, for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone. Each such plan revision should include procedures for assessment and collection of such fees.

HN6 The 1990 revisions of the CAA relied on the one-hour NAAQS in setting certain classifications, but the amendments did "contemplate[] that EPA could change the NAAQS based upon its review of 'the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health' that the pollutant may cause." *Id.*, quoting CAA §§ 108(a), 109(d), 42 U.S.C. §§ 7408(a), 7409(d). In particular, § 172(e) of the CAA guards against backsliding in air quality in the wake of changes to the NAAQS. Section 172(e) provides:

(e) Future modification of standard

HN7 If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable [**8] to all areas which have not attained that standard as of the date of such relaxation. *Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.*

CAA § 172(e), 42 U.S.C. § 7502(e) (emphasis added). Thus, **HN8** even if the NAAQS is "relaxed," which would reflect a view that more pollutants can be in the air than previously thought, states are still not allowed to loosen their air pollution controls.

B. Previous Decisions Addressing the Impact of the Revised NAAQS

Soon after EPA announced that it would adopt the more stringent eight-hour NAAQS, various parties challenged EPA's plan for implementing it. First, in *Whitman v. American Trucking Assn's*, the Supreme Court ruled that EPA could not implement the eight-hour standard under the pre-1990 sections of the CAA alone, because to do so amounted to a rejection of the amendments' detailed scheme and limitations on EPA's and states' discretion in administering the CAA. 531 U.S. 457, 121 S. Ct.

903, 149 L. Ed. 2d 1 (2001). In light of this conclusion, EPA promulgated a new rule that fully revoked the one-hour NAAQS, created a classification table for air quality regions based on the new settings, and made only regions that were classified [**9] as "nonattainment" under *both* the old and new NAAQS subject to the 1990 amendments' strictures. See Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard — Phase 1, 69 Fed. Reg. 23,951 (Apr. 30, 2004) (codified at 40 C.F.R. parts 50, 51, 81) ("2004 Rule"). EPA also interpreted § 172(e)'s anti-backsliding rule to apply, even though the NAAQS was strengthened instead of relaxed, so that any areas that were classified as "severe" or "extreme" [**1123] nonattainment areas under the one-hour NAAQS, would remain subject to certain controls, even though the NAAQS mandating those controls (the one-hour standard) was revoked. Id. at 23,972. However, EPA interpreted "controls" to exclude many of the controls mandated by the 1990 amendments, including § 185's fee for major stationary sources. Id. at 23,984.

This approach, too, was challenged, resulting in the *South Coast* case. In that case, as relevant here, the D.C. Circuit upheld the revocation of the one-hour NAAQS as long as adequate anti-backsliding controls relating to the old standard were kept, but ruled that EPA's definition of "controls" to exclude § 185 was an abuse of discretion. South Coast, 472 F.3d at 899—900. The D.C. Circuit explained that HN9 the anti-backsliding requirements for regions designated nonattainment under the one-hour NAAQS was [**10] all that was left of that NAAQS, and those requirements must be kept in order to effectuate the EPA's purpose of continuous improvement of air quality with no retreat. See id. at 900. Therefore, EPA could not define "controls" to exclude § 185. Id. at 902—903. But in agreeing that § 172(e)'s anti-backsliding principle must be respected, the D.C. Circuit agreed with EPA that § 172(e) applied as EPA had determined, even though the new NAAQS was stricter, rather than relaxed as provided for in the statute's text. Id. at 900. Thus § 172(e) applied when standards were

strengthened as well as when they were relaxed.

After this approval of its application of § 172(e) in the context of a stronger NAAQS, EPA issued a guidance document providing an overview of controls that could be implemented in lieu of § 185 if they were "not less stringent," as required by § 172(e). The D.C. Circuit vacated the guidance document on the basis that it should have been issued via notice and comment procedures. Natural Res. Def. Council v. EPA, 643 F.3d 311, 321, 395 U.S. App. D.C. 397 (D.C. Cir. 2011) ("NRDC I"). The court also disagreed with EPA's view "that § 172(e) expressly authorizes alternatives in this specific context," since the statute does not provide for the context of the NAAQS being strengthened, and while noting that "neither the statute nor our case law obviously precludes" [**11] EPA from approving alternatives to § 185, the court rejected one proposed alternative as being "a clear violation" of the CAA. Id. at 319, 321—22. But the court reaffirmed *South Coast's* holding that HN10 while § 172(e) does not *expressly* apply when the NAAQS has been strengthened, EPA could permissibly interpret it to apply here. Id. at 319. The D.C. Circuit declined to rule on whether alternatives to § 185 might be acceptable if EPA found them to be "not less stringent," leaving that determination instead for a court that was presented with a specific alternative approved by EPA. The rule challenged here — EPA's approval of Rule 317 into California's SIP — is such an alternative, which EPA has approved as being "not less stringent than" § 185.

C. The South Coast Region and Rule 317

1. Background of Rule 317

The South Coast Air Quality Management District ("SCAQMD") has responsibility for air quality in the parts of California's Los Angeles, Orange, Riverside, and San Bernardino Counties that lie within the South Coast Air Basin. Cal. Health & Safety Code § 40410; Cal. Admin. Code § 60104 (describing the ambit of the South Coast Air

Basin). According to rankings by the American Lung Association, this region is "the most ozone-polluted area in the country." State of the Air 2014, at 15 (2014).² As a result, [**12] parts of SCAQMD have been designated "severe" or "extreme" [*1124] nonattainment areas ever since the 1990 CAA amendments first categorized air quality regions. See *Designation of Areas for Air Quality Planning Purposes*, 56 Fed. Reg. 56,694, 56,722 (Nov. 6, 1991).

HNI1 SCAQMD adopted Rule 317, "Clean Air Act Non-Attainment Fee," on February 4, 2011. Rule 317 is intended to provide alternative "not less stringent" controls to what is required in § 185's anti-backsliding measures, as discussed above. Under Rule 317, SCAQMD must (1) calculate the fees that would have been assessed under § 185; (2) conduct an annual equivalency demonstration to prove that Rule 317 is generating at least the same amount of funds into the equivalency account as § 185 fees would have done; (3) collect additional fees if there is any shortfall in the equivalency account. Rule 317 does not assess fees on "major stationary sources," unlike § 185. Rather, the rule collects fees from "qualified programs" that are "surplus to the [SIP for the one-hour NAAQS]" and are "designed to result in direct VOC or NO_x reductions" or future reductions. These programs are generally aimed at reducing emissions from mobile sources, which account for over 80% of the emissions polluting the South Coast's air. SCAQMD Final Staff Report, Proposed Amended Rule 317 - Clean Air Act Non-Attainment Fees, at 1. The fees collected by Rule 317 are also required to [**13] be used to improve air quality, a requirement that § 185 lacks, and that is among the reasons Respondents say Rule 317 will be even more effective in achieving the Clean Air Act's aim of reducing pollution than would be a regular § 185 program of fees on major stationary sources.

2. EPA's Approval of Rule 317

² Available at <http://www.stateoftheair.org/2014/assets/ALA-SOTA-2014-Full.pdf>

EPA published a proposal to approve the rule as part of California's SIP on January 12, 2012. *Revisions to the California State Implementation Plan, South Coast Air Quality Management District*, 77 Fed. Reg. 1895. After notice and comment, on December 14, 2012, **HNI2** EPA issued a final rule approving Rule 317's incorporation into *California's SIP. Revisions to the California State Implementation Plan, South Coast Air Quality Management District*, 77 Fed. Reg. 74,372.

In the final rule, EPA responded to several comments from Earthjustice, the law firm representing Petitioners. In particular, Earthjustice objected "that nothing in the plain language of the [CAA], the 'principles' behind that language, or [South Coast] gives EPA the power to rewrite the terms of section 185" or approve any alternatives to that control, and that § 172(e) is inapplicable because EPA had strengthened, not relaxed, the NAAQS. *Id.* at 74,375. EPA explained in response that § 185 was no longer directly applicable, since the one-hour NAAQS had been revoked, but that EPA was implementing § 185 and other controls via application of the principles of § 172(e) in order to prevent backsliding, even though § 172(e) did not directly apply to the context of a strengthened, [**14] rather than relaxed, NAAQS. EPA's final rule clearly articulated its reasoning:

EPA's 8-hour ozone standard is recognized as a strengthening of the NAAQS, rather than a relaxation; however, EPA is applying the "principles" of section 172(e) to prevent backsliding of air quality in the transition from regulation of ozone pollution using a 1-hour metric to an 8-hour metric. Our application of the principles of section 172(e) in this context was upheld by the D.C. Circuit in the *South Coast* decision: "EPA retains the authority to revoke the one-hour standard so long as adequate anti-backsliding provisions are introduced." *South Coast*, 472 F.3d at 899. Further, the court stated, that in light of the revocation, "[t]he only remaining requirements

as to the one-hour NAAQS are the anti-backsliding limitations." *Id.*

[*1125] . . . [S]ection 172(e) requires State Implementation Plans to contain "controls" that are "not less stringent" than the controls that applied to the area before the NAAQS revision. EPA's 2004 Rule defined the term "controls" in section 172(e) to exclude section 185. *See* 2004 Rule. The D.C. Circuit ruled that EPA's exclusion of section 185 from the list of "controls" for Severe and Extreme non-attainment areas was improper [but did not] address the specific issue of whether the principles [*115] of section 172(e) required section 185 itself or any other controls not less stringent, and section 172(e) clearly on its face allows such equivalent programs. Further, the court in [*NRDC I*] specifically noted with respect to equivalent alternative programs that, "neither the statute nor our case law obviously precludes [the equivalent program alternative.]" *643 F.3d at 321*. In this rulemaking approving SCAQMD Rule 317, EPA is fully recognizing section 185 as a "control" that must be implemented through the application of the principles of section 172(e). As explained above, the D.C. Circuit stated that EPA must apply the principles of section 172(e) to non-attainment requirements such as section 185. Thus, we are following the D.C. Circuit's holding that the principles of section 172(e) apply in full to implement [section] 185 obligations.

77 Fed. Reg. at 74,375.

With respect to Rule 317 specifically, EPA acknowledged that the rule does not collect fees from major stationary sources as § 185 would, but concluded that SCAQMD was reasonable to focus on mobile source emissions, and that Rule 317's "fee equivalency account" would ensure that the fees collected by Rule 317 would be "at least equal to the amount collected under section 185," which EPA believed to be a reasonable measurement of

equivalent stringency. *Id. at 74,376*. EPA also stated that "SCAQMD has demonstrated that Rule 317 will result in [**16] a federally enforceable requirement to obtain funding for and make expenditures on air pollution reduction projects in amounts at least equal to the amounts that would otherwise be collected under section 185." *Id.* Finally, EPA noted that since fees collected by Rule 317 are required to be used for pollution reduction programs, unlike fees collected by § 185, "it is reasonable to expect that in one respect SCAQMD's alternative program will achieve more emission reductions than direct implementation of section 185." *Id.*

Petitioners filed a petition for review of EPA's approval of Rule 317 in this court on February 12, 2013, and we have jurisdiction under CAA § 307(b)(1).³

II. Discussion

A. Standard of Review

HNI3 As the CAA itself does not specify a standard of review, this court reviews any regulations promulgated in connection with it under the standard prescribed by the Administrative Procedure Act. *Sierra Club v. EPA*, *671 F.3d 955, 961 (9th Cir. [**1126] 2012)*. Accordingly, we will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*. "[We] review the record to ensure that agency

³Intervenor National Environmental Development Association's Clean Air Act Project contends that Petitioners lack standing to bring this claim because they cannot make the requisite showing of causality between EPA's action and their alleged injury, since Petitioners do not argue that Rule 317 is "less stringent" and therefore bad for their members' health. However, even though Petitioners do not specifically challenge Rule 317, the declarations they submitted in support of standing demonstrate that their members may be harmed if EPA lacked authority to approve alternatives to § 185 fee programs. [*117] Because that question of authority is the central issue in this case, we conclude that Petitioners have standing to challenge EPA's authority to approve Rule 317.

decisions are founded on a reasoned evaluation of the relevant factors, and may not rubberstamp . . . administrative decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute" *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009) (quoting *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003)).

Further, **HN14** we use the *Chevron* framework to review an agency's interpretation of a statute that it administers. The first of *Chevron's* two steps investigates "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as [**18] well as the agency, must give effect to the unambiguously expressed intent of Congress." *467 U.S. at 842-43*. "[I]f the 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." *Id. at 843*.

B. *Chevron* Step One

HN15 *Chevron's* first step is a textual inquiry in which the court must determine whether, in a given statute, "Congress has directly spoken to the precise question at issue." *Chevron*, *467 U.S. at 842-43*. In this case, the question is whether Congress clearly indicated in the text of the CAA whether, if the NAAQS is strengthened rather than relaxed, EPA may approve alternative programs that are "not less stringent than" § 185 fee programs.

Petitioners argue that under step one of *Chevron*, § 172(e)'s language requiring EPA to promulgate alternative "not less stringent" programs clearly only applies when a NAAQS is relaxed, not strengthened, so with this textual clarity the court should end its analysis there and grant the petition. Petitioners make this argument notwithstanding the D.C. Circuit's *South Coast* decision upholding EPA's extension of the § 172(e) requirement of anti-backsliding *controls* (i.e., § 185 fee programs) to apply when the [**19] NAAQS has been

strengthened: in Petitioners' view, the permissibility of extending anti-backsliding controls when the NAAQS has been strengthened does not mean that § 172(e)'s provision for EPA approving *other* controls that "are not less stringent than" § 185, should also be extended in the same context.

We disagree.**HN16** Section 172(e) does not directly apply, either to impose § 185 fees or do anything else, because it does not provide for what happens in any context except when the NAAQS has been "relaxe[d]." In other words, Congress has not "directly spoken to the precise question at issue," which is what happens when the NAAQS has been strengthened. And as EPA points out, this *Chevron* step one question was effectively answered in the 2004 rule revoking the one-hour NAAQS, where EPA explained its view that Congress had not spoken to what happens to the CAA's anti-backsliding rules if the NAAQS is strengthened, but reasoned that "if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent." *69 Fed. Reg. 23,951, 23,972*. As related in and approved by the *South Coast* decision, EPA previously interpreted part of the gap left [**20] by Congress to say which Subpart 2 "controls" are applicable to nonattainment [**1127] areas when the NAAQS has been strengthened. At issue now is the remainder of the gap, addressing EPA's authority to promulgate controls that may be different, but that are "not less stringent than" § 185 fee programs and other Subpart 2 controls.

C. *Chevron* Step Two

HN17 Since "the statute is silent or ambiguous with respect to the specific issue," we proceed to *Chevron's* second step, and determine "whether the agency's answer is based on a permissible construction of the statute." *467 U.S. at 843*. **HN18** EPA's answer in this case was to say, as it has since 2004, that § 172(e)'s language applies equally to the context of the NAAQS being strengthened as to the

context of it being relaxed. Further, EPA concluded, since § 172(e) allows "controls which are not less stringent than the controls" applicable before the NAAQS was strengthened, a "not less stringent" control could be some program other than a strict application of § 185's fees from major stationary sources. We find this interpretation, and EPA's approval of Rule 317 based on it, to be reasonable, both textually and as a matter of policy and Congressional intent.

Textually, EPA's interpretation is reasonable because [**21] it is in keeping with the interpretation it previously gave to another part of the same sentence in the same statute. That is, in the 2004 Rule revoking the one-hour NAAQS, EPA concluded that the "controls" mentioned in § 172(e) will apply even though the NAAQS was strengthened rather than relaxed; now, EPA is giving the second part of the same clause in § 172(e) — "not less stringent than" — the same treatment. This makes intuitive linguistic sense: if one part of a sentence in a statute is being applied by analogy to a new context that was not provided for, it is difficult to see why another part of the same sentence should not also be applied by analogy, especially when it has the same effect: to impose controls requiring a certain level of stringency, even after conditions are changed.

This textual conclusion is also supported by the fact that, as EPA points out, HN19 there is no language in the CAA limiting the scope of § 172(e) to prevent it from applying to controls such as § 185, or otherwise restricting its application, but Congress did so limit other subsections of § 172. See, e.g., CAA § 172(d), 42 U.S.C. § 7502(d) (requiring that SIP revisions comply with CAA § 110); CAA § 182(a), 42 U.S.C. § 7511a(a) (restricting application of § 172(c)(9)). Since it is clear that Congress knew how to limit [**22] § 172, and limited some subsections of the statute but not § 172(e), we can reasonably presume that Congress did not mean to limit the application of § 172(e) to provide for alternatives to § 185. See United Transp. Union v. BNSF Ry. Co., 710 F.3d

915, 928 (9th Cir. 2013) (HN20 "[W]here 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))).

With respect to Congressional policy and intent, as EPA, intervenors, and amici stress, this interpretation is reasonable because it promotes air quality, in keeping with the purpose of the CAA. EPA's interpretation allows EPA and states, in the wake of new scientific results leading to a new NAAQS, to take into account such changes in scientific knowledge and better tailor their SIPs. That way, in keeping with the cooperative federalist nature of the CAA, nonattainment areas with different air quality problems can address those problems with different solutions that may [**1128] be more appropriate to their particular geographies, as long as those solutions are "not less stringent than" a § 185 fee program or other Subpart 2 controls. In the SCAQMD region, for example, major stationary [**23] sources are already strictly regulated and contribute a relatively small amount to ozone pollution, with other sources, such as cars and trucks, contributing much more. The SCAQMD staff determined that Rule 317, by collecting fees from other sources and then directing all assessed fees at reducing pollution, would tackle the problem of these other pollution sources, and thus move the region toward attainment, more quickly than (or at least as quickly as) § 185's strict fees on major stationary sources; EPA in approving Rule 317 concluded likewise.

This interpretation leads clearly from the D.C. Circuit's opinion in South Coast. To reiterate, the court there held that HN21 § 172(e)'s requirement for "not less stringent" controls to prevent backsliding applies not only when the NAAQS is relaxed but also when it is strengthened. 472 F.3d at 900. The court further held that there was no ambiguity in the word "control" and that it

encompassed everything in the CAA designed to limit ozone levels, including § 185. *Id. at 902*. The EPA had contended that § 185's penalty provision was not one of the controls "applicable" to nonattainment areas before the NAAQS was relaxed. The EPA's theory was that the control was not applicable, because the provision had not [**24] yet been enforced since the deadlines for compliance had not yet been reached. *Id. at 902—903*. The D.C. Circuit rejected that argument, holding that to be "applicable" within the meaning of § 172(e) the control need not be currently enforced. Because § 185 was designed to constrain pollution, it was an applicable "control." *Id. at 903*. That holding means that, pursuant to § 172(e), when the standard was relaxed, or strengthened, the EPA was required to promulgate controls "not less stringent" than the penalty provisions of § 185. Rule 317, EPA concluded here, is such a "not less stringent" control.

Moreover, contrary to Petitioners' claims, this interpretation of § 172(e) does not give EPA anything like the unfettered discretion that Congress sought to cut back when it enacted the 1990 amendments to the CAA. Rather, *HN22* every program that EPA approves must be tied to § 185 and other relevant Subpart 2 controls by being "not less stringent than" them. This means EPA must assess each proposed alternative program for its stringency and compare — whether on the basis of fees or some other metric — the alternative program's claimed outcomes to the outcomes projected for Subpart 2 controls. EPA's interpretation of § 172(e) to give it authority to make this assessment [**25] and approve proper "not less stringent" alternatives is therefore reasonable.

We come then to Rule 317 itself. Petitioners do not challenge either EPA's way of measuring what makes an alternative program "not less stringent than" a § 185 fee program, nor do they challenge EPA's ultimate conclusion that Rule 317 is "not less stringent," and may even be more stringent, than § 185. Their argument in this petition is purely

statutory: it rises or falls with this court's conclusion about whether EPA *can* interpret the CAA's text to give it the authority to approve "not less stringent" alternatives, and does not address the actual merits of EPA's application of that authority to approve Rule 317. We have already concluded that EPA can so interpret the CAA, so that *HN23* it does have the authority to approve alternatives to § 185 fee programs that are "not less stringent." Now, noting that the rulemaking record shows that SCAQMD constructed Rule 317 to collect an equivalent amount of fees to what it would collect [**1129] with § 185 program, so that Rule 317 is "not less stringent than" a § 185 fee program, we conclude that EPA's approval of Rule 317 into California's SIP was a proper exercise of its authority under § 172(e) to approve such alternative, not less stringent, programs.

III. [**26] *Conclusion*

Because EPA reasonably interpreted CAA § 172(e) to give it authority to approve programs that are alternative to, but not less stringent than, § 185 fee programs, EPA's approval of Rule 317 as such an alternative program, after reasoned consideration and notice and comment procedure regarding Rule 317's stringency and approach to fee collecting, was proper. Therefore, the petition for review is **DENIED**.

End of Document

Tab 7

Sierra Club v. EPA

United States Court of Appeals for the District of Columbia Circuit

September 12, 2012, Argued; November 9, 2012, Decided

No. 11-1184

Reporter

699 F.3d 530 *; 403 U.S. App. D.C. 61 **; 2012 U.S. App. LEXIS 23106 ***; 42 ELR 20234; 75 ERC (BNA) 1644; 2012 WL 5457950

SIERRA CLUB, PETITIONER v.
ENVIRONMENTAL PROTECTION AGENCY
AND LISA PEREZ JACKSON,
ADMINISTRATOR, U.S. ENVIRONMENTAL
PROTECTION AGENCY, RESPONDENTS,
AMERICAN CHEMISTRY COUNCIL, ET AL.,
INTERVENORS

Prior History: [***1] On Petition for Review of Final Action of the United States Environmental Protection Agency.

Sierra Club v. Jackson, 2011 U.S. Dist. LEXIS 5316 (D.D.C., 2011)

Core Terms

rulemaking, sources, requirements, deadline, district court, redressable, notice-and-comment, obligations, promulgated, regulations, colleagues, emission standards, agency's, abandon, vacatur, notice, agency's action, Air, procedures, vacate, accomplish, categories, challenges, pollutants, emissions, purports, license, listing

Case Summary

Procedural Posture

Petitioner environmental group challenged a "Determination" of respondent Environmental Protection Agency (EPA) that announced the EPA had met the regulatory obligations imposed on it by the Clean Air Act, 42 U.S.C.S. § 7412(c)(6). The

group argued the Determination was subject to, but issued without, compliance with the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C.S. § 553.

Overview

As to sources for which the EPA set standards for § 7412(c)(6) hazardous air pollutants without purporting to do so, the claim that the standards did not necessarily comply with § 7412(c)(6) was potentially redressable by compelling the EPA to align the standards set with § 7412(c)(6)'s mandate. The group had standing. The group's challenge was timely under 42 U.S.C.S. § 7607, as it argued the Determination was unlawfully shoehorning previous rulemakings into its argument that it had completed its obligations under § 7412(c)(6), and, the challenge could not have been brought until after the EPA identified the rules it believed satisfied its § 7412(c)(6) responsibilities. The Determination clearly purported to bar further demands for additional source-listing or standard-setting. It tread new ground by taking previous rulemakings — promulgated without any evident goal of satisfying the § 7412(c)(6) obligations — and repurposing them to satisfy § 7412(c)(6). Because the Determination manifested a new yet final agency position on its compliance with § 7412, it was a legislative rulemaking subject to the notice-and-comment provisions of § 553, which the EPA had not provided.

Outcome

The Determination was vacated and was remanded

for the EPA to follow the notice-and-comment provisions of the Administrative Procedure Act.

Administrative Law > Agency Rulemaking > Notice & Comment Requirements

LexisNexis® Headnotes

Environmental Law > ... > Emission Standards > Stationary Emission Sources > Hazardous Pollutants

HN1 See 42 U.S.C.S. § 7412(c)(6).

Environmental Law > ... > Emission Standards > Stationary Emission Sources > Hazardous Pollutants

HN2 The obligation of the Environmental Protection Agency under 42 U.S.C.S. § 7412(c)(6) comprises both listing sources (due by November 15, 1995) and promulgating standards (due by November 15, 2000).

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Environmental Law > Air Quality > Enforcement > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

HN3 42 U.S.C.S. § 7607's provision for review of "final action" by the agency imposes a jurisdictional requirement.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN4 The familiar two-part inquiry into an agency decision's finality is that, first, the action under review must mark the consummation of the agency's decisionmaking process — it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

HN5 Courts have generally termed the category of rules subject to notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C.S. § 553, as "legislative rules."

Counsel: James S. Pew filed the briefs and argued the cause for petitioner.

Madeline Fleischer, Attorney, U.S. Department of Justice, argued the cause for respondents. With her on the brief were Norman L. Rave Jr., Attorney, and Michael Thrift, Attorney, U.S. Environmental Protection Agency.

Lisa M. Jaeger, Jeffrey A. Knight, David M. Friedland, and Leslie A. Hulse were on the brief for intervenors American Chemistry Council, et al., in support of respondents.

Judges: Before: HENDERSON and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge WILLIAMS. Opinion concurring in the judgment filed by Circuit Judge HENDERSON.

Opinion by: WILLIAMS

Opinion

[*531] [**62] WILLIAMS, *Senior Circuit Judge*: Sierra Club here challenges a "Determination" of the Environmental Protection Agency. In the Determination, EPA announced that it had met the regulatory obligations imposed on it by § 112(c)(6) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(c)(6). We conclude that the Determination is a legislative rulemaking subject to the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553. [***2] Because EPA issued the Determination without providing notice and opportunity for comment, we vacate and remand for the agency to follow those procedures.

* * *

In 1990 Congress amended the CAA to assign EPA the following duty:

HN1 With respect to [seven specified hazardous air pollutants ("HAPs")], the Administrator shall, not later than five years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990.

42 U.S.C. § 7412(c)(6). **HN2** The obligation thus comprises both listing *sources* (due by November 15, 1995) and promulgating *standards* (due by November 15, 2000).

In 1998 EPA published its conclusion that it had satisfied its duty to list sources, a conclusion Sierra Club immediately challenged. But the CAA specifically precluded review of the agency's source-listing under § 112(c)(6) until the agency had issued emissions standards thereunder, 42 U.S.C. § 7412(e)(4), so we dismissed the challenge, without prejudice [***3] to the Sierra Club's seeking review once EPA issued standards. Sierra Club v. EPA, No. 98-1270, 1998 U.S. App. LEXIS 30892, 1998 WL 849408 (D.C. Cir. Nov. 24, 1998).

EPA's listing of sources and promulgation of standards continued after its 1998 rulemaking, and well after the statutory deadline. As to sources, it made successive adjustments in the 1998 list by adding new sources and delisting old ones. See, e.g., 76 Fed. Reg. 9450/1 (Feb. 17, 2011) (adding gold mine source category); 73 Fed. Reg. 1916/1 (Jan. 10, 2008) (finalizing decision not to regulate gasoline distribution area sources); 72 Fed. Reg. 53,814/1 (Sept. 20, 2007) (listing electric arc furnace [*532] [**63] steelmaking facilities as an area source); 67 Fed. Reg. 68,124/1 (Nov. 8, 2002) (delisting asphalt hot-mix production, fabricated metal products, paint and allied products, paper

coated and laminated, packaging and transportation equipment manufacturing, and open burning of scrap tires as area source categories).

As to emissions standards, it continued to set such standards for a variety of sources, sometimes in an express effort to satisfy its § 112(c)(6) obligations, see, e.g., 76 Fed. Reg. 15,554/1, 15,556 (Mar. 21, 2011) (setting emissions standards for [***4] 112(c)(6) chemicals emitted by industrial, commercial, and institutional boilers), sometimes with no reference to § 112(c)(6), see, e.g., 62 Fed. Reg. 52384/1 (Oct. 7, 1997) (setting emissions standards for Primary Aluminum Reduction Plants, with specific reference to chemicals listed in § 112(b), but not § 112(c)(6)).

Despite its activities in this area, EPA failed to meet the statutory deadline of November 15, 2000. In 2001 Sierra Club filed suit in district court to compel timely compliance. *Sierra Club v. Whitman*, No. 01-1558, (D.D.C. filed July 18, 2001). EPA responded with an argument that such a suit was an inappropriate remedy for any omissions in its fulfillment of its § 112(c)(6) duties. Rather, it pointed to the declaration it had filed with the court saying that it intended, once it completed emissions standards for remaining source categories, to "issue a notice that explains how it has satisfied the requirements of [§] 112(c)(6) in terms of issuing standards for source categories that account for the statutory thresholds identified in [§] 112(c)(6)." It assured the court that that action, like any other final agency action, would be subject to review in this court.

The [***5] district court accepted EPA's view, and set a remedial deadline for EPA to complete its obligations under § 112(c)(6), but refused to identify the legal standards required by that section, finding instead that the D.C. Circuit was "the exclusive forum for substantive review of EPA regulations promulgated under [§] 112 of the Clean Air Act." *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 60 (D.D.C. 2006). On EPA's motion, the district court extended the deadlines announced in *Johnson*

"a number" of times, and ultimately ordered EPA to comply with its statutory deadline by February 21, 2011. *Sierra Club v. Jackson, No. 01-1537, 2011 U.S. Dist. LEXIS 5316, 2011 WL 181097 at *1, *14 (D.D.C. January 20, 2011).*

EPA honored that court deadline in March 2011 by issuing the Determination challenged here. The Determination declared that the agency "has completed sufficient standards to meet the 90 percent requirement" under § 112(c)(6). *76 Fed. Reg. 15308/1* (Mar. 21, 2011). The Determination also referred to an accompanying memorandum that "document[s] the actions the Agency has taken to meet these requirements."

Sierra Club petitions for review of EPA's Determination. It claims that EPA's announcement that it has satisfied [***6] its obligations under the statute is unreasonable, arbitrary, capricious, and otherwise unlawful. Sierra Club also argues that the Determination is a legislative rulemaking subject to the notice-and-comment requirements set forth in § 553 of the APA, and invalid for failure to comply with those requirements.

EPA naturally resists Sierra Club's arguments on the merits, but also argues that we lack jurisdiction to resolve this matter for two alternative reasons. First, it claims a want of standing. Second, it argues that Sierra Club's challenges are untimely under § 307 of the CAA, *42 U.S.C. § 7607*, since the suit lags some of the regulations referenced in the Determination by more than the 60 days allowed [***533] [***64] by § 307—lags those regulations, in fact, by many years. There is, besides, another threshold issue—the question whether the Determination was a "final" agency action.

* * *

Standing. EPA attacks Sierra Club's standing with the argument that "[a]lthough Sierra Club asserts that its members are harmed by emissions of [§] 112(c)(6) HAPs from certain source categories, . . . it provides no evidence that the emission standards it discusses in its brief fail to effectively control the

[§] 112(c)(6) [***7] HAPs." Respondent's Br. at 23. Accordingly, it says, Sierra Club cannot show, as it must, that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (internal quotation marks omitted). EPA seems to suggest that Sierra Club's complaint relates solely to whether the standard-setting rules at issue explicitly mention § 112(c)(6), saying that petitioner has offered no "basis to believe that, if EPA were forced to revisit those emission standards and set numeric limitations specifically naming the [§] 112(c)(6) HAPs, the resulting level of control would be any more stringent" Respondent's Br. at 23-24.

This argument misconceives the nature of Sierra Club's complaint. Sierra Club argues that despite EPA's statutory obligations, it has yet to set emission standards for two types of § 112(c)(6) HAPs, and has set standards for another type of HAPs "for sources that account for far less than ninety percent of aggregate emissions" of that type. Petitioner's Br. at 27. The Club seeks a vacatur of the Determination so that, before any such determination becomes final, it can make [***8] its case directly to EPA as to why the agency's conclusion that it has met the court-ordered deadline for all three types of HAPs is erroneous and, relatedly, why the statute compelled EPA to regulate the HAPs to which Club members are exposed more stringently than the agency has already purported to do. If correct on the merits, as we must assume for standing purposes, such a challenge presents a clearly redressable injury: some Sierra Club members unquestionably live within zones they claim are exposed to § 112(c)(6) HAPs, and our vacatur will require EPA, consistent with the district court's deadline order, to entertain and respond to the Club's claims about the necessary scope and stringency of the standards.

Having shown its members' redressable concrete interest, Sierra Club can assert violation of the APA's notice-and-comment requirements, as those

procedures are plainly designed to protect the sort of interest alleged. As to such requirements, Sierra Club enjoys some slack in showing a causal relation between its members' injury and the legal violation claimed. Its position is similar to that of a party "living adjacent to the site for proposed construction of a federally licensed [***9] dam . . . [who] challenge[s] the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered." *Lujan*, 504 U.S. at 572 n.7. Moreover, as to sources for which EPA set standards for § 112(c)(6) HAPs without purporting to do so, Sierra Club's claim that the standards did not necessarily comply with § 112(c)(6)—the merits of which, again, we must assume—is potentially redressable by compelling EPA to align the standards set with § 112(c)(6)'s mandate.

Timeliness. EPA does not deny that Sierra Club filed its present petition within 60 days of the issuance of the Determination. [*534] [**65] Rather, it says that Sierra Club is using the present suit as a back door for attacking long past rulemakings. But Sierra Club's contention here is that EPA's previous rulemakings do not satisfy the agency's obligations under § 112(c)(6) in part because some of these previous regulations did not, on their face, purport to carry out that paragraph's demands. Sierra Club claims that, with the Determination, EPA is unlawfully shoehorning previous rulemakings into the service of its argument [***10] that it had completed its obligations under § 112(c)(6). If Sierra Club is correct—a question on which we express no opinion—the agency action Sierra Club challenges is only the Determination, which (in its view) repurposed previous rulemakings to satisfy EPA's § 112(c)(6) obligations. Sierra Club's challenge is not only timely but could not be brought at all until after EPA identified the rules that it believed satisfied its responsibilities under § 112(c)(6).

Finality. Neither party disputes that the Determination in question is a final decision for

purposes of the APA. We have held, however, that HN3 § 307's provision for review of "final action" by the agency imposes a jurisdictional requirement. *Nat'l Env'l Dev. Ass'n's Clean Air Proj. v. EPA*, 686 F.3d 803, 808, 402 U.S. App. D.C. 5 (D.C. Cir. 2012). Cf. *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) (distinguishing between "claims processing rules" and jurisdictional barriers). In any event, the Determination easily satisfies HN4 the familiar two-part inquiry into an agency decision's finality:

First, the action under review "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). [***11] Second, the action must "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178.

Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 13, 367 U.S. App. D.C. 240 (D.C. Cir. 2005) (some internal citations and quotation marks omitted).

The first requirement is satisfied with unusual clarity, as the whole purpose of the Determination is to ring down the curtain on EPA's § 112(c)(6) activities. See *76 Fed. Reg. 15,308/1*. Nor can there be a question that "legal consequences will flow" from the Determination. EPA has declared, for the first time, that it has fully accomplished the listing of sources and promulgation of standards required by § 112(c)(6). Most obviously as to sources, but also quite clearly as to standards never before pegged to § 112(c)(6), EPA purports to close off any legal claim that it has fallen short of compliance with § 112(c)(6).

Indeed, in the deadline suit before the district court, EPA based its successful response on the premise that this very Determination would both issue and be a final agency action reviewable in this Court. See *supra* 4-5.

Finding that we have jurisdiction, we turn to the question whether the Determination [***12] constitutes a legislative rulemaking that cannot be issued without first being subject to notice and comment under § 553 of the APA. We agree with Sierra Club that it does. Because this conclusion forces a remand under which the parties can develop a record that will render EPA's legal and technical decisions more transparent and thereby facilitate substantive review (and perhaps moot some or all of the parties' dispute), we do not reach Sierra Club's arguments on the substance of the Determination or express the slightest opinion as to their merit.

[*535] [**66] HNS We have generally termed the category of rules subject to notice-and-comment requirements as "legislative rules." U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 34, 365 U.S. App. D.C. 149 (D.C. Cir. 2005). As will often be the case where an agency action is clearly final, the question whether the Determination "is a legislative rule that required notice and comment[] is easy." Natural Res. Def. Council v. EPA, 643 F.3d 311, 320, 395 U.S. App. D.C. 397 (D.C. Cir. 2011). The Determination having declared the end not only of its multi-decade effort of listing and delisting sources subject to regulation under § 112(c)(6), but also of any further duty to issue § 112(c)(6) standards, it clearly purports [***13] to bar further demands for additional source-listing or standard-setting. (This closure effect is subject, perhaps, to petitions for modification based, for example, on claims of changed circumstances. See, e.g., RSR Corp. v. EPA, 102 F.3d 1266, 1267, 322 U.S. App. D.C. 238 (D.C. Cir. 1997) (discussing the rule first announced in Geller v. FCC, 610 F.2d 973, 198 U.S. App. D.C. 31 (D.C. Cir. 1979), which provided an exception to the timeliness rule in cases of "changed circumstances giving rise to a new cause of action beyond the statutory period for review") (internal citation omitted).)

EPA cites Independent Equipment Dealers Association v. EPA, 372 F.3d 420, 362 U.S. App. D.C. 53 (D.C. Cir. 2004), to support its argument

that the Determination is not a legislative rule. Far from it. In deciding that the agency communication at issue was not a legislative rule, we emphasized that it "tread no new ground [and] left the world just as it found it." Id. at 428 (then-Judge Roberts). The Determination here does precisely what the agency action in Independent Equipment Dealers did not. It tread new ground by taking previous rulemakings—which EPA had promulgated without any evident goal of satisfying its § 112(c)(6) obligations—and repurposing them to satisfy [***14] § 112(c)(6). Because the Determination manifests a new yet final agency position on its compliance with § 112(c)(6), it is a legislative rulemaking subject to § 553's notice-and-comment requirements.

We repeat, of course, that nothing we say should be taken as ruling on Sierra Club's substantive claims.

* * *

We vacate the Determination and remand to EPA to fulfill the notice-and-comment requirements of § 553 of the APA.

So ordered.

Concur by: KAREN LECRAFT HENDERSON

Concur

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in the judgment:

Although I join in the judgment vacating EPA's "Determination," 76 Fed. Reg. 15,308 (Mar. 21, 2011), I write separately because I believe that Article III standing is far from certain.

"Article III of the Constitution limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies.'" Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 597, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007). By limiting the jurisdiction of federal courts to the consideration of cases and controversies, the standing doctrine ensures that the judiciary does not spill the banks of

its Article III authority. Allen v. Wright, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1289, 376 U.S. App. D.C. 443 (D.C. Cir. 2007). [***15] Because the doctrine implicates this fundamental caution about the judiciary's constitutional role, we address standing with considerable care. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

[*536] [**67] A party seeking to invoke the power of an Article III court must establish the "irreducible constitutional minim[a] of standing," to wit, injury in fact, causation and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). I agree with my colleagues that Sierra Club establishes an injury in fact which, assuming its success on the merits, is caused by EPA's failure to engage in the notice-and-comment procedures required by the Administrative Procedure Act (APA), 5 U.S.C. § 553. I suspect, however, that today's decision will most likely provide no relief for that injury.

Section 112(c)(6) of the Clean Air Act (Act) requires EPA to assure that "not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4)." 42 U.S.C. § 7412(c)(6). That is *all* it requires. EPA is under no obligation, statutory or otherwise, to inform anyone that it has satisfied the requirements of section 112(c)(6). The

[***16] issuance of the Determination was purely voluntary, amounting to little more than a public service message.¹

¹ This conclusion also implicates another jurisdictional concern, viz., whether the Determination was "final action" within the meaning of section 307 of the Act. See Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA, 686 F.3d 803, 808, 402 U.S. App. D.C. 5 (D.C. Cir. 2012). Because it is uncertain that the Determination accomplishes anything, it is also unclear that it is "one by which rights or obligations have been determined or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 178, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (quotation marks omitted). Nevertheless, I accept what I believe to be my colleagues' conclusion that the

Given that EPA was not required to issue the Determination, I am doubtful our decision will redress Sierra Club's injury. My colleagues correctly note that a party alleging a procedural injury is not required to show that the agency's decision would have been different had it adhered to the APA. Cnty. of Delaware, Pa. v. Dep't of Transp., 554 F.3d 143, 147, 384 U.S. App. D.C. 280 (D.C. Cir. 2009) [***17] ("[A] litigant 'who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary to show is that the procedural step was connected to the substantive result.'" (quoting Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 94-95, 351 U.S. App. D.C. 214 (D.C. Cir. 2002))). Even so, I cannot escape the conclusion that redress is most likely "merely speculative" as opposed to "likely." Lujan, 504 U.S. at 561 (quotation marks omitted). Because EPA's compliance with section 112(c)(6) does not rest on the issuance of the Determination, it is likely that, on remand, EPA will simply abandon the Determination rather than undertake the expensive and cumbersome notice-and-comment procedures imposed by section 553 of the APA. The upshot would be that EPA will continue to decline to issue regulations and Sierra Club's alleged injury will remain unredressed.²

Determination has altered the legal landscape by "taking previous rulemakings . . . and repurposing them to satisfy § 112(c)(6)." Maj. Op. 10.

² In its abbreviated standing discussion, my colleagues appear to conflate the two distinct standing prongs of injury in fact and redressability by stating without explaining that Sierra Club suffers a "clearly redressable injury[]" [***18] given that some Sierra Club members live within zones they claim are exposed to § 112(c)(6) HAPs." Maj. Op. 6. Exposure to section 112(c)(6) HAPs plainly constitutes an injury in fact. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). And such injury is obviously redressable by an order to promulgate regulations. But that is not what our vacatur order accomplishes. Our instruction to EPA is merely that, before it promulgates a notice of this kind, it must do so pursuant to the APA's notice-and-comment procedures. EPA may simply choose to withdraw the notice altogether and rest on its internal conclusion that it has satisfied section 112(c)(6), forcing Sierra Club to seek some other form of redress.

[*537] [**68] My colleagues believe that the "deadline suit" in the district court, apparently still pending, obviates my concern. In a footnote included in its district court brief in that case, EPA stated its intention to issue a notice explaining that it had satisfied its section 112(c)(6) obligations. Maj. Op. 4 (quoting [***20] Def.'s Mem. in Supp. of Cross-Mot. for Summ. J. on Remedy 19 n.16, *Sierra Club v. Johnson*, No. 01-1537 (D.D.C. Jun. 13, 2005)). The district court ordered EPA to comply with the requirements of section 112(c)(6) but declined either to instruct EPA on how to comply or to review the substance of any regulations relied upon by EPA to satisfy section 112(c)(6), concluding that both actions were beyond its jurisdiction. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 59-60 (D.D.C. 2006).³ The district

Similarly, the dicta hypothetical discussed in the *Lujan* footnote on which my colleagues rely is distinguishable. See Maj. Op. 5-6 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). They compare Sierra Club's alleged procedural deprivation to a hypothetical agency's failure to prepare an environmental impact statement before construction of a federally licensed dam. An adjacent landowner could challenge the agency's [***19] failure without showing that his input into the statement's preparation would result in the denial of the license. *Lujan*, 504 U.S. at 572 n.7. But as Justice Scalia noted, the environmental impact statement is a procedural requirement. *Id.* at 572. Thus, in order to proceed with licensure and construction, the agency *must* allow the landowner to make known his concerns. But here, because the Determination is not required by statute, EPA may give up the Determination entirely and at the same time cease promulgating section 112(c)(6) regulations. The distinction is thus that the hypothetical agency in *Lujan* may not accomplish its goal—licensure or construction—without at least knowing the injured party's concerns. By abandoning the Determination, EPA may accomplish its goal—no promulgation of additional regulations pursuant to section 112(c)(6)—without regard to Sierra Club's concerns.

³ My colleagues make much of the fact that EPA assured Sierra Club and the district court that it intended to issue the Determination, which would be reviewable in this Court. Maj. Op. 4. This seems of little consequence to me. First, the district court did not rely on EPA's assurance to reach its ultimate conclusion that it could not review the standards [***21] on which EPA relied to satisfy section 112(c)(6) because it lacked jurisdiction. *Johnson*, 444 F. Supp. 2d at 59-60. Second, EPA cannot stipulate to the finality of the Determination because finality implicates our jurisdiction, which my colleagues acknowledge we must resolve ourselves. See Maj. Op. 8; see also *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541,

court did not instruct EPA to issue the Determination but merely to "assure that sources accounting for ninety percent of the aggregate emissions of certain persistent and bioaccumulative hazardous air pollutants are subject to emission standards with respect to such pollutants." Order at 2, *Sierra Club v. Johnson*, No. 01-1537, 2006 U.S. Dist. LEXIS 14923 *3 (D.D.C. Mar. 31, 2006).

My colleagues conclude that "our vacatur order will require EPA, consistent with the District Court's deadline order, to entertain and respond to the Club's claims about the necessary scope and stringency of the standards." Maj. Op. 6-7. I am unconvinced. If EPA declines to issue the Determination, Sierra Club will presumably return to district court to enforce the deadline order, as it has done before. See [*538] [**69] Mot. to Enforce Order of Jan. 20, 2011, *Sierra Club v. Jackson*, No. 01-1537 (D.D.C. Aug. 3, 2011). EPA will presumably defend against enforcement with the Technical Memorandum (prepared in [***22] order to support the Determination) showing how it has satisfied the district court's order. See Maj. Op. 5. If the district court is correct about its jurisdiction under the Act, it cannot review the standards on which EPA relies. See *Johnson*, 444 F. Supp. at 59-60. Nor can we, because judicial review of the standards that Sierra Club previously failed to challenge would violate the sixty-day deadline imposed by section 307(b)(1) of the Act. 42 U.S.C. § 7607(b)(1). The proper recourse for Sierra Club will then be to petition for reconsideration of those standards or for a new rulemaking. See *Ojato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666, 169 U.S. App. D.C. 195 (D.C. Cir. 1975); see also *RSR Corp. v. EPA*, 102 F.3d 1266, 1270, 322 U.S. App. D.C. 238 (D.C. Cir. 1997). If, after consideration of Sierra Club's comments, EPA denies the petition, we may review the denial and—if persuaded—

106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself . . . of its own jurisdiction . . . ' even though the parties are prepared to concede it." (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 79 L. Ed. 338 (1934)).

grant Sierra Club the relief it seeks. Although the administrative petition process—like my colleagues' hoped-for result arising from remand—will enable Sierra Club to make known its concerns to EPA, I doubt that EPA will permit Sierra Club to short circuit that process by reissuing the Determination after notice and comment. Remand is thus [***23] unlikely to provide Sierra Club redress.

The possibility that an agency will abandon a rulemaking after we vacate and remand a procedurally deficient rule exists, of course, whenever we impose this remedy. *See, e.g., Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 174 F.3d 206, 335 U.S. App. D.C. 370 (D.C. Cir. 1999) (vacating OSHA rule for lack of notice-and-comment, which rule OSHA subsequently abandoned); Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 *Admin. L. Rev.* 1071, 1124 (2005) (describing OSHA's abandonment of rule after vacatur); *see also Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1265, 376 U.S. App. D.C. 414 (D.C. Cir. 2007) (noting that agency may "abandon its initial rule" after vacatur); Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 *N.Y.U. L. Rev.* 278, 279 (2005). Because vacating the Determination leaves unstated but intact EPA's underlying conclusion that it has satisfied section 112(c)(6), I [***24] expect that abandonment will occur here. We have never, however, required a petitioner challenging agency action to show that the agency will not abandon the rulemaking after vacatur and remand—nor could we—and I would not seek to impose that requirement here. Accordingly, I concur in the judgment of the Court.

NRDC v. EPA

United States Court of Appeals for the District of Columbia Circuit

May 12, 2011, Argued; July 1, 2011, Decided

No. 10-1056

Reporter

643 F.3d 311 *; 395 U.S. App. D.C. 397 **; 2011 U.S. App. LEXIS 13390 ***; 41 ELR 20223; 72 ERC (BNA) 2185

NATURAL RESOURCES DEFENSE COUNCIL,
PETITIONER v. ENVIRONMENTAL
PROTECTION AGENCY, RESPONDENT.
AMERICAN CHEMISTRY COUNCIL, ET AL.,
INTERVENORS

Prior History: [***1] On Petition for Review of a Final Action of the Environmental Protection Agency.

Core Terms

attainment, nonattainment, Air, alternatives, requirements, regions, deadline, ozone, notice, controls, stringent, implementation plan, air quality, sources, vacate, rulemaking, classification, emission, severe, agency's action, task force, regulations, Pollution, penalties, qualifies, Ambient, approve, argues, alternative program, regional director

Case Summary

Procedural Posture

Petitioner environment organization filed a petition for review of a final action by respondent Environmental Protection Agency (EPA) as to a guidance document that addressed obligations of regions still in nonattainment of a now-revoked ozone air quality standard under the Clean Air Act. Numerous industry groups intervened in support of the EPA.

Overview

The guidance document gave nonattainment areas flexibility to choose between the statutorily mandated program and an equivalent program alternative. The court held that the environment organization had standing because certain members were injured by the EPA's guidance. The court ruled that the guidance document qualified as a legislative rule that the EPA was required to issue through notice and comment rulemaking. Since the EPA did not meet the notice and comment requirements, the EPA violated the Administrative Procedure Act. The document could not be considered a mere statement of policy because it bound the EPA regional directors. Nothing in the statute, prior regulations, or case law authorized the EPA to accept alternatives. Likewise, nothing prior to the guidance entitled a state to have the EPA evaluate a proposed alternative for equivalency rather than reject it outright. The attainment alternative violated the plain language of § 172(e) of the Clean Air Act, *42 U.S.C.S. § 7502(e)*, that required that any alternative be not less stringent than applicable controls.

Outcome

The court granted the petition for review and vacated the guidance.

LexisNexis® Headnotes

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

HN1 The Clean Air Act requires the Environmental Protection Agency to establish national ambient air quality standards (NAAQS) for certain criteria pollutants, including ozone. 42 U.S.C.S. § 7409(a). Regions in nonattainment of those standards are subject to additional restrictions over and above the Act's implementation requirements. These additional restrictions appear in Title I, Part D of the Act. Subpart 1 contains general nonattainment regulations that pertain to every pollutant for which a NAAQS exists. Subpart 2, added by the Clean Air Act Amendments of 1990, addresses ozone. That latter subpart classifies nonattainment areas as either marginal, moderate, serious, severe, or extreme, 42 U.S.C.S. § 7511(a)(1), giving areas with worse air quality extra time to come into compliance in exchange for imposing more stringent standards. Subpart 2 also contains provisions designed to encourage these regions to meet their deadlines.

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > State
Implementation Plans

HN2 Section 185 of the Clean Air Act directs states to impose fees on all major stationary sources in severe and extreme nonattainment areas that miss their deadlines. 42 U.S.C.S. § 7511d(a). Under § 185, such states must submit implementation plans, and if a state fails to do so, the Environmental Protection Agency must collect the fees itself. § 7511d(a), (d). In addition, states failing to submit adequate implementation plans may incur penalties, including loss of federal highway funding. 42 U.S.C.S. § 7509(b)(1).

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > Nonattainment
Areas

HN3 Section 172(e) of the Clean Air Act provides

that, where the Environmental Protection Agency relaxes a national ambient air quality standard, it shall promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation. 42 U.S.C.S. § 7502(e).

Environmental Law > Air
Quality > Enforcement > Administrative Proceedings

Environmental Law > Administrative Proceedings &
Litigation > Judicial Review

Environmental Law > Administrative Proceedings &
Litigation > Jurisdiction

HN4 Section 307(b)(1) of the Clean Air Act gives the United States Court of Appeals for the District of Columbia exclusive jurisdiction over challenges to final Environmental Protection Agency actions. 42 U.S.C.S. § 7607(b)(1).

Civil
Procedure > ... > Justiciability > Standing > Burdens
of Proof

Civil
Procedure > ... > Justiciability > Standing > Injury in
Fact

HN5 To demonstrate that a member would have standing to sue in her own right for organizational standing, an organization must establish that she has suffered injury, caused by the defendant's action, that is redressable through a claim.

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

HN6 To be final, an agency action must (1) mark the consummation of the agency's decisionmaking process and (2) be one by which rights or obligations have been determined, or from which legal consequences will flow. Finality is a necessary feature of fitness for review.

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

Environmental Law > Air Quality > State
Implementation Plans

HN7 For the purposes of finality, it is irrelevant how the interpretation will apply to any individual state's implementation plan-approval process.

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

Administrative Law > Judicial
Review > Reviewability > Questions of Law

Administrative Law > Judicial
Review > Reviewability > Ripeness

HN8 A purely legal claim in the context of a facial challenge is presumptively reviewable.

Administrative Law > Judicial
Review > Reviewability > General Overview

Environmental Law > Air
Quality > Enforcement > Administrative Proceedings

Environmental Law > Administrative Proceedings &
Litigation > Judicial Review

HN9 The U.S. Congress has emphatically declared a preference for immediate review with respect to Clean Air Act rulemaking.

Administrative Law > Agency Rulemaking > Notice
& Comment Requirements

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Validity

HN10 5 U.S.C.S. § 553 requires that legislative rules, but not policy statements or interpretive rules, be issued only after notice and comment.

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Validity

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency
Action

HN11 Policy statements are binding on neither the public nor the agency. The inquiries into whether an agency action was final and whether the agency action was a rule are essentially the same.

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > Validity

HN12 Where in the absence of a rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, the rule is legislative.

Governments > Legislation > Interpretation

HN13 First, always, is the question whether the U.S. Congress has directly spoken to the precise question at issue.

Environmental Law > Air Quality > General
Overview

Environmental Law > Administrative Proceedings &
Litigation > Judicial Review

Governments > Courts > Judicial Precedent

HN14 Where the Environmental Protection Agency violates the Clean Air Act's plain language as interpreted by court precedent, that is the end of the matter.

Business & Corporate
Compliance > ... > Environmental Law > Air
Quality > National Ambient Air Quality Standards

Environmental Law > Air Quality > Nonattainment
Areas

HN15 Section 172(e) of the Clean Air Act, 42 U.S.C.S. § 7502(e), does not condition its strict distaste for backsliding on the Environmental Protection Agency (EPA)'s determinations of expediency; the EPA must determine its procedures after it has identified what findings must be made under the Act.

Environmental Law > Air Quality > General
Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Governments > Legislation > Interpretation

HNI16 If the Environmental Protection Agency disagrees with the Clean Air Act's requirements, it should take its concerns to the U.S. Congress. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by the United States Court of Appeals for the District of Columbia.

Counsel: Paul Cort argued the cause for petitioner. With him on the briefs was Deborah Reames.

Stephanie J. Talbert, Attorney, U.S. Department of Justice, argued the cause for respondent. With her on the brief were John C. Cruden, Deputy Assistant Attorney General and Sara Schneeberg, Attorney, U.S. Environmental Protection Agency. Thomas A. Lorenzen, Attorney, U.S. Department of Justice, entered an appearance.

Barbara Baird argued the cause for intervenor South Coast Air Quality Management District. With her on the brief was Kurt R. Wiese.

Leslie Sue Ritts, Claudia M. O'Brien, Charles H. Knauss, Sandra P. Franco, Thomas G. Echikson, Rachel D. Gray, and Adam J. White were on the brief for intervenors for respondent American Chemistry Council, et al. Richard P. Sobiecki and Stacey L. VanBelleghem entered an appearance.

Judges: Before: ROGERS, TATEL, and GRIFFITH, Circuit Judges. Opinion for the Court filed by Circuit Judge TATEL.

Opinion by: TATEL

Opinion

[*313] [*399] Opinion for the Court filed by *Circuit Judge TATEL*.

TATEL, *Circuit Judge*: Yet again we face a challenge to the Environmental Protection Agency's

regulation of ozone under the Clean Air Act. At issue [***2] this time is an EPA "guidance document" addressing obligations of regions still in nonattainment of a now-revoked ozone air quality standard. Petitioner argues that the Guidance amounts to a legislative rule issued in violation of the Administrative Procedure Act's notice and comment requirement and that its substantive content is contrary to law. Firing nearly all the arrows in its jurisdictional quiver, EPA argues that petitioner lacks standing, that the Guidance does not qualify as final agency action, and that petitioner's claims are unripe for judicial review. As we explain in this opinion, all three arrows miss their target. On the merits, we conclude that the Guidance qualifies as a legislative rule that EPA was required to issue through notice and comment rulemaking and that one of its features—the so-called attainment alternative—violates the Clean Air Act's plain language. We therefore grant the petition for review and vacate the Guidance.

I.

HNI The Clean Air Act requires EPA to establish national ambient air quality standards (NAAQS) for certain criteria pollutants, including ozone. 42 U.S.C. § 7409(a). Regions in nonattainment of those standards are subject to "additional restrictions [***3] over and above the [Act's] implementation requirements." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). These additional restrictions appear in Title I, Part D of the Act. "Subpart 1 contains general nonattainment regulations that pertain to every pollutant for which a NAAQS exists. . . . Subpart 2, added by the Clean Air Act Amendments of 1990, addresses ozone." *Id.* (internal citations omitted). That latter subpart classifies nonattainment areas as either "marginal," "moderate," "serious," "severe," or "extreme," 42 U.S.C. § 7511(a)(1), giving areas with worse air quality extra time to come into compliance in exchange for imposing more stringent standards. *Id.* (listing [*314] [**400] classifications and attainment dates). Subpart 2 also contains

provisions designed to encourage these regions to meet their deadlines. Central to this case, one of those provisions, HN2 section 185, directs states to impose fees on all major stationary sources in severe and extreme nonattainment areas that miss their deadlines. *Id.* § 7511d(a). Under section 185, such states must submit implementation plans, and if a state fails to do so, EPA must collect the fees itself. *Id.* § 7511d(a), (d). In addition, states [***4] failing to submit adequate implementation plans may incur penalties, including loss of federal highway funding. *Id.* § 7509(b)(1).

Until 1997, EPA had in place a 1-hour ozone NAAQS prohibiting average hourly concentrations from exceeding .12 parts per million. The 1990 amendments, including the table specifying nonattainment classifications and attainment deadlines, incorporate that 1-hour standard. *Id.* § 7511(a)(1). In 1997, however, EPA found the 1-hour standard insufficient to "protect the public health," *id.* § 7409(b), and so promulgated an 8-hour standard of .08 parts per million. National Ambient Air Quality Standards for Ozone: Final Rule, 62 Fed. Reg. 38,856, 38,863 (July 18, 1997) (codified at 40 C.F.R. pt. 50) ("1997 Ozone Rule"). Because the .12 parts per million 1-hour standard roughly corresponds to a .09 parts per million 8-hour standard, the revision changed not only "the measuring stick [but also] the target." S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 892, 374 U.S. App. D.C. 121 (D.C. Cir. 2006). Overall, the 8-hour standard is more protective of public health and "generally even more effective in limiting 1-hour exposures . . . than is the . . . 1-hour standard." 1997 Ozone Rule, [***5] 62 Fed. Reg. at 38,863. That said, EPA acknowledged that "it is possible that an 8-hour standard alone could allow for high 1-hour exposures of concern." *Id.* Accordingly, to ease the transition to the new standard, EPA determined that the requirements of Subpart 2, including section 185, would apply only to nonattainment under the 1-hour standard, which would remain in place until all areas achieved attainment. *Id.* at 38,873. The 8-hour standard would be implemented only under Subpart 1, a part

of the statute that leaves EPA substantial regulatory flexibility.

Reviewing the 1997 rule in *Whitman v. American Trucking Ass'ns*, the Supreme Court observed that even though Subpart 2 expressly relies on the 1-hour standard, EPA remained free to revise the NAAQS. 531 U.S. at 484. Given this, the Court recognized that the statute left several gaps for EPA to fill as it implemented revised NAAQS. *Id.* at 483-84 (identifying three specific gaps related to classification and attainment deadlines). The Court nonetheless held that EPA's exemption of the 8-hour standard from the Subpart 2 requirements violated the statute. *Id.* at 484-86. According to the Court, Congress intended Subpart 2 to "eliminate[] [***6] [the] regulatory discretion" that Subpart 1 allowed and that EPA's reading was impermissible because it "render[ed] Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory." *Id.* at 484. "A plan reaching so far into the future," the Court explained, "was not enacted to be abandoned the next time the EPA reviewed the ozone standard." *Id.* at 485.

Following *American Trucking*, EPA tried again to reconcile Subpart 2 with the new 8-hour standard. See Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1, 69 Fed. Reg. 23,951 (Apr. 30, 2004) (codified at 40 C.F.R. pts. 50, 51, 81). In a 2004 rulemaking, the agency determined that Subpart 2 would apply only to areas in [*315] [**401] nonattainment of both the 1-hour and the 8-hour standards, but that the 1-hour standard would be withdrawn in full one year after the 8-hour standard's effective date. Pursuant to this new scheme, 76 of the 122 then-non-attaining areas would be subject only to Subpart 1. S. Coast, 472 F.3d at 892. Addressing one of the gaps the Supreme Court identified in *American Trucking*—relating to regional classification under the 8-hour standard—EPA noted that because net air quality [***7] had improved since 1990, some areas would have a lower classification under the 8-hour standard than they had had under the 1-hour standard. *Id.* at 890. For instance, although Baton

Rouge had been a severe nonattainment area under the 1-hour standard, it was in only marginal nonattainment of the 8-hour standard. *See id. at 899*. Rather than allow such regions to loosen existing implementation standards, EPA interpreted section 172(e)—a Subpart 1 "anti-backsliding" provision that applies "[i]f the administrator *relaxes* a [NAAQS]," 42 U.S.C. § 7502(e) (emphasis added)—to apply as well where NAAQS were made more stringent. *See Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1, 69 Fed. Reg. at 23,972* (concluding that Congress intended "that such controls not be weakened where the NAAQS is made more stringent"). **HN3** Section 172(e) provides that where EPA relaxes a NAAQS, it "shall . . . promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). Accordingly, the 2004 Rule announced that Subpart 2 "applicable controls" had to remain in place for areas that had been in nonattainment under the 1-hour standard and were in attainment or a lower classification of nonattainment under the 8-hour standard. *S. Coast, 472 F.3d at 890*. For Baton Rouge, for instance, controls applicable to severe nonattainment regions would continue to apply despite the fact that the city qualified as a marginal nonattainment area under the new standard. Sorting through the various Subpart 2 provisions, EPA determined that some were applicable controls and others, including section 185 fees, were not. *Id.*

In *South Coast Air Quality Management District v. EPA*, we rejected a challenge to EPA's withdrawal of the 1-hour standard but vacated the portions of the rule exempting areas in nonattainment of only the 8-hour standard from Subpart 2 strictures. *Id. at 892-95*. *****9** At the least, we held, Subpart 2 must apply for areas with 8-hour concentrations exceeding .09 parts per million, the 8-hour equivalent of the 1-hour standard on which

Congress relied in enacting Subpart 2. *Id. at 892-94*. For areas with 8-hour concentrations between .08 parts per million (the new standard) and .09 parts per million, we found that EPA's sole reason for excluding these areas from Subpart 2—to create regulatory flexibility and thus "maximize its own discretion"—contradicted the "clear intent of Congress." *Id. at 894-95*. We also concluded that although EPA's interpretation of section 172(e) was reasonable, the same could not be said for its exclusion of section 185 fees from "applicable controls." *Id. at 900, 902-03*. We explained: "[a]s Congress set the penalty deadline well into the future, giving states and industry ample notice and sufficient incentives to avoid the penalties, they were 'applicable' before they were actually imposed . . . , [and] [b]ecause these penalties were designed to constrain ozone pollution, they are controls that section 172(e) requires to be retained." *Id. at 903*. Responding to EPA's *****16** *****402** argument that enforcement would be impractical because the *****10** penalty calculation relied on the no-longer-measured 1-hour standard, we warned that "section 172(e) does not condition its strict distaste for backsliding on EPA's determinations of expediency; EPA must determine its procedures *after* it has identified what findings must be made under the Act." *Id.* In sum, we ruled that pursuant to section 172(e)'s anti-backsliding principles, an area subject to section 185 penalties due to its classification under the now-defunct 1-hour standard must apply those penalties as an "applicable control" if the area missed its attainment deadline under the 1-hour standard.

Now before us is EPA's latest attempt to reconcile the 8-hour standard with Subpart 2. This time its effort relates only to the application of section 185 fees to the eight regions in severe or extreme nonattainment of the 1-hour standard: Baltimore, Baton Rouge, Houston, New York City, Sacramento, the San Joaquin Valley, the South Coast Air Basin (CA), and the Southeast Desert (CA). Because attainment deadlines for the eight regions have now expired, all are in the process of developing section 185 implementation plans.

Faced with the prospect of hefty fees, industry groups complained [***11] to EPA that because they already had in place the best available emission control technology, they could reduce emissions and thus avoid fees only by cutting production. *Report of the US EPA Clean Air Act Advisory Committee Task Force on section 185 of the Clean Air Act* 3 (May 12, 2009) (included at J.A. 56). Moreover, they asserted, because section 185 set such a low emissions threshold for major stationary sources, the fees would apply to many small businesses, as well as to hospitals and schools. *Id.* at 4. Lastly, they alleged that stationary sources contribute far less to overall air pollution today than they did in 1990 and face far higher marginal costs for further reduction than do mobile sources. *Id.* at 3.

To address these concerns, the Clean Air Act Advisory Committee, a body created by the 1990 Amendments to advise EPA on scientific and industry developments relevant to rule making, established a task force that generated a list of section 185 alternatives including shifting costs to mobile sources and implementing market-based programs. Environmental organizations participating in the task force submitted an "Alternative Opinion" criticizing the policy rationales of the industry [***12] groups and asserting that the statute allowed no alternatives. The Committee submitted the task force report to EPA along with the following question: "Is it legally permissible under either section 185 or 172(e) for a State to exercise the discretion identified in [the options listed in this letter]?" Letter from Eddie Terrill & Robert Wyman, Co-chairs of the Section 185 Task Force, to Elizabeth Craig, Acting Assistant Administrator, Office of Air & Radiation (May 16, 2009) ("*Task Force Letter*") (included at J.A. 51).

In response, EPA issued a "Guidance" document aimed at Regional Air Division Directors—the agency officials directly responsible for implementation plan approval. That January 5, 2010, document explains to Directors that

[i]n the implementation rule for the 1997 ozone NAAQS, EPA determined that although section 172(e) does not directly apply where EPA has strengthened the NAAQS, as it did in 1997, it was reasonable to apply the same principle for the transition from the 1-hour NAAQS to the 1997 8-hour NAAQS. As part of applying the principle in section 172(e) for purposes of the transition from the 1-hour standard to the 1997 8-hour standard, EPA can either require states [***13] [*317] [**403] to retain programs that applied for purposes of the 1-hour standard, or alternatively can allow states flexibility to adopt alternative programs, but only if such alternatives are 'not less stringent' than the mandated program.

Memorandum from Stephen D. Page, Director, Office of Air Quality Planning & Standards to Regional Air Division Directors 3 (Jan. 5, 2010) ("*Fee Program Guidance*") (included at J.A. 66). In other words, EPA believes 1-hour nonattainment areas have flexibility to choose between the statutorily mandated program and an equivalent—i.e., the program alternative.

In addition to that alternative, the Guidance explains, regions attaining either the 1-hour or the 8-hour standard can avoid section 185 fees through an "attainment alternative." Specifically, in such regions the existing 8-hour implementation controls would qualify as a "not less stringent" alternative to section 185 fees. *Id.* at 3-4. In other words, a region satisfying the 8-hour standard would have no obligation to pay section 185 fees even though it remained in nonattainment of the 1-hour standard. The Guidance sets forth two justifications for the attainment alternative. First, "it would unfairly penalize [***14] sources in these areas to require that fees be paid after an area has attained the 8-hour standard due to permanent and enforceable emission reductions because the fees were imposed due to a failure to meet the applicable attainment deadline for the 1-hour standard, not any failure to achieve the now applicable 8-hour standard by its attainment date." *Id.* at 4. Second, because EPA no

longer redesignates areas under the 1-hour standard, "relief from the 1-hour fee program requirements under the terms of the statute is an impossibility, since the conditions the statute envisioned for relieving an area of its fee program obligation"—reclassification as in attainment of the 1-hour standard—"no longer can exist." *Id.*

As to both the program and attainment alternatives, the Guidance explains that approval of individual alternatives would occur on a case-by-case basis. Specifically, if after preliminarily assessing a proposal, EPA were to find the alternative satisfactory, it would proceed with notice and comment to finalize that finding. *Id.* at 3.

On March 5, 2010, the Natural Resources Defense Council (NRDC) filed a petition for review of the Guidance pursuant to HN4 Clean Air Act section 307(b)(1), [***15] which gives this court exclusive jurisdiction over challenges to final EPA actions. 42 U.S.C. § 7607(b)(1). NRDC argues that EPA violated the Administrative Procedure Act by issuing the Guidance without notice and comment and that both the program and attainment alternatives violate the Clean Air Act. In response, EPA argues that NRDC lacks standing, that the Guidance fails to qualify as final agency action, and that NRDC's challenges are unripe for review. On the merits, EPA contends that the Guidance is either a policy statement or an interpretive rule and, in either case, is exempt from the notice and comment requirement. It also defends both alternatives as permissible exercises of statutory gapfilling. Numerous industry groups and the South Coast Air Quality Management District have intervened in support of EPA.

II.

NRDC argues that it has "organizational standing" due to alleged injuries suffered by two of its members. Sierra Club v. EPA, 292 F.3d 895, 898, 352 U.S. App. D.C. 191 (D.C. Cir. 2002) (listing three requirements of organizational standing, only one of which—that at least one member would

have standing to sue in her own right—is at issue in this [*318] [**404] case); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) [***16] (HN5 to demonstrate that a member would have standing to sue in her own right, the organization must establish that she has suffered injury, caused by the defendant's action, and redressable through this claim). Both members live in 1-hour nonattainment areas (one in the Houston area, which has an attainment deadline of November 15, 2007, and the other in the San Joaquin Valley, which has a deadline of November 15, 2010), and both assert that local ambient ozone levels have adversely affected their health and forced them to reduce time they spend outside. *See* Marilyn McGill Aff. ¶¶ 2, 6; Gaylee Amend Aff. ¶¶ 2, 6-8; *see also 42 U.S.C. § 7511(a)(1); Approval and Promulgation of Implementation Plans; Texas; Houston/Galveston Nonattainment Area; Ozone*, 66 Fed. Reg. 57,160 (Nov. 14, 2001) (codified at 40 C.F.R. pt. 52) (approving plan for Houston, a severe nonattainment area, to achieve attainment by 2007); Clean Air Act Reclassification; San Joaquin Valley Nonattainment Area, 69 Fed. Reg. 20,550 (Apr. 16, 2004) (codified at 40 C.F.R. pt. 81) (reclassifying the San Joaquin Valley as an extreme nonattainment area and therefore pushing the attainment deadline to 2010 from 2005). According to [***17] NRDC, the Guidance exacerbates these injuries by delaying or suspending future air quality improvements. Any such effect, EPA counters, is purely hypothetical because it may never approve an alternative.

In our view, the Guidance injures NRDC's members in three independent ways. First, the Guidance caused several nonattainment areas, including Houston and the San Joaquin Valley, to abandon plans to submit section-185-compliant implementation plans, thus delaying, at the very least, implementation of section 185, which in turn delays the reduction of ambient ozone and harms NRDC members. *See* Elena Craft Aff. ¶¶ 7-9; Sarah Jackson Aff. ¶¶ 6-12. Second, even in the San Joaquin Valley, where the attainment deadline

had not yet passed at the time NRDC filed this petition, the Guidance had a present, concrete effect because it eliminated section 185's powerful incentive for major stationary sources to reduce emissions before the deadline. *See S. Coast*, 472 F.3d at 903 (explaining that even where a nonattainment deadline has yet to pass, section 185 is currently applicable because it incentivizes emission reductions before fees are implemented). Third, because the Guidance replaces a brightline [***18] section 185 requirement with a flexible standard, it is likely to result in lengthier rulemaking processes. And because an order vacating the Guidance would require Houston and the San Joaquin Valley to submit section-185-compliant state implementation plans (or, if they failed to do so, because EPA itself would be obligated to implement section 185, *see* 42 U.S.C. § 7511d(d)), these injuries are all redressable. *See* Recording of Oral Arg. at 31:05-09 (counsel for EPA clarifying that were we to vacate the Guidance, nonattainment regions would remain obligated to submit SIPs under existing deadlines and would not receive extensions related to future rulemakings); *Lujan*, 504 U.S. at 562 (explaining that where "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation [of a third party]" the critical question is how the third party would respond to an order declaring the government's action illegal).

EPA nonetheless insists that the Guidance causes no injury because any approved alternative program will, by definition, be "not less stringent" than section 185 fees. Of course, this argument carries absolutely no weight with respect to the attainment alternative [***19] for which the Guidance [*319] [**405] requires no equivalency analysis. The argument is also unpersuasive with respect to the program alternative. To begin with, it is possible that a plan EPA might legitimately find equivalent to a section 185 penalty (and which we would thus uphold on the merits) could nonetheless be so meaningfully different as to cause cognizable Article III injury. In any event, even assuming that a resulting program were perfectly equivalent, the

delay in improving air quality would still injure NRDC members. EPA's argument also proves far too much. Were EPA to prevail, although NRDC might well have standing to bring an as-applied challenge to any particular "not less stringent" determination, no one would have standing to challenge EPA's authority to allow alternatives in the first place. Especially given that Congress enacted Subpart 2 for the very purpose of curtailing EPA discretion, *see Am. Trucking*, 531 U.S. at 484-86, it would be ironic indeed if the application of standing doctrine allowed EPA to effectively maintain that very discretion. Neither precedent nor logic requires us to adopt such a counterintuitive approach to standing.

The next two jurisdictional issues—finality [***20] and ripeness—turn on the same question: whether the Guidance announces a binding change in the law. *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (explaining that *HN6* to be final, the action must (1) "mark the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow" (internal quotation marks omitted)); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (identifying finality as a necessary feature of fitness for review). It did. Prior to issuing the Guidance, neither the statute nor EPA regulations nor case law authorized EPA regional directors to approve implementation plans containing alternatives to section 185 fees. Conceding as much with respect to regulations and case law, EPA argues that section 172(e) expressly authorizes alternatives in this specific context. We disagree. Although section 172(e) does allow EPA to sanction alternatives where it *relaxed* the NAAQS, nothing in the statute expressly addresses situations where, as here, EPA *strengthened* the NAAQS. Accordingly, while section 172(e) expressly [***21] contemplates alternatives, its application in this context requires interpretation—a point EPA acknowledges elsewhere when it asserts that "there is a gap in the statute that the

EPA must fill." Resp't's Br. 34. This is all the more so with respect to the attainment alternative: because section 172(e) protects against backsliding from an *old* standard, nothing in it hints that a state could escape from its strictures by satisfying a *new* standard.

EPA insists that the Guidance changed nothing because prior to its issuance, a regional director could have considered an alternative. Perhaps so, but that director also retained discretion, now withdrawn by the Guidance, to reject the alternative solely for failing to comply with section 185. Indeed, this is essentially what happened when the San Joaquin Valley Unified Air Pollution Control District submitted a section 185 plan that exempted certain major stationary sources. After notice and comment, EPA rejected the plan for failure to comply with section 185, explaining that because San Joaquin never characterized the plan as an alternative, EPA had no need to "take a final position regarding whether it could approve a substitute program [***22] for the program specified under [Clean Air Act] section 185." Revisions to the California State Implementation Plan, San Joaquin Valley United Air Pollution Control District, 75 Fed. Reg. 1716, 1717-18 (Jan. 13, 2010). In other words, had San Joaquin asked EPA to treat its proposal as an alternative, the regional director might have performed an equivalency analysis or determined that alternatives were categorically unacceptable. Post-Guidance, however, the director may no longer reject a plan on the latter ground. The permissibility of alternatives is now a closed question, and the Guidance leaves to future rulemakings only the issue of whether a specific proposed alternative satisfies the program or attainment option.

The Guidance's language supports the conclusion that EPA has definitively interpreted section 172(e) as permitting alternatives. The Guidance explains that "EPA is electing to consider alternative programs to satisfy the section 185 fee program [implementation plan] revision requirement," and

the document announces that "[i]f [EPA's] preliminary assessment indicates that the alternative program is not less stringent, we would issue a notice in the Federal Register proposing [***23] to make such a determination." *Fee Program Guidance* at 3. By contrast, with regard to approvability of individual plans, the document expressly reserves discretion for future administrative action: "The remainder of this memorandum describes the circumstances under which we believe we can approve an alternative program that is 'no less stringent.' These interpretations will only be finalized through . . . notice-and-comment rulemaking to address the fee program obligations associated with each applicable nonattainment area." *Id.*

In sum, then, the Guidance altered the legal regime by resolving the question posed by the Clean Air Act Advisory Committee: "Is it legally permissible under either section 185 or 172(e) for a State to exercise the discretion identified in [the options listed in this letter]?" *Task Force Letter*. Answering that question affirmatively, the Guidance binds EPA regional directors and thus qualifies as final agency action. Bennett, 520 U.S. at 177-78; see also Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020-23, 341 U.S. App. D.C. 46 (D.C. Cir. 2000) (explaining that HN7 for the purposes of finality, it is irrelevant how the interpretation will apply to any individual state's SIP-approval [***24] process). Moreover, because the Guidance is final, and because the issue raised by NRDC is purely legal, the question before us is fit for judicial review. See Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 215, 377 U.S. App. D.C. 234 (D.C. Cir. 2007) (HN8 "[A] purely legal claim in the context of a facial challenge is presumptively reviewable." (internal quotations marks and ellipses omitted)); see also Abbott Labs., 387 U.S. at 149 (describing the fitness requirement). And because HN9 "Congress has emphatically declared a preference for immediate review" with respect to Clean Air Act rulemaking, we have no need to consider the ripeness test's second element, namely, the hardship to the parties of withholding review.

Cement Kiln Recycling Coal., 493 F.3d at 215; see also *Natural Res. Def. Council v. EPA*, 22 F.3d 1125, 1133, 306 U.S. App. D.C. 43 (D.C. Cir. 1994) (finding such congressional intent in the sixty day time limit in the Clean Air Act judicial review provision—the same provision governing review in this case—and concluding, therefore, that the court need not consider hardship).

III.

Given that the Guidance document changed the law, the first merits question—whether the Guidance is a legislative rule that required notice and [***25] comment—is easy. See *HNI10* 5 U.S.C. § 553 (requiring that [***321] [***407] legislative rules, but not policy statements or interpretive rules, be issued only after notice and comment). To begin with, because the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy; it is a rule. *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94, 326 U.S. App. D.C. 422 (D.C. Cir. 1997) ("*HNI11* [P]olicy statements are binding on neither the public nor the agency." (internal citation omitted)); see also *Cement Kiln Recycling Coal.*, 493 F.3d at 226 & n.14 (finding that the inquiries into whether the agency action was final and whether the agency action was a rule were essentially the same). Moreover, contrary to EPA's alternative argument, this rule is not interpretive; it is legislative. As we explained above, nothing in the statute, prior regulations, or case law authorizes EPA to accept alternatives to section 185. Likewise, nothing prior to the Guidance entitled a state to have EPA evaluate a proposed alternative for equivalency rather than reject it outright. Accordingly, the Guidance qualifies as a legislative rule that EPA had no authority to issue without notice and comment. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112, 302 U.S. App. D.C. 38 (D.C. Cir. 1993) [***26] (stating that *HNI12* where "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties," the

rule is legislative).

Having concluded that EPA issued the Guidance in violation of the Administrative Procedure Act's notice and comment requirement, we could simply vacate and end this opinion. NRDC, however, urges us to resolve its substantive claims, arguing that "a ruling on these questions is in the interest of judicial and administrative economies." Pet'r's Br. 26. Our case law provides little direction on whether, having determined to vacate on procedural grounds, we should nonetheless address substantive claims. Compare *Sprint Corp. v. FCC*, 315 F.3d 369, 377, 354 U.S. App. D.C. 288 (D.C. Cir. 2003) (remanding without reaching substantive claims), and *Syncor Int'l Corp.*, 127 F.3d at 96 (same), with *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 4-6, 8, 335 U.S. App. D.C. 85 (D.C. Cir. 1999) (reaching statutory claims but declining to evaluate arbitrary and capricious challenges), *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206, 377 U.S. App. D.C. 356 (D.C. Cir. 2007) (vacating a portion of a rule both because [***27] agency failed to provide an opportunity for comment and because agency failed to provide adequate explanation), and *Ala. Power Co. v. FERC*, 160 F.3d 7, 11, 333 U.S. App. D.C. 77 (D.C. Cir. 1998) (finding it appropriate to proceed to petitioner's argument that agency lacked authority to take challenged action after having found that agency failed to follow required procedure in taking that action).

In deciding how to proceed here, we keep in mind two competing interests. On the one hand, we must avoid prejudging the notice and comment process, the very purpose of which is to give interested parties the opportunity to participate in rulemaking and to ensure that the agency has before it all relevant information. *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1140-41, 313 U.S. App. D.C. 51 (D.C. Cir. 1995). On the other hand, were we to vacate the Guidance without passing on the validity of the two alternatives, we could exacerbate the very delay that is injuring NRDC's members.

Evaluating the program alternative in light of these considerations, we believe that the interest in preserving the integrity of the notice and comment process strongly outweighs any concern about delay. Because neither the statute nor our case law obviously precludes [***28] that alternative, we believe that by weighing in now we would unfairly prejudge any future notice and comment process.

[*322] [**408] The attainment alternative presents a very different situation. Because it violates the statute's plain language and our precedent, nothing would be gained by postponing a decision on the merits. Indeed, doing so would exacerbate the delay that is harming NRDC.

We begin with the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (**HNI3**) "First, always, is the question whether Congress has directly spoken to the precise question at issue."). *Section 172(e)*'s plain language requires that any alternative be "not less stringent than applicable controls." Recall that under the attainment alternative, an area need achieve only one or the other of the two NAAQS, meaning that an area in attainment of the 8-hour standard may treat its 8-hour implementation plan as an alternative to section 185 fees for 1-hour nonattainment. Although it is theoretically possible that controls in place to meet the 8-hour standard in a particular region could be equivalent to the section 185 penalties under the 1-hour standard, EPA does not purport to draw such [***29] a conclusion. Instead, EPA equates the purpose of retaining section 185 as an anti-backsliding measure (to achieve attainment) with the purpose of 8-hour attainment controls (to achieve attainment). But it ignores the fact that to satisfy section 172(e), the alternative must be "not less stringent" than the applicable control required to attain the superseded standard. In other words, those two attainments are of different standards.

The attainment alternative also exceeds several of the limits to EPA's gapfilling discretion that we identified in *South Coast*. See *Sierra Club v. EPA*,

479 F.3d 875, 878, 880, 375 U.S. App. D.C. 228 (D.C. Cir. 2007) (per curiam) (explaining that **HNI4** where EPA violates "the Clean Air Act's plain language as interpreted by [our precedent]" that is "the end of the matter" (quoting *Chevron*, 467 U.S. at 842)). First, we held that applicable controls "must be enforced under the one-hour NAAQS." *S. Coast*, 472 F.3d at 903. Expressly contradicting that directive, the attainment alternative requires enforcement of section 185 in only a subset of the 1-hour nonattainment regions—those also in nonattainment of the 8-hour standard. Second, we explained that the purpose of maintaining "applicable [***30] controls" under the 1-hour standard was not to achieve attainment of the new standard, but rather to prevent backsliding from the old standard. *Id.* at 900 ("Considered as a whole, the Act reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter. Even if EPA set requirements that proved too stringent and unnecessary to protect public health, EPA was forbidden from releasing states from these burdens."). In other words, the Act creates a one-way ratchet, "plac[ing] states onto a one-way street whose only outlet is attainment" of the NAAQS—even NAAQS EPA has subsequently replaced. *Id.* Because the attainment alternative allows violations of the 1-hour standard to continue, it makes the ratchet two-way—a clear violation of the statute. Finally, we rejected EPA's argument that because it would no longer be making attainment findings under the 1-hour standard, it could refrain from enforcing section 185 on regions in severe and extreme nonattainment of that standard. Repeating this argument here, EPA tells us that because it "no longer promulgates redesignations for the 1-hour standard because that standard has been revoked . . . relief [***31] from the 1-hour fee program requirements under the terms of the statute is an impossibility, since the conditions the statute envisioned for relieving an area of its fee program obligation [*323] [**409] no longer can exist." *Fee Program Guidance* at 4. In *South Coast*, however, we explained that "**HNI5** section 172(e)

does not condition its strict distaste for backsliding on EPA's determinations of expediency; EPA must determine its procedures *after* it has identified what findings must be made under the Act." 472 F.3d at 903. The same is true here.

In concluding that EPA has once again "failed to heed the restrictions on its discretion set forth in the [Clean Air] Act," S. Coast, 472 F.3d at 886, we recognize that EPA believes "it would unfairly penalize sources in these areas to require that fees be paid after an area has attained the 8-hour standard due to permanent and enforceable emission reductions because the fees were imposed due to a failure to meet the applicable attainment deadline for the 1-hour standard, not any failure to achieve the now applicable 8-hour standard by its attainment date." Fee Program Guidance at 4. But as we have said before, HNI16 "[i]f the Environmental Protection Agency disagrees [***32] with the Clean Air Acts' requirements . . . , it should take its concerns to Congress. . . . In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court." Sierra Club, 479 F.3d at 884.

IV.

For the foregoing reasons, we grant the petition for review and vacate the Guidance.

So ordered.

Tab 8

United States Telecom Ass'n v. FCC

United States Court of Appeals for the District of Columbia Circuit

November 18, 2004, Argued ; March 11, 2005, Decided

No. 03-1414, Consolidated with 03-1443

Reporter

400 F.3d 29 *; 365 U.S. App. D.C. 149 **; 2005 U.S. App. LEXIS 4058 ***; 35 Comm. Reg. (P & F) 492

UNITED STATES TELECOM ASSOCIATION
AND CENTURYTEL, INC., PETITIONERS v.
FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS, CELLULAR
TELECOMMUNICATIONS & INTERNET
ASSOCIATION, ET AL., INTERVENORS

Subsequent History: Costs and fees proceeding at, Motion denied by United States Telecom Ass'n v. FCC, 2005 U.S. App. LEXIS 18599 (D.C. Cir., Aug. 26, 2005)

Appeal after remand at, Petition denied by, Decision reached on appeal by Nat'l Tel. Coop. Ass'n v. FCC, 563 F.3d 536, 385 U.S. App. D.C. 327, 2009 U.S. App. LEXIS 9741 (2009)

Prior History: [***1] On Petitions for Review of an Order of the Federal Communications Commission.

In re Tel. No. Portability, 18 F.C.C.R. 23697, 2003 FCC LEXIS 6249 (F.C.C., 2003)

Disposition: Petitions for review granted in part and denied in part. Order remanded to FCC to prepare final regulatory flexibility analysis, and matter stayed pending preparation of analysis.

Core Terms

carriers, portability, Intermodal, wireline, porting, first order, wireless, notice, requirements, numbers, telephone number, telecommunications, subscribers, legislative rule, rulemaking, physical

location, regulations, telephone, provider, users, second order, customer's, entities, notice-and-comment, comments, final regulatory flexibility, service area, Declaratory, procedures, issues

Case Summary

Procedural Posture

Petitioner wireline carriers challenged an order on the carriers' transfer of telephone numbers to wireless carriers, arguing the order was a legislative rule issued without notice and comment under the Administrative Procedure Act (APA), 5 U.S.C.S. § 553, and a regulatory flexibility analysis under the Regulatory Flexibility Act (RFA), 5 U.S.C.S. § 604. Respondent Federal Communications Commission (FCC) argued the order was interpretative.

Overview

The order required porting numbers to wireless carriers where the requesting wireless carrier's "coverage area" overlapped the geographic location of the rate center of the customer's wireline number, if the porting-in carrier kept the number's original rate center designation. A wireless carrier's "coverage area" was defined as the area where wireless service could be received from the wireless carrier. It effectively required carriers to provide customers with the ability to retain their numbers when moving from one physical location to another, notwithstanding a prior order, which expressly declared that wireline carriers were not obligated to provide location portability. The challenged order was a legislative rule subject to the APA. Since the FCC published notice in the Federal Register, and received and considered

comments, and the proposal was virtually identical to the order adopted, any error was harmless. But, the failure to follow the RFA was not harmless; it was impossible to know the impact on small entities without a regulatory flexibility analysis required under 5 U.S.C.S. §§ 604(a)(3), 611(a)(4). Remand and a stay of enforcement against small entities was proper.

Outcome

The petitions for review were denied as the claim under the APA claim. The petitions with respect to the RFA claim were granted. The challenged order was remanded to the FCC for the purpose of preparing a final regulatory flexibility analysis. Any future enforcement of the order against carriers that were "small entities" under the RFA was stayed until the FCC prepared and published a final regulatory flexibility analysis.

LexisNexis® Headnotes

Communications Law > Federal Acts > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > Coverage & Definitions

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN1 The Telecommunications Act of 1996 imposes numerous duties on local exchange carriers, wireline carrier companies that provide telephone service over telephone wires. 47 U.S.C.S. § 153(26). One obligation is to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the

Federal Communications Commission. 47 U.S.C.S. § 251(b)(2). The Act defines "number portability" as the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another. 47 U.S.C.S. § 153(30). The Act further directs the Commission to establish regulations to implement the statutory requirements. 47 U.S.C.S. § 251(d)(1).

Administrative Law > Agency

Rulemaking > Informal Rulemaking

HN2 The Administrative Procedure Act (APA) imposes notice-and-comment requirements that must be followed before a rule may be issued. 5 U.S.C.S. § 553. The APA expressly states, however, that those procedural requirements do not apply to "interpretative rules." 5 U.S.C.S. § 553(b). Courts and many commentators have generally referred to the category of rules to which the notice-and-comment requirements do apply as "legislative rules."

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Informal Rulemaking

HN3 A rule that effectively amends a prior legislative rule is a legislative, not an interpretative rule. This "effective amendment" test has been formulated in a number of ways. New rules that work substantive changes, or "major substantive legal additions" to prior regulations are subject to the Administrative Procedure Act's (APA) procedures. If an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required. Fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule.

Administrative Law > Agency
Rulemaking > Informal Rulemaking

Communications Law > Federal Acts > General
Overview

Communications Law > Federal
Acts > Telecommunications Act > General Overview

HN4 The Telecommunications Act of 1996 mandates number porting in accordance with requirements prescribed by the Federal Communications Commission, 47 U.S.C.S. § 251(b)(2), requirements that are to be "implemented" in "regulations." 47 U.S.C.S. § 251(d). When a statute defines a duty in terms of agency regulations, those regulations are considered legislative rules.

Administrative Law > Agency Rulemaking > General
Overview

Administrative Law > Agency
Rulemaking > Informal Rulemaking

HN5 See 5 U.S.C.S. § 553(b), (c), (d).

Administrative Law > Agency
Rulemaking > Informal Rulemaking

Administrative Law > ... > Constitutional
Controls > Authority to Adjudicate > Declaratory
Orders

HN6 To remand solely because the agency labeled the action a declaratory ruling rather than as a notice of proposed rulemaking would be to engage in an empty formality under 5 U.S.C.S. § 553.

Administrative Law > Agency
Rulemaking > Informal Rulemaking

Administrative Law > Judicial Review > Standards of
Review > General Overview

Civil Procedure > ... > Standards of
Review > Harmless & Invited Errors > General
Overview

Civil Procedure > Appeals > Standards of
Review > Prejudicial Errors

HN7 5 U.S.C.S. § 706 requires courts to take "due

account" of "the rule of prejudicial error." An utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure.

Administrative Law > Agency Rulemaking > General
Overview

Administrative Law > Agency
Rulemaking > Informal Rulemaking

HN8 The Regulatory Flexibility Act imposes procedural requirements on agency rulemaking, in particular the preparation of a "final regulatory flexibility analysis" regarding the effect of the rule on small businesses. 5 U.S.C.S. § 604. That requirement applies when an agency promulgates a final rule under 5 U.S.C.S. § 553, after being required by that § 553 or any other law to publish a general notice of proposed rulemaking.

Administrative Law > Agency
Rulemaking > Informal Rulemaking

Administrative Law > Judicial
Review > Reviewability > Jurisdiction & Venue

HN9 The Regulatory Flexibility Act grants courts jurisdiction to review claims of noncompliance with the provision of the Act that requires preparation of a final regulatory flexibility analysis. 5 U.S.C.S. § 604.

Administrative Law > Agency
Rulemaking > Informal Rulemaking

Administrative Law > Judicial Review > Remand &
Remittitur

HN10 The Regulatory Flexibility Act outlines the remedies available for its violation. 5 U.S.C.S. § 611(a)(4).

Administrative Law > Agency
Rulemaking > Informal Rulemaking

Administrative Law > Judicial Review > Remand &
Remittitur

HN11 See 5 U.S.C.S. § 611(a)(4).

Counsel: Aaron M. Panner argued the cause for petitioners. With him on the briefs were Michael K. Kellogg, David E. Frulla, Andrew D. Herman, L. Marie Guillory, Jill Canfield, and Michael T. McMenamain.

Gregory W. Whiteaker, Michael R. Bennet, and Rebecca L. Murphy were on the brief for intervenors Central Texas Telephone Cooperative, Inc., et al. in support of petitioners.

Ivan C. Evilsizer was on the brief for amicus curiae Hot Springs Telephone Co. in support of petitioners.

Joel Marcus, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were R. Hewitt Pate, Assistant Attorney General, U.S. Department of Justice, Catherine G. O'Sullivan and Andrea Limmer, Attorneys, John A. Rogovin, General Counsel, Federal Communications Commission, Richard K. Welch, Associate General Counsel, John E. Ingle, Deputy Associate General Counsel, and Rodger D. Citron, Counsel.

Theodore C. Whitehouse, David M. Don, John J. LoCurto, Luisa L. Lancetti, Charles W. McKee, Michael F. Altschul, Robert J. Aamoth, and Todd D. Daubert were on the brief for intervenors Cellular [***2] Telecommunications & Internet Association, et al. in support of respondents.

Judges: Before: SENTELLE, RANDOLPH, and GARLAND, Circuit Judges. Opinion for the Court filed by Circuit Judge GARLAND.

Opinion by: GARLAND

Opinion

[**150] [*30] GARLAND, *Circuit Judge*: The petitioners in these consolidated petitions for review challenge an order of the Federal Communications Commission (FCC) that sets forth the conditions under which wireline telecommunications carriers must transfer

telephone numbers to wireless carriers. The petitioners argue that the FCC's order is a legislative rule that requires notice and comment under the Administrative Procedure Act (APA), 5 U.S.C. § 553, and a regulatory flexibility analysis under the Regulatory Flexibility Act (RFA), 5 U.S.C. § 604. The FCC contends that its order is an interpretative rule a rule that merely interprets one of the FCC's previous legislative rules and hence is exempt from APA and RFA requirements.

We conclude that the order is a legislative rule because it constitutes a substantive change in a prior rule. Although this rendered the order subject to the APA's notice-and-comment requirements, we find that the FCC [***3] effectively complied with those requirements (notwithstanding its view that it was not required to do so), and that any deviations were at most harmless error. There is no dispute, however, that the FCC failed to comply with the RFA's requirement to prepare a final regulatory flexibility analysis regarding the order's impact on small entities.

In light of these conclusions, we grant the petitions in part and deny them in part, remanding the order to the FCC to prepare a final regulatory flexibility analysis. Until that analysis is complete, we stay the effect of the order solely as it applies to those carriers that qualify as small entities under the RFA.

I

HNI The *Telecommunications Act of 1996* imposes numerous duties on local exchange carriers (LECs), which, for purposes of this case, are wireline carriers companies that provide telephone service over telephone wires. See 47 U.S.C. § 153(26) (defining LECs); see also FCC Br. at 2. The duty at issue here is the obligation "to provide, to the extent technically feasible, [*31] [**151] number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). The Act [***4] defines "number portability" as "the ability of users of telecommunications services to retain, at the same

location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." *Id.* § 153(30). The Act further directs the FCC "to establish regulations to implement" the statutory requirements. *Id.* § 251(d)(1).

On July 2, 1996, shortly after the 1996 Telecommunications Act became law, the FCC released its first order regarding number portability. See First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 F.C.C.R. 8352 (1996) (*First Order*). The *First Order* was issued pursuant to APA notice-and-comment procedures, and contained the regulatory flexibility analysis required by the RFA. *Id.* P 1, at 8353-54, app. C, at 8486. In the *First Order*, the FCC recognized two kinds of portability that are relevant to this case: "service provider portability" and "location portability." *Id.* PP 172, 174, at 8443.

The *First Order* required all carriers to provide service provider portability, which it made [***5] "synonymous with" the statutory definition of number portability: "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers . . . when switching from one telecommunications carrier to another." *Id.* P 27, at 8366- 67. Compare 47 C.F.R. § 52.21(q), with 47 U.S.C. § 153(30). In addition, the *First Order* clarified that the portability obligation included not only porting between wireline carriers, but also "intermodal portability": the porting of numbers from wireline carriers to wireless providers, and vice versa. *First Order* P 152, 11 F.C.C.R. at 8431, P 155, at 8433, P 166, at 8440; see 47 C.F.R. §§ 52.23(b), 52.31(a).¹

¹ The *First Order* also required porting between wireless providers. *First Order* P 155, 11 F.C.C.R. at 8433. Although the Telecommunications Act of 1996 imposed porting duties only on LECs, the FCC relied on another statute, the *Telecommunications Act of 1934*, as the basis for imposing a porting obligation on

[***6] Although the *First Order* mandated service provider portability, it expressly declined to require "location portability," which it defined as "the ability of users of telecommunications services to retain existing telecommunications numbers . . . when moving from one physical location to another." *First Order* P 174, 11 F.C.C.R. at 8443; see *id.* P 6, at 8356; 47 C.F.R. § 52.21(j). But the *First Order* left many issues unresolved. In particular, while it required porting "at the same location," and expressly declined to require porting when moving from "one physical location to another," it did not define the word "location."

The FCC enlisted a federal advisory committee, the North American Numbering Council (NANC), to make recommendations regarding the implementation of number portability. See *First Order* PP 94-95, 11 F.C.C.R. at 8401-02. The FCC also established a phased schedule requiring LECs to complete implementation of number portability in the 100 largest metropolitan areas by December 31, 1998. See *id.* P 77, at 8393. As a result of subsequent postponements, the carriers' intermodal porting duty did not [***7] commence until November 24, 2003 in large metropolitan areas, and until six months later in other areas. See *Verizon Wireless' Petition for Partial Forbearance from the [***32] [***152] Commercial Mobile Radio Services Number Portability Obligation* P 31, 17 F.C.C.R. 14972, 14985-86, P 34, at 14986-87 (2002).

In 1997, the FCC received the NANC's recommendations regarding wireline-to-wireline service provider portability and issued a second order that adopted those recommendations. See *Second Report and Order, Telephone Number Portability*, 12 F.C.C.R. 12281 (1997) (*Second Order*); 47 C.F.R. § 52.26(a) (codifying the NANC Working Group Report). Like the *First Order*, the *Second Order* was issued pursuant to notice and comment and included a regulatory flexibility

wireless carriers. *Id.* P 4, at 8355, P 153, at 8431 (relying on the FCC's authority over the wireless spectrum, as described in 47 U.S.C. § 332).

analysis. *Second Order* P 2, 12 F.C.C.R. at 12283, app. C, at 12358. Under the *Second Order*, wireline-to-wireline number portability was "limited to carriers with facilities or numbering resources in the same rate center . . ." See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*; [***8] *CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues* P 7, 18 F.C.C.R. 23697, 23700 (2003) (*Intermodal Order*) (citing the *Second Order's* adoption of the NANC recommendations). Accordingly, a subscriber could not keep the same telephone number if he changed from a wireline telephone in one rate center to a wireline telephone physically located in a different rate center. *Id.* P 7, at 23,700, P 24, at 23,707. A "rate center" is a relatively small geographic area, designated by a LEC and state regulators, that is used to determine whether a given call is local or toll. See FCC, FCC Clears Way for Local Number Portability Between Wireline and Wireless Carriers, 2003 FCC LEXIS 6247, 2003 WL 22658210 (Nov. 10, 2003); FCC Br. at 6-7.

The *Second Order* was limited to wireline-to-wireline portability and did not resolve any issues relating to intermodal portability. Instead, the FCC once again enlisted the NANC to develop standards necessary to provide for wireless carriers' participation in number portability. See *Second Order* P 91, 12 F.C.C.R. at 12333. In particular, the FCC asked the NANC to consider "how to account for [***9] differences between service area boundaries for wireline versus wireless services." *Id.* P 91, at 12334. (The "service area" of a wireless carrier is typically considerably larger than the rate center of a LEC. See FCC Br. at 7.) But the NANC was unable to reach a consensus on intermodal portability issues, especially because of the problem of "rate center disparity":

Because wireline service is fixed to a specific location the subscriber's telephone number is limited to use within the rate center within which it is assigned. By contrast, . . . because

wireless service is mobile . . . , while the wireless subscriber's number is associated with a specific geographic rate center, the wireless service is not limited to use within that rate center.

Intermodal Order P 11, 18 F.C.C.R. at 23,701 (discussing NANC Report).

On January 23, 2003, the Cellular Telecommunications & Internet Association (CTIA) petitioned the FCC for a declaratory ruling that "wireline carriers have an obligation to port their customers' telephone numbers to a [wireless] provider whose service area overlaps the wireline carrier's rate center" associated with the requested [***10] number. See Petition for Declaratory Ruling of the CTIA, *Telephone Number Portability*, CC Docket No. 95-116 (Jan. 23, 2003), at 1. CTIA asked the FCC to reject the view of certain LECs that portability was required only when a wireless provider had a physical presence in the wireline rate center from which the customer sought to port the number. *Id.* at 3. The FCC issued a public notice seeking comments on CTIA's proposed rule. [*33] [***153] See Petition for Declaratory Ruling That Wireline Carriers Must Provide Portability to Wireless Carriers Operating Within Their Service Areas, 68 Fed. Reg. 7323 (Feb. 13, 2003) (corresponding Shepard's decision can be found at 18 F.C.C.R. 832). Numerous members of the wireline industry, including several of the petitioners here,² submitted comments.

[***11] Some of the commenters argued that the FCC could not adopt the rule requested by CTIA without following APA rulemaking procedures.³

² See, e.g., Comments of the U.S. Telecom Ass'n, *Telephone Number Portability*, CC Docket No. 95-116 (Feb. 26, 2003); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, *Telephone Number Portability*, CC Docket No. 95-116 (Feb. 26, 2003).

³ See, e.g., Ex Parte Letter from M.T. McMenamin, USTA, to M.H. Dortch, FCC, *Telephone Number Portability*, CC Docket No. 95-116 (Sept. 30, 2003); Ex Parte Letter from K.B. Levitz, BellSouth, to

Those commenters contended that intermodal porting, as proposed by CTIA, necessarily entails location portability because it requires LECs to port numbers to a wireless carrier even if the carrier has no facilities or assigned telephone numbers within the rate center associated with the number to be ported.⁴ Other commenters focused on the merits of the proposal. Those contended, inter alia, that CTIA's proposal would give wireless carriers unfair advantages over wireline carriers: while it would permit wireless carriers to port numbers from and thus compete for wireline customers, wireline carriers would be unable to compete for wireless customers whose numbers were outside the wireline carriers' rate centers.⁵ Finally, some commenters contended that CTIA's proposal would impose special burdens on small and rural telephone companies. They argued that, because wireless carriers rarely have switching capability within the service areas of small, independent wireline carriers serving small towns or rural areas, those wireline carriers would have [***12] to bear the costs of transporting calls outside their local service territories when their customers made calls to wireless subscribers with ported numbers.⁶

On November 10, 2003, the FCC released the order at issue in this case, known as the *Intermodal Order*, 18 F.C.C.R. 23697 (2003). The *Intermodal Order* [***13] adopted the rule proposed in the CTIA petition. It requires wireline carriers to "port numbers to wireless carriers where the requesting wireless carrier's 'coverage area' overlaps the geographic location of the rate center in which the customer's wireline number is provisioned," so long as "the porting-in carrier maintains the number's

M.H. Dortch, FCC, *Telephone Number Portability*, CC Docket No. 95-116 (Sept. 30, 2003).

⁴ See Ex Parte Letter of M.T. McMenamin, *supra*; Ex Parte Letter of K.B. Levitz, *supra*.

⁵ See Ex Parte Letter from C. O'Connell, Qwest, to M.H. Dortch, FCC, *Telephone Number Portability*, CC Docket No. 95-116 (Oct. 17, 2003).

⁶ See Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, *supra*.

original rate center designation following the port." *Id.* P 22, at 23,706. A wireless carrier's "coverage area" is defined as the "area in which wireless service can be received from the wireless carrier." *Id.* P 1, at 23,698.⁷

[***14] [**154] [*34] The FCC insisted that the *Intermodal Order* had merely adopted "clarifications" of the wireline carriers' existing obligation under prior orders, and hence did not require a new rulemaking. *Id.* P 26, at 23,708. The Commission rejected the contention that it had imposed a duty of location portability. Because the number has to retain its original rate center designation, the FCC said, the number remains at the "same location" for purposes of the statutory and regulatory definitions of portability. *Id.* P 28, at 23,708-09. The fact that the order requires wireline carriers to port numbers to wireless carriers that do not have "a physical point of interconnection or numbering resources in the rate center where the number is assigned" does not, according to the FCC, amount to location portability. *Id.* P 1, at 23,698; see *id.* P 26, at 23,708.

The U.S. Telecom Association and other entities, principally advancing the interests of wireline carriers, now petition for review of the *Intermodal Order*. They do not challenge the merits of the order. Rather, they contend that it is invalid solely because it is a legislative rule issued without adherence to the procedural [***15] requirements of the APA and RFA.⁸

⁷ The order also required wireless carriers to port numbers to wireline carriers, but only to wireline carriers within a number's originating rate center. Moreover, "because of the limitations on wireline carriers' networks ability to port-in numbers from distant rate centers," the FCC said it would "hold neither the wireline nor the wireless carriers liable for failing to port under these conditions," but would instead issue a further notice of proposed rulemaking on the issue. *Intermodal Order* P 22, at 23,706.

⁸ On May 13, 2003, CTIA filed a separate petition with the FCC regarding wireless-to-wireless porting. The FCC issued an order resolving that petition on October 7, 2003. See *Telephone Number Portability -Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, 18 F.C.C.R. 20971 (2003). That order is the subject

II

HN2 The *Administrative Procedure Act* imposes notice-and-comment requirements (the specifics of which we discuss in Part III) that must be followed before a rule may be issued. See 5 U.S.C. § 553. The APA expressly states, however, that those procedural requirements do not apply to "interpretative rules." See id. § 553(b).⁹ This court and many commentators have generally referred to the category of rules to which [***16] the notice-and-comment requirements do apply as "legislative rules."¹⁰

The petitioners contend that the *Intermodal Order* constitutes a legislative rule because it effectively amends the FCC's previous legislative rule -- the *First Order*. See, e.g., American Mining Cong. v. Mine Safety & Health Admin., 302 U.S. App. D.C. 38, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (stating that **HN3** a rule that "effectively amends a prior legislative [***17] rule" is "a legislative, not an interpretative rule").¹¹ Our cases have formulated this "effective amendment" test in a number of ways. We have, for example, held that "new rules that work substantive changes," Sprint Corp. v. FCC, 354 U.S. App. D.C. 288, 315 F.3d 369, 374

of another set of petitions for review in this court, which were argued on the same day as the present case. See Central Tex. Tel. Coop., Inc. v. FCC, 365 U.S. App. D.C. 247, 402 F.3d 205, 2005 U.S. App. LEXIS 4057, No. 03-1405 (D.C. Cir. Mar. 11, 2005).

⁹ Although the APA's notice-and-comment procedures are also inapplicable to certain "adjudications," the FCC made it clear that it regards the *Intermodal Order* as a rule rather than an adjudication. See FCC Br. at 18; Oral Arg. Tape at 30:02-30:35.

¹⁰ See, e.g., Appalachian Power Co. v. EPA, 341 U.S. App. D.C. 46, 208 F.3d 1015, 1020 & n.11 (D.C. Cir. 2000); RICHARD J. PIERCE, JR., I ADMINISTRATIVE LAW TREATISE § 6.1, at 304 (2002); John F. Manning, *Nonlegislative Rules*, 72 *GEO. WASH. L. REV.* 893, 893 (2004).

¹¹ See also Sprint Corp. v. FCC, 354 U.S. App. D.C. 288, 315 F.3d 369, 374 (D.C. Cir. 2003)

(noting that "an amendment to a legislative rule must itself be legislative" (quotation marks omitted)); National Family Planning & Reprod. Health Ass'n v. Sullivan, 298 U.S. App. D.C. 288, 979 F.2d 227, 235 (D.C. Cir. 1992) (same).

(D.C. Cir. 2003) (emphasis added), [***35] [***155] or "major substantive legal additions," Appalachian Power Co. v. EPA, 341 U.S. App. D.C. 46, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (emphasis added), to prior regulations are subject to the APA's procedures.¹² Enunciating a similar test, the Supreme Court has said that if an agency adopts "a new position *inconsistent with*" an existing regulation, or effects "a substantive change in the regulation," notice and comment are required. Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100, 131 L. Ed. 2d 106, 115 S. Ct. 1232 (1995) (emphases added) (quotation marks omitted); see id. at 101. Although these verbal formulations vary somewhat, their underlying principle is the same: fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive [***18] regulatory change an interpretative rule. See Appalachian Power Co., 208 F.3d at 1024 ("An agency may not escape . . . notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation."); C.F. Communications Corp. v. FCC, 327 U.S. App. D.C. 1, 128 F.3d 735, 739 (D.C. Cir. 1997) (holding that the FCC "may not bypass [the APA's notice-and-comment] procedure by rewriting its rules under the rubric of 'interpretation'").

[***19] We agree with the petitioners that the *Intermodal Order* effects a substantive change in the *First Order*. The *First Order* required carriers to ensure "the ability of users of telecommunications services to retain, *at the same location*, existing telecommunications numbers . . . when switching from one telecommunications carrier to another." *First Order* P 27, 11 *F.C.C.R. at*

¹² See also Alaska Prof'l Hunters Ass'n v. FAA, 336 U.S. App. D.C. 197, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."); American Mining Cong., 995 F.2d at 1109 ("If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first . . ." (quotation mark omitted) (second alteration in original)).

8366-67 (emphasis added); 47 C.F.R. § 52.21(q) (emphasis added). Although the *First Order* did not expressly define "same location," the FCC did declare that it would not require "location portability," which it defined as "the ability of users of telecommunications services to retain existing telecommunication numbers . . . when moving from one *physical* location to another." *First Order* P 174, 11 F.C.C.R. at 8443 (emphasis added); see *id.* P 6, at 8356; 47 C.F.R. § 52.21(j).

The *Intermodal Order*, by contrast, requires carriers to provide users with the ability to retain their existing numbers *regardless of* physical location. Under that order, a wireline carrier must port whenever "the requesting [***20] wireless carrier's 'coverage area' overlaps the geographic location of the rate center in which the customer's wireline number is provisioned," provided that the porting-in carrier maintains the number's original rate center designation. *Intermodal Order* P 22, 18 F.C.C.R. at 23,706. Because wireless carriers' coverage (service) areas are often quite expansive - in some cases encompassing much of the United States -- the *Intermodal Order* effectively requires carriers to provide their subscribers with the ability to retain their numbers "when moving from one physical location to another," notwithstanding the *First Order's* declaration that such location portability would not be mandated.

Nor can the *Intermodal Order* derive support from the *Second Order* another prior legislative rule, also issued pursuant to notice and comment. In the *Second* [***36] [***156] *Order*, which established the requirements for number portability in the wireline-to-wireline context, the FCC provided that such portability was "limited to carriers with facilities or numbering resources in the same rate center . . ." *Intermodal Order* P 7, 18 F.C.C.R. at 23,700. But the [***21] *Intermodal Order* rejects a similar limitation for wireline-to-wireless portability, and instead requires wireline carriers to port numbers to wireless carriers that do "not have a point of interconnection or numbering resources in the same rate center as the ported number. . ."

Id. P 26, at 23,708; see *id.* P 1, at 23,698 (describing a "point of interconnection" as something "physical"); *In re Starnet, Inc.*, 355 F.3d 634, 638 (7th Cir. 2004) (noting that "usually a rate center corresponds to the group of customers (a subset of an area code) served by a given complement of telephone switching equipment").

In short, the *Intermodal Order* requires wireline carriers to port telephone numbers without regard to the physical location of the subscriber, the equipment, or the carrier, and thus effectively requires location portability a requirement that the *First Order* had foresworn. Under the *Intermodal Order*, a wireline subscriber can move from New York to California --3000 miles from his original residence, from the wire attached to his original wireline telephone, from the geographic boundaries of the original rate center, and from the original wireline [***22] company's point of interconnection -- and yet keep his telephone number provided that he switches to a wireless company with service overlapping the original rate center. Everything physical the person, the residence, the telephone, the point of interconnection -- is at a new location, yet porting is nonetheless required. Hence, by adopting the *Intermodal Order*, the FCC removed its prior "physical location" limitation on the duty to port.

The FCC makes three arguments in support of the contrary contention. First, it points to a single sentence in the *First Order* that, it maintains, provided notice of the interpretation later adopted in the *Intermodal Order*. That sentence, which comes directly after one that defines "location portability," reads as follows: "Today, telephone subscribers must change their telephone numbers when they move outside the area served by their current central office." *First Order* P 174, 11 F.C.C.R. at 8443.

We do not see how this sentence provides support for the rule announced in the *Intermodal Order*. As the FCC concedes, the sentence described the FCC's then-current rules --which did not require

location portability. FCC [***23] Br. at 25. The sentence thus made clear that *unless* the Commission were to impose location portability which it declined to do and insists it still has not done¹³ subscribers would have to change their numbers if they moved outside the area served by their current carrier's central office. Yet as we have discussed, under the *Intermodal Order* subscribers need *not* change their telephone numbers when they move outside the area served by their central office: instead, they can switch to a cell phone and retain the same number as long as they move anywhere in the wireless company's overlapping service area even across the country. Hence, the *Intermodal Order* permits the very outcome that the Commission associated with *location* portability. Moreover, because the ported number includes the subscriber's original area code, this kind of portability exhibits a principal problem that the *First Order* associated with location portability: the [*37] [**157] "loss of geographic identity of one's telephone number." *First Order* P 176, 11 F.C.C.R. at 8444.

[***24] This point is further driven home by examining the notice of proposed rulemaking that preceded the *First Order*. That notice contained the same sentence that would later appear in the *First Order*. But it also contained a succeeding sentence that made the Commission's meaning unmistakable by explaining what location portability would enable subscribers to do:

Today, telephone subscribers must change their telephone numbers when they move outside the area served by their current central office. *Location portability would enable subscribers to keep their telephone numbers when they move to a new neighborhood, a nearby community, across the state, or even, potentially, across the country.*

Notice of Proposed Rulemaking, *Telephone*

¹³ See *Intermodal Order* P 28, 18 F.C.C.R. at 23,708-09; FCC Br. at 5.

Number Portability P 26, 10 F.C.C.R. 12350, 12360 (1995) (emphasis added). And that is precisely what the *Intermodal Order* now enables subscribers to do.

Second, the FCC argues that "porting from a wireline to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number does not, in and of itself, constitute location portability, *because* [***25] *the rating of calls to the ported number stays the same.*" *Intermodal Order* P 28, 18 F.C.C.R. at 23,708 (emphasis added). The rating remains the same because the FCC added that requirement as a proviso: a wireline carrier must port to a wireless carrier if the latter's service area overlaps the rate center associated with the subscriber's number, "provided that the porting-in carrier maintains the number's original rate center designation following the port." *Id.* P 22, at 23,706. The FCC insists that under this proviso, "the number does not leave the rate center," and hence "it has not been subject to location porting." FCC Br. at 25-26 (emphasis in original) (citing *Intermodal Order* P 28).

But this focus on the "location" of the telephone number, based solely on its rating, is at best *metaphysical*. It surely is not the physical location discussed in the *First Order*.¹⁴ Moreover, the *First Order* emphasized the *user's* location, not the *number's*. See *First Order* P 172, 11 F.C.C.R. at 8443 (defining location portability as "the ability of users. . . to retain existing telecommunications numbers . . . when moving [***26] from one physical location to another" (emphasis added)); *id.* P 181, at 8447 (declaring that the "1996 Act's requirement to provide number portability is limited to situations when *users* remain 'at the same location'" (emphasis added)). Indeed, in the

¹⁴ Indeed, at oral argument in the companion case, which concerned the FCC's order on wireless-to-wireless porting, see *supra* note 8, FCC counsel conceded that to say a number is "located" within its rate center is "almost a bit of fiction; there really is no physical location . . ." *Central Tex. Tel. Coop., Inc. v. FCC*, No. 03-1405, Oral Arg. Tape at 32:05-32:28.

sentence highlighted by the FCC and discussed above, the *First Order* explained that in the absence of location portability, "*subscribers* must change their telephone numbers when *they* move outside the area served by their current central office." *Id.* P 174, at 8443 (emphases added).

Third, the FCC argues that the *Intermodal Order* did not substantively change the [***27] *First Order*, but instead merely curtailed the unlimited portability requirement imposed in the *First Order*. The *First Order*, the FCC contends, "imposed no limitations on the LECs' duty of wireline-to-wireless porting." FCC Br. at 20. And in the Commission's view, the petitioners [**158] [*38] have no reason to complain about a rule that merely reduced their preexisting obligations.

But it is simply wrong to say that the *First Order* "imposed no limitations" on a wireline carrier's duty to port numbers to a wireless carrier. To the contrary, the order expressly limited that obligation by declaring that wireline carriers were not obligated to provide location portability. *First Order* P 6, 11 F.C.C.R. at 8356. Accordingly, the petitioners have every reason to complain about a rule (if promulgated without notice and comment) that jettisoned the *First Order's* promise regarding location portability.

Indeed, the FCC does not truly contend that the *Intermodal Order* would have been valid had it contained *no* limitation on the "unlimited" requirement of the *First Order*. Rather, as noted above, the FCC's claim that the *Intermodal Order* does not impose location [***28] portability depends upon the order's proviso that the porting-in carrier must maintain the number's original rate center designation. Nor is that the only necessary limitation in the FCC's view. The principal limit on portability announced by the *Intermodal Order* is that the wireless carrier's coverage area must overlap the geographic rate center in which the customer's wireline number is provisioned. And at oral argument, the FCC conceded that, had the *Intermodal Order* not included such a limit on the

porting obligation, it "would have begun to be inconsistent with location portability." Oral Arg. Tape at 38:51-39:28. It is thus clear that the *Intermodal Order* cannot be defended as an interpretation that merely cuts back on an ostensibly unlimited portability obligation imposed by the *First Order*.

In short, this is not a case in which an interpretative rule merely "supplies crisper and more detailed lines than the authority being interpreted," *American Mining Cong.*, 995 F.2d at 1112, or simply provides "a clarification of an existing rule," *Sprint Corp.*, 315 F.3d at 374. Rather, it is one in which the rule at issue substantively changes [***29] a preexisting legislative rule. Such a rule is a legislative rule, and it can be valid only if it satisfies the notice-and-comment requirements of the APA.

There is another reason, specific to the 1996 Telecommunications Act, to regard the rule at issue here as legislative. **H₄** The 1996 Act mandates number porting "in accordance with requirements prescribed by the Commission," 47 U.S.C. § 251(b)(2), requirements that are to be "implemented" in "regulations." *Id.* § 251(d). As we explained in *American Mining Congress*, when a statute defines a duty in terms of agency regulations, those regulations are considered legislative rules. 995 F.2d at 1109.

Of course, even when a statute requires an agency to proceed by implementing regulations, it need not develop legislative rules to "address every conceivable question." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96, 131 L. Ed. 2d 106, 115 S. Ct. 1232 (1995). But the question of what Congress meant by "at the same location" in its definition of number portability is not just any "conceivable question." Rather, it is a crucial statutory element of the portability requirement itself, at least as far [***30] as wireline-to-wireless porting is concerned. Accordingly, the *First Order* did not satisfy the FCC's statutory obligation to "establish regulations" to implement number portability when

it merely required "service provider portability," and then defined that phrase by parroting the definition of number portability already contained in the statute. *See supra* Part I; cf. *Pearson v. Shalala*, 334 U.S. App. D.C. 71, 164 F.3d 650, 660 (D.C. Cir. 1999) ("We are [*39] [**159] quite unimpressed with the government's argument that the agency is justified in employing this standard without definition because Congress used the same standard . . ."). Something more was necessary,¹⁵ and that something was provided by the specifics of the wireline-to-wireless regulations contained in the *Intermodal Order*.

[**31] Finally, the FCC complains that technological disparities require a different interpretation of the statutory term "location" in the intermodal context than in the wireline-to-wireline context, and that the Commission's regulations should reflect that difference. The Commission may well be correct. We are not suggesting that the *Intermodal Order* is unreasonable; indeed, the petitioners do not challenge the substantive reasonableness of the rule. *See* Oral Arg. Tape at 1:02:06-1:02:13.¹⁶ It may be that, as a matter of telecommunications policy, "location" should have reduced significance in the wireline-to-wireless context, and that the FCC would be justified in defining the word without reference to anything "physical."

¹⁵ As discussed above, to the extent that the *First Order* did do something more than parrot the statutory definition (e.g., by inserting the reference to "physical" location), it did so in language that is inconsistent with the *Intermodal Order*.

¹⁶ The petitioners do contend that the *Intermodal Order* represents a significant departure from the *First Order's* promise that the FCC would maintain competitive neutrality between wireline and wireless carriers. The petitioners do not, however, contend that this asserted departure renders the *Intermodal Order* substantively invalid, but only argue that it supports the proposition that the *Intermodal Order* is so different from the *First Order* that it cannot be an interpretative rule. Pet'rs Br. at 24; Oral Arg. Tape at 1:01:45-1:02:07. Because we conclude that the *Intermodal Order* is not an interpretative rule for other reasons, we do not consider this argument. For the same reason, we do not consider the intervenors' argument that the *Intermodal Order* is a legislative rule because it assertedly changes interconnection obligations.

[**32] But in declaring that it was not requiring location portability, and in using the adjective "physical" in the definition of that term, the *First Order* made clear that it *did* regard location as a physical concept. Moreover, at least in the intermodal context, where one side of the porting transaction involves a wireline telephone, physical location is a quite meaningful concept.¹⁷ [**33] Accordingly, however physical location is measured whether by the residence or geographic rate center of the wireline user, the coordinates of the landline attached to the user's telephone, or the point of interconnection of the user's wireline carrier --a rule that requires the carrier to port the number to a wireless telephone that may be thousands of miles from any of those places represents a substantive change from the rule announced in the *First Order*.¹⁸ Such a change may be permissible, but to accomplish it the FCC must comply with the procedural requirements of the APA.¹⁹

[*40] [**160] For the foregoing reasons, we conclude that the [**34] *Intermodal Order* was a legislative rule, and that the FCC therefore had to issue it pursuant to the notice-and-comment requirements of APA § 553. As the next Part

¹⁷ This point distinguishes our analysis of the FCC's *Intermodal Order* from our analysis of the Commission's wireless-to-wireless order, as set forth in *Cent. Tex. Tel. Coop. v. FCC*, 365 U.S. App. D.C. 247, 402 F.3d 205, 2005 U.S. App. LEXIS 4057, No. 03-1405 (D.C. Cir. Mar. 11, 2005).

¹⁸ Cf. *In re Starnet, Inc.*, 355 F.3d at 638 (noting that "language in the regulations links 'location portability' to movement 'from one physical location to another,' but does not distinguish among the customer's physical location, the end of the wire's physical location, or the rate center's physical location" (internal citation omitted)).

¹⁹ Cf. *C.F. Communications Corp.*, 128 F.3d at 739 (holding that, although the Commission may be able to "amend its rules to render 'premises' a term of art encompassing telephone equipment or land . . . on which telephone equipment is located[,] . . . to do so, it must use the notice and comment procedure of the Administrative Procedure Act"); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 326 U.S. App. D.C. 25, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.").

explains, however, that is not the end of the story.

III

HN5 The Administrative Procedure Act requires that "general notice of proposed rule making shall be published in the Federal Register," 5 U.S.C. § 553(b); that "after notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submissions," *id.* § 553(c); that "after consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose," *id.*; and that a "substantive rule" shall be published "not less than 30 days before its effective date," *id.* § 553(d). For the kind of informal rulemaking at issue here, no other procedures are required to satisfy the APA. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978).

Although the FCC does not raise the point, it appears that the Commission satisfied each of these requirements when [***35] it issued the *Intermodal Order*.²⁰ The FCC published notice in the Federal Register. See 68 Fed. Reg. 7323.²¹ The notice sought comments on CTIA's proposal "that wireline carriers are obligated to provide portability of their customers' telephone numbers to [wireless] providers whose service area overlaps the wireline carriers' rate centers." *Id.* The Commission received and considered comments on that proposal from, among others, the petitioners in this case. See *supra* note 2. It then adopted essentially the same rule proposed in the notice, in an order that explained the rule's basis and purpose, and published that

²⁰ At oral argument, the FCC explained that it did not press this point because APA compliance would not resolve the RFA issue. See Oral Arg. Tape at 26:30-26:40; see also *infra* Part IV.

²¹ The APA requires that the notice include: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). The FCC's notice contained each of these elements.

order. See 18 F.C.C.R. 23697; see generally *supra* Part I.

[***36] The only deficiency in these procedures identified by the petitioners is that the FCC labeled its published notice as a request for comment on CTIA's "Petition for Declaratory Ruling," rather than as a "Notice of Proposed Rulemaking."²² The label, however, is not fatal. As we held in *New York State Commission on Cable Television v. FCC*, **HN6** "to remand solely because the Commission labeled the action a declaratory ruling would be to engage in an empty formality." 242 U.S. App. D.C. 126, 749 F.2d 804, 815 (D.C. Cir. 1984).

Nonetheless, because the FCC does not press it, we do not reach a final decision as to whether the procedures attending issuance of the *Intermodal Order* fully conformed [**161] [*41] to the APA. But we do address the question --raised in the petitioners' own brief [***37] --of whether any procedural error that might have occurred was harmless. Pet'rs Br. at 17, 27-30; see **HN7** 5 U.S.C. § 706 (requiring courts to take "due account" of "the rule of prejudicial error"). In making that assessment, the petitioners urge us to heed our admonition in *Sprint Corp. v. FCC*, that "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." 354 U.S. App. D.C. 288, 315 F.3d 369, 376 (D.C. Cir. 2003) (quoting Sugar Cane Growers Coop. v. Veneman, 351 U.S. App. D.C. 214, 289 F.3d 89, 96 (D.C. Cir. 2002)). As we have just noted, however, there was no "utter failure" in this case; indeed, we are hard pressed to discern any failure at all.

In any event, we have no uncertainty that if there was a procedural failure, it was harmless. The petitioners contend that by "proceeding without issuing a notice, the FCC constrained the industry's ability to propose solutions to technical and

²² As mentioned *supra* note 9, despite the label the FCC does not defend the *Intermodal Order* on the ground that it was a "declaratory ruling" that constituted an adjudication under 5 U.S.C. § 554(e).

regulatory barriers to intermodal portability that would have enabled the FCC to proceed in a balanced, nondiscriminatory fashion." Pet'rs Br. at 17. But unlike the situation [***38] in *Sprint Corp.*, the FCC did not proceed without notice. To the contrary, the proposal published in the Federal Register made the issue under consideration crystal clear.²³ And as we have said, the proposal was virtually identical to the order ultimately adopted by the Commission.

Nor did the FCC "constrain[] the industry's ability to propose solutions." *Id.* Again to the contrary, the Commission invited and received comment from the industry on intermodal portability. Nor was the industry misled by the fact that the notice was labeled a request for comment on CTIA's petition for a declaratory ruling, rather than as a notice of proposed rulemaking. Indeed, as the petitioners conceded at oral argument, every challenge to the *Intermodal Order* that [***39] they have raised in their appellate briefs was also made during the comment period. Oral Arg. Tape at 19:33-19:42.²⁴ And they cannot identify a single additional comment that they would have made but for the labeling of the notice, nor any other deficiency in the rulemaking process. *Id.*; see *New York State Comm'n*, 749 F.2d at 815 (declining to remand an FCC order, despite a claim that the notice was mislabeled, where the "arguments raised in" the comments were "identical to the issues on appeal").²⁵

²³ Indeed, the title alone encapsulated the proposal under consideration: *Petition for Declaratory Ruling That Wireline Carriers Must Provide Portability to Wireless Carriers Operating Within Their Service Areas*, 18 F.C.C.R. 832 (2003).

²⁴ See, e.g., *Intermodal Order* P 16, 18 F.C.C.R. at 23,703-04 (noting comments that the CTIA proposal could not be promulgated without notice-and-comment rulemaking, that it would give wireless carriers an unfair competitive advantage over wireline carriers, that it would amount to a system of location portability, and that it would cause particular difficulties for rural LECs); *supra* Part I and notes 2-6.

²⁵ The *Intermodal Order* differed in each respect noted in the preceding two paragraphs from the payphone provider rule at issue in *Sprint Corp.*, 354 U.S. App. D.C. 288, 315 F.3d 369. In *Sprint*

[***40] Under these circumstances, any error --if error there was --was plainly harmless. [*42]

[**162] Accordingly, although we conclude that the *Intermodal Order* was a legislative rule requiring adherence to the procedures specified in *APA* § 553, we find no deficiency in the procedures actually followed that would warrant vacating or remanding the order.²⁶

IV

HN8 The *Regulatory Flexibility Act* also imposes procedural requirements on agency rulemaking, in particular the preparation of a "final [***41] regulatory flexibility analysis" regarding the effect of the rule on small businesses. See 5 U.S.C. § 604.²⁷ That requirement applies "when an agency promulgates a final rule under *section 553* of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking." *Id.* Because we have concluded that the FCC was required by *section 553* to publish such a notice, the RFA's requirements are applicable to the *Intermodal Order*.

By contrast to the notice-and-comment requirements, there is no dispute that the FCC utterly failed to follow the RFA when it issued the

Corp., the notice that preceded issuance of the payphone rule was not published in the Federal Register and described a proposal completely different from that which the FCC ultimately adopted. *Id.* at 374, 376. Moreover, "the comments submitted in response to the . . . Notice demonstrated that the parties did not appreciate that the Commission was contemplating" the rule it finally issued. *Id.* at 376.

²⁶ The petitioners also contend that the *First Order* and *Second Order* established a procedure for resolving number portability issues that required reference to the NANC. As a consequence, the petitioners maintain that until the NANC submits a proposal, the FCC may not impose a porting obligation without first engaging in APA rulemaking. Although we do not read the first two orders as establishing any such mandatory procedure, the contention is mooted by our conclusion that issuance of the *Intermodal Order* satisfied the APA.

²⁷ Although *HN9* the RFA grants courts jurisdiction to review claims of noncompliance with the provision of the Act that requires preparation of a final regulatory flexibility analysis, 5 U.S.C. § 604, judicial review under other provisions of the RFA is limited, see 5 U.S.C. § 611(a).

Intermodal Order. Nor is there an argument [***42] that the Commission's failure was harmless, as it is impossible to determine whether a final regulatory flexibility analysis which must include an explanation for the rejection of alternatives designed to minimize significant economic impact on small entities, *see id.* § 604(a)(3) --would have affected the final order when it was never prepared in the first place. *See Sprint Corp., 315 F.3d at 377* (holding that the wholesale failure to afford proper notice and comment was not harmless because "the effect of the Commission's procedural errors is uncertain").

HN10 The RFA outlines the remedies available for its violation as follows:

HN11 In granting any relief in an action under this section, the court shall order the agency to take corrective action . . . including, but not limited to-

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small

entities unless the court finds that continued enforcement of the rule is in the public interest.

Id. § 611(a)(4). A combination of the two specified remedies --remand coupled with a stay of enforcement against small entities -- is appropriate here.

The petitioners [***43] contend that the order will have a serious impact on small rural carriers, which will have to impose the initial cost of implementation and the continuing cost of transporting calls to ported numbers on a narrow base of rural subscribers. Those costs, the petitioners argue, "bring[] no benefit to the vast majority of rural subscribers that are unwilling to give up their wireline service, yet must bear the cost burden nonetheless." Pet'rs Br. at 18. The petitioners do not seek to undo any porting of numbers that has already occurred; they ask only to stay [*43] [**163] the mandatory obligation to

accede to new porting requests. Oral Arg. Tape at 57:15-57:55.

The FCC does not contest the petitioners' argument, and it gives no reasons why continued enforcement of the order with respect to small entities pending a final regulatory flexibility analysis would be in the public interest.²⁸ Rather, it stands on its contention that no regulatory flexibility analysis was required at all. *See* FCC Br. at 30. Under these circumstances, we have no basis for finding that continued enforcement against statutorily defined small entities during the remand would be in the public interest.

[***44] Accordingly, we remand the *Intermodal Order* to the FCC for the Commission to prepare the required final regulatory flexibility analysis. We stay future enforcement of the *Intermodal Order* only as applied to carriers that qualify as small entities under the RFA. The stay will remain in effect until the FCC completes its final regulatory flexibility analysis and publishes it in accordance with 5 U.S.C. § 604(b). Of course, nothing in this disposition prevents small carriers from voluntarily adhering to the *Intermodal Order's* number portability requirements during that period.

v

For the foregoing reasons, we deny the petitions with respect to the APA claim, and grant the petitions with respect to the RFA claim. We remand the *Intermodal Order* to the FCC for the purpose of preparing a final regulatory flexibility analysis, and we stay future enforcement of the order against carriers that are "small entities" under the RFA until the FCC prepares and publishes that analysis.

So ordered.

²⁸ The FCC *does* allege that the public interest weighs against vacating the *entire* rule (as to entities of every size), and that such a remedy would be overbroad given the injury claimed to rural carriers. FCC Br. at 36.

Tab 9

Va. DOT v. United States EPA

United States District Court for the Eastern District of Virginia, Alexandria Division

January 3, 2013, Decided; January 3, 2013, Filed

Civil Action No. 1:12-CV-775

Reporter

2013 U.S. Dist. LEXIS 981 *; 43 ELR 20002; 2013 WL 53741

VIRGINIA DEPARTMENT OF
TRANSPORTATION, ET AL, Plaintiffs, -v-
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL, Defendants.

Andrea West Wortzel, LEAD ATTORNEY,
Hunton & Williams LLP, Richmond, VA.

For NAIOP Northern Virginia, the Commercial
Real Estate Development Association, National
Association of Home Builders, Northern Virginia
Association Of Realtors, Intervenor Plaintiffs: John
David Wilburn, LEAD ATTORNEY,
McGuireWoods [*2] LLP, McLean, VA; Stephen
Phillip Mulligan, McGuireWoods LLP (McLean),
McLean, VA.

Core Terms

pollutants, load, sediment, stormwater, Creek,
maximum, regulations, terms, nonpollutants,
impaired, annual

For United States Environmental Protection
Agency, Lisa P. Jackson, United States
Environmental Protection Agency Region III,
Shawn M. Garvin, Intervenor Defendants: Dennis
Carl Barghaan, Jr., LEAD ATTORNEY, United
States Attorney's Office, Alexandria, VA.

Counsel: [*1] For Virginia Department of
Transportation, Plaintiff: Earle Duncan Getchell,
Jr., Kenneth Thomas Cuccinelli, II, LEAD
ATTORNEYS, Office of the Attorney General
(Richmond), Richmond, VA.

Judges: Liam O'Grady, United States District
Judge.

For Board of Supervisors, Fairfax County, Virginia,
Plaintiff: Christopher Donald Pomeroy, AquaLaw
PLC, Richmond, VA.

Opinion by: Liam O'Grady

For United States Environmental Protection
Agency, Lisa P. Jackson, Administrator, United
States Environmental Protection Agency Region
III, Shawn M. Garvin, Regional Administrator,
Defendants: Dennis Carl Barghaan, Jr., LEAD
ATTORNEY, United States Attorney's Office,
Alexandria, VA.

Opinion

For National Association of Clean Water Agencies,
National Association of Flood and Stormwater
Management Agencies, American Public Works
Association, Movants: Kevin McArdle Blair,
Rebecca Anne Worthington, LEAD ATTORNEYS,
Squire Sanders LLP (DC), Washington, DC.

Memorandum Opinion

Before the Court is the Plaintiffs' motion for
judgment on the pleadings under *Federal Rule of
Civil Procedure 12(c)*. The Defendants opposed the
motion, and the Plaintiffs replied. The Court heard
oral arguments on December 14, 2012 and now
issues this memorandum opinion and
accompanying order granting the Plaintiffs' motion.

For Virginia Manufacturers Association, Amicus:

Background

The Clean Water Act, 33 U.S.C. § 1251 et seq., establishes the basic structure for regulating discharge of pollutants into the waters of the United States, and provides certain mechanisms to improve and maintain the quality of surface waters.

One such mechanism is the requirement that states identify "designated uses" for each body of water within their borders, as well as "water quality criteria" sufficient to support those uses. 33 U.S.C. § 1313(c)(2)(A). [*3] The Environmental Protection Agency ("EPA") evaluates the uses and criteria developed by the states, and either approves them or else proposes and promulgates its own set of standards. § 1313(c)(3).

Once the standards are in place, each state is required to maintain a list—also subject to approval or modification by EPA—of its waterbodies that are "impaired" because they do not meet their respective water quality criteria. 33 U.S.C. § 1313(d)(1)(A). For each waterbody on the impaired list, the state is required to establish a set of total maximum daily loads ("TMDLs") sufficient to bring the body back into compliance with its water quality criteria. § 1313(d)(1)(C). Each TMDL establishes the maximum amount of a pollutant that may be added to the waterbody daily from all sources (runoff, point sources, etc.). EPA is required to publish a list of pollutants suitable for maximum daily load measurement, § 1314(a)(2)(D), and it has determined that all pollutants are suitable for TMDLs, *see Total Maximum Daily Loads Under Clean Water Act*, 43 *Fed. Reg.* 60,662. Therefore, any pollutant that falls within the relatively broad definition of "pollutant" set forth in § 1362(6) may be regulated via [*4] TMDL. EPA can approve or modify as it sees fit TMDLs proposed by the states. § 1313(d)(2).

Here the state in question is Virginia, and the waterbody is a 25-mile long tributary of the Potomac River, located in Fairfax County, called Accotink Creek. The creek has been the subject of litigation in the past that is not relevant to this matter except the result: EPA was required to set

TMDLs for Accotink Creek once Virginia failed to do so by a certain date. Specifically, the creek had been identified as having "benthic impairments," which is to say the community of organisms that live on or near the bottom of the creek were not as numerous or healthy as they should be. EPA was to set appropriate TMDLs to improve the health of the benthic community in Accotink Creek.

On April 18, 2011, EPA established a TMDL for Accotink Creek which limited the flow rate of stormwater into Accotink Creek to 681.8 ft³/acre-day. The TMDL was designed to regulate the amount of sediment in the Accotink, because EPA believed sediment was a primary cause of the benthic impairment. Both parties agree that sediment is a pollutant, and that stormwater is not. EPA refers to stormwater flow rate as a "surrogate" for [*5] sediment.

The Plaintiffs are now challenging the TMDL on multiple grounds, but presently before the Court is a single issue: Does the Clean Water Act authorize the EPA to regulate the level of a pollutant in Accotink Creek by establishing a TMDL for the flow of a nonpollutant into the creek?

Analysis

I. Standard of Review

Count I of the complaint, at issue here, is brought under the Administrative Procedures Act. *See* Comp. ¶ 169. The APA "confines judicial review of executive branch decisions to the administrative record of proceedings before the pertinent agency." *Shipbuilders Council of Am. V. U.S. Dept. of Homeland Sec.*, 770 F. Supp. 2d 793, 802 (E.D. Va. 2011). As such, the district court "sits as an appellate tribunal," and APA claims can be resolved equally well in the context of *Rule 12* or *Rule 56*. *Univ. Med. Ctr. Of S. Nev. V. Shalala*, 173 F.3d 438, 441 n. 3, 335 U.S. App. D.C. 322 (D.C. Cir. 1999).

Because Count I presents a question of statutory interpretation, the Court reviews EPA's decision

using the two-step analysis set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). For a given question of statutory interpretation, the first step under *Chevron* is to determine whether Congress [*6] addressed the "precise question at issue." 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter . . ." *Id.* If the Court cannot find that Congress has squarely addressed the question, the Court must move to *Chevron's* second step. In the second step of statutory construction under *Chevron*, the Court must determine whether the agency's interpretation of the statute is "permissible." *Id.* at 843. The agency's construction is permissible if it is reasonable, but it need not be what the Court considers the *best* or *most reasonable* construction. See *id.* at 845. The Court is not to simply impose its own construction on the statute, but instead it gives deference to any reasonable statutory construction by the agency. *Id.* at 843.

II. Chevron Step One

Whether statutory ambiguity exists so that the issue cannot be settled at *Chevron's* first step is for the Court to decide, and the Court "owe[s] the agency no deference on the existence of ambiguity." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468, 368 U.S. App. D.C. 368 (D.C. Cir. 2005). The Court begins the inquiry by "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. As always, the analysis begins with the text [*7] of the statute. *Nat'l Elec. Mfrs. Ass'n v. U.S. Dept't of Energy*, 654 F.3d 496, 504 (4th Cir. 2011).

The text of the statute that requires states to establish their own TMDLs, 33 U.S.C. § 1313(d)(1)(C), is:

Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, **the total maximum daily load, for those pollutants which the Administrator identifies** under *section 1314(a)(2)* of this title

as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. (emphasis added)

The next subsection, § 1313(d)(2), grants EPA the authority to set TMDLs when the state has not done so adequately. "Pollutant" is a statutorily defined term. 33 U.S.C. § 1362(6).

The Court sees no ambiguity in the wording of this statute. EPA is charged with establishing TMDLs for the appropriate pollutants; that does not give them authority to regulate nonpollutants. The parties agree that sediment is a [*8] pollutant under 33 U.S.C. § 1362(6), and stormwater is not. Then how does EPA claim jurisdiction over setting TMDLs for stormwater?

EPA frames the stormwater TMDL as a surrogate. EPA's research apparently indicates that the "[sediment] load in Accotink Creek is a function of the amount of stormwater runoff generated within the watershed." Def. Opp. at 8. And EPA believes that framing the TMDL in terms of stormwater flow rate is superior to simply expressing it in terms of maximum sediment load.

The DC Circuit has considered and rejected a similar attempt by EPA to take liberties with the way Congress intended it to express its TMDLs. In *Friends of the Earth, Inc. v. Env. Protection Agency*, EPA had promulgated TMDLs for the Anacostia River that expressed the maximum load of certain pollutants in terms of annual and seasonal amounts. 446 F.3d 140, 143, 371 U.S. App. D.C. 1 (D.C. Cir. 2006). The court found that expressing a TMDL in terms of annual or seasonal maximums was not allowed, because the statute granted authority only for daily loads. *Id.* at 148. The court reached its conclusion even though EPA apparently made a strong argument that expressing TMDLs in

terms of annual or seasonal loads was an effective [*9] and reasonable approach. *See id.* Presumably a daily load could have been derived by simply dividing the annual load by 365, yet the court still required expression in the terms dictated by Congress.

Here too, EPA hopes to express a TMDL in terms other than those contemplated by the statute, arguing that such an expression is the most effective method. But, as *Friends of the Earth* illustrates, EPA may not regulate something over which it has no statutorily granted power—annual loads or nonpollutants—as a proxy for something over which it *is* granted power—daily loads or pollutants.

EPA's argument that its surrogate approach should be allowed because the statute does not specifically forbid it fails. EPA is not explicitly forbidden from establishing total maximum *annual* loads any more than they are explicitly barred from establishing TMDLs for nonpollutants. The question is whether the statute grants the agency the authority it is claiming, not whether the statute explicitly withholds that authority. And in this case, as in *Friends of the Earth*, the statute simply does not grant EPA the authority it claims.

The dicta in *Weyerhaeuser Co. v. Costle* is not as helpful to EPA's case as it would [*10] like. 590 F.2d 1011, 1022 n.6, 191 U.S. App. D.C. 309 (D.C. Cir. 1978). It is true that the court said in a footnote "[i]t is well recognized that EPA can use pollution parameters that are not harmful in themselves, but act as indicators of harm." *Id.* But in that case, the non-harmful pollution parameters the EPA sought to regulate were components of the effluent commonly discharged from paper mills, *id. at 1022*, making them effluents themselves. And power to regulate effluents is expressly granted to the EPA in the relevant statutory section. *See 33 U.S.C. § 1314(b)*.

EPA would like to create the impression that Congress has given it loose rein to determine

exactly what it could and could not regulate. On page 16 of its opposition to this motion, EPA points out that "Congress authorized EPA to determine which pollutants were suitable for TMDL calculation and measurement." (Internal quotes removed). While this may be true, EPA glosses over the fact that 33 U.S.C. § 1314(a)(2)(D) only gives EPA the power to regulate pollutants as that term is defined—by Congress—elsewhere in the statute. And, as discussed above, sediment is a pollutant for these purposes, but stormwater is not.

In a similar vein, EPA regulations [*11] which imply that the agency has discretion to set the TMDL as it sees fit do not bear on the question now before the Court. EPA has promulgated a regulation allowing TMDLs to be "expressed in terms of either mass per time, toxicity, or other appropriate measure," 40 C.F.R. § 130.2(i), and another that allows TMDLs to be expressed as a "property of pollution," 50 Fed. Reg. 1774, 1776 (Jan. 11, 1985). But, EPA citing these regulations to demonstrate that the surrogate TMDL approach is permissible is mere bootstrapping. To the extent the regulations allow EPA to set TMDLs for nonpollutants, they exceed the statutory authority of EPA.

The plain language of the statute trumps all, but legislative history also supports Plaintiffs' argument. Congress's intent to limit EPA's discretion in this context is evidenced by the committee record cited by Plaintiffs, which has also been used by the Ninth Circuit, in which Senator Randolph, Chairman of the Senate committee that amended the act in 1972, explained, "We [*12] have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives [for] administrators to follow." Pl. Mot. 7, *citing Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1072 (9th Cir. 2011). Congress created a statutory scheme that included a precise definition of the word "pollutant," and then gave EPA authority to set TMDLs for those pollutants. Senator Randolph's comments strongly imply that

Congress did not intend anything more or less than what is written in the statute.

The Court considers the language of 33 U.S.C. § 1313(d)(1)(C) to be unambiguous. Congress has spoken directly on the question at issue, and its answer is that EPA's authority does not extend to establishing TMDLs for nonpollutants as surrogates for pollutants. The legislative history of the CWA is consistent with this reading. Therefore, this Court finds EPA's interpretation of § 1313 and the related provisions to be impermissibly broad based on analysis under the first step of *Chevron* analysis.

III. Chevron Step Two

Because the Court considers Congress's intent to be clear and unambiguously expressed by the language of the [*13] statute, it need not move to the second step of *Chevron* analysis. But the Court notes that there is substantial reason to believe EPA's motives go beyond "permissible gap-filling."

Page 9 of EPA's opposition says, "stormwater flow rates as a surrogate would more effectively address the process by which sediment impairs aquatic life in Accotink Creek." If the sediment levels in Accotink Creek have become dangerously high, what better way to address the problem than by limiting the amount of sediment permitted in the creek? If sediment level is truly "a function of the amount of stormwater runoff, as EPA claims, then the TMDL could just as easily be expressed in terms of sediment load.

In [*14] fact, the Board of Supervisors of Fairfax County argued at the December 14th hearing (without objection from EPA) that EPA has approved 3,700 TMDLs for sediment nationwide, and in Virginia has addressed 111 benthic impairments with TMDLs. None of them regulated the flow rate of stormwater. By comparison, EPA has tried out its novel approach of regulating sediment via flow in only four instances nationwide, and all four attempts were challenged in court. One has settled, the other three are still pending.

The Court suspects that the decision to regulate stormwater flow as a surrogate for sediment load would not constitute a permissible construction of § 1313(d)(1)(C), even given the deference due at *Chevron's* second step. This is especially likely because EPA is attempting to increase the extent of its own authority via flow TMDLs, which courts must examine carefully. See *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155, 161-62 (4th Cir. 1998). EPA's attempt to set TMDLs for nonpollutants probably goes beyond "permissible gap-filling" and is instead an impermissible construction of the statute.

Conclusion

The language of § 1313(d)(1)(C) is clear. EPA is authorized to [*15] set TMDLs to regulate pollutants, and pollutants are carefully defined. Stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via TMDL. Claiming that the stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulable, does not bring stormwater within the ambit of EPA's TMDL authority. Whatever reason EPA has for thinking that a stormwater flow rate TMDL is a better way of limiting sediment load than a sediment load TMDL, EPA cannot be allowed to exceed its clearly limited statutory authority. For these reasons, the Plaintiffs' motion for Rule 12(c) judgment on the pleadings on Count I of their complaint is granted.

January 3, 2013

Alexandria, Virginia

/s/ Liam O'Grady

Liam O'Grady

United States District Judge

Tab 10

33 USCS § 1362

Current through PL 114-262, approved 12/14/16, with a gap of PL 114-255.

United States Code Service - Titles 1 through 54 > TITLE 33. NAVIGATION AND NAVIGABLE WATERS > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL > GENERAL PROVISIONS

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

- (1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.
- (2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.
- (3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.
- (4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act [33 USCS § 1288].
- (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.
- (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
- (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

- (8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.
- (9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone [15 UST § 1606].
- (10) The term "ocean" means any portion of the high seas beyond the contiguous zone.
- (11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.
- (12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.
- (13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.
- (14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.
- (15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.
- (16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.
- (17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.
- (18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

- (19)The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.
- (20)The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.
- (21)Coastal recreation waters.
- (A) In general. The term "coastal recreation waters" means--
- (i) the Great Lakes; and
 - (ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) [33 USCS § 1313(c)] by a State for use for swimming, bathing, surfing, or similar water contact activities.
- (B) Exclusions. The term "coastal recreation waters" does not include--
- (i) inland waters; or
 - (ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.
- (22)Floatable material.
- (A) In general. The term "floatable material" means any foreign matter that may float or remain suspended in the water column.
- (B) Inclusions. The term "floatable material" includes--
- (i) plastic;
 - (ii) aluminum cans;
 - (iii) wood products;
 - (iv) bottles; and
 - (v) paper products.
- (23)Pathogen indicator. The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.
- (24)Oil and gas exploration and production. The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.
- (25)Recreational vessel.
- (A) In general. The term "recreational vessel" means any vessel that is--
- (i) manufactured or used primarily for pleasure; or
 - (ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion. The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that--

- (i) is engaged in commercial use; or
- (ii) carries paying passengers.

(26) Treatment works. The term "treatment works" has the meaning given the term in section 212 [33 USCS § 1292].

History

(June 30, 1948, ch 758, Title V, § 502, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 886; Dec. 27, 1977, P.L. 95-217, § 33(b), 91 Stat. 1577; Feb. 4, 1987, P.L. 100-4, Title V, §§ 502(a), 503, 101 Stat. 75; Nov. 18, 1988, P.L. 100-688, Title III, Subtitle B, § 3202(a), 102 Stat. 4154; Feb. 10, 1996, P.L. 104-106, Div A, Title III, Subtitle C, § 325(c)(3), 110 Stat. 259; Oct. 10, 2000, P.L. 106-284, § 5, 114 Stat. 875; Aug. 8, 2005, P.L. 109-58, Title III, Subtitle C, § 323, 119 Stat. 694; July 30, 2008, P.L. 110-288, § 3, 122 Stat. 2650.)

(As amended June 10, 2014, P.L. 113-121, Title V, Subtitle B, § 5012(b), 128 Stat. 1328.)

UNITED STATES CODE SERVICE

Copyright © 2017 Matthew Bender & Company, Inc. a member of the LexisNexis Group™ All rights reserved.

Tab 11

40 CFR 122.21

This document is current through the December 30, 2016 issue of the Federal Register with the exception of the amendments appearing at 81 FR 96572

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.21 Application for a permit (applicable to State programs, see § 123.25).

(a) Duty to apply.

(1) Any person who discharges or proposes to discharge pollutants or who owns or operates a "sludge-only facility" whose sewage sludge use or disposal practice is regulated by part 503 of this chapter, and who does not have an effective permit, except persons covered by general permits under § 122.28, excluded under § 122.3, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.44(m), must submit a complete application to the Director in accordance with this section and part 124 of this chapter. The requirements for concentrated animal feeding operations are described in § 122.23(d).

(2) Application Forms: (i) All applicants for EPA-issued permits must submit applications on EPA permit application forms. More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there. Application forms may be obtained by contacting the EPA water resource center at (202) 260-7786 or Water Resource Center, U.S. EPA, Mail Code 4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460 or at the EPA Internet site www.epa.gov/owm/pdes.htm. Applications for EPA-issued permits must be submitted as follows:

(A) All applicants, other than POTWs and TWTDS, must submit Form 1.

(B) Applicants for new and existing POTWs must submit the information contained in paragraph (j) of this section using Form 2A or other form provided by the director.

(C) Applicants for concentrated animal feeding operations or aquatic animal production facilities must submit Form 2B.

(D) Applicants for existing industrial facilities (including manufacturing facilities, commercial facilities, mining activities, and silvicultural activities), must submit Form 2C.

(E) Applicants for new industrial facilities that discharge process wastewater must submit Form 2D.

(F) Applicants for new and existing industrial facilities that discharge only nonprocess wastewater must submit Form 2E.

(G) Applicants for new and existing facilities whose discharge is composed entirely of storm water associated with industrial activity must submit Form 2F, unless exempted by §

122.26(c)(1)(ii). If the discharge is composed of storm water and non-storm water, the applicant must also submit, Forms 2C, 2D, and/or 2E, as appropriate (in addition to Form 2F).

(H) Applicants for new and existing TWTDS, subject to paragraph (c)(2)(i) of this section must submit the application information required by paragraph (q) of this section, using Form 2S or other form provided by the director.

(ii) The application information required by paragraph (a)(2)(i) of this section may be electronically submitted if such method of submittal is approved by EPA or the Director.

(iii) Applicants can obtain copies of these forms by contacting the Water Management Divisions (or equivalent division which contains the NPDES permitting function) of the EPA Regional Offices. The Regional Offices' addresses can be found at § 1.7 of this chapter.

(iv) Applicants for State-issued permits must use State forms which must require at a minimum the information listed in the appropriate paragraphs of this section.

(b) Who applies? When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.

(c) Time to apply.

(1) Any person proposing a new discharge, shall submit an application at least 180 days before the date on which the discharge is to commence, unless permission for a later date has been granted by the Director. Facilities proposing a new discharge of storm water associated with industrial activity shall submit an application 180 days before that facility commences industrial activity which may result in a discharge of storm water associated with that industrial activity. Facilities described under § 122.26(b)(14)(x) or (b)(15)(i) shall submit applications at least 90 days before the date on which construction is to commence. Different submittal dates may be required under the terms of applicable general permits. Persons proposing a new discharge are encouraged to submit their applications well in advance of the 90 or 180 day requirements to avoid delay. See also paragraph (k) of this section and § 122.26(c)(1)(i)(G) and (c)(1)(ii).

(2) Permits under section 405(f) of CWA. All TWTDS whose sewage sludge use or disposal practices are regulated by part 503 of this chapter must submit permit applications according to the applicable schedule in paragraphs (c)(2)(i) or (ii) of this section.

(i) A TWTDS with a currently effective NPDES permit must submit a permit application at the time of its next NPDES permit renewal application. Such information must be submitted in accordance with paragraph (d) of this section.

(ii) Any other TWTDS not addressed under paragraphs (c)(2)(i) of this section must submit the information listed in paragraphs (c)(2)(ii)(A) through (E) of this section to the Director within 1 year after publication of a standard applicable to its sewage sludge use or disposal practice(s), using Form 2S or another form provided by the Director. The Director will determine when such TWTDS must submit a full permit application.

(A) The TWTDS's name, mailing address, location, and status as federal, State, private, public or other entity;

(B) The applicant's name, address, telephone number, and ownership status;

40 CFR 122.21

(C) A description of the sewage sludge use or disposal practices. Unless the sewage sludge meets the requirements of paragraph (q)(8)(iv) of this section, the description must include the name and address of any facility where sewage sludge is sent for treatment or disposal, and the location of any land application sites;

(D) Annual amount of sewage sludge generated, treated, used or disposed (estimated dry weight basis); and

(E) The most recent data the TWTDS may have on the quality of the sewage sludge.

(iii) Notwithstanding paragraphs (c)(2)(i) or (ii) of this section, the Director may require permit applications from any TWTDS at any time if the Director determines that a permit is necessary to protect public health and the environment from any potential adverse effects that may occur from toxic pollutants in sewage sludge.

(iv) Any TWTDS that commences operations after promulgation of an applicable "standard for sewage sludge use or disposal" must submit an application to the Director at least 180 days prior to the date proposed for commencing operations.

(d) Duty to reapply.

(1) Any POTW with a currently effective permit shall submit a new application at least 180 days before the expiration date of the existing permit, unless permission for a later date has been granted by the Director. (The Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.)

(2) All other permittees with currently effective permits shall submit a new application 180 days before the existing permit expires, except that:

(i) The Regional Administrator may grant permission to submit an application later than the deadline for submission otherwise applicable, but no later than the permit expiration date; and

(3) [Reserved]

(e) Completeness.

(1) The Director shall not issue a permit before receiving a complete application for a permit except for NPDES general permits. An application for a permit is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. For EPA administered NPDES programs, an application which is reviewed under § 124.3 of this chapter is complete when the Director receives either a complete application or the information listed in a notice of deficiency.

(2) A permit application shall not be considered complete if a permitting authority has waived application requirements under paragraphs (j) or (q) of this section and EPA has disapproved the waiver application. If a waiver request has been submitted to EPA more than 210 days prior to permit expiration and EPA has not disapproved the waiver application 181 days prior to permit expiration, the permit application lacking the information subject to the waiver application shall be considered complete.

40 CFR 122.21

(3) Except as specified in 122.21(e)(3)(ii), a permit application shall not be considered complete unless all required quantitative data are collected in accordance with sufficiently sensitive analytical methods approved under 40 CFR part 136 or required under 40 CFR chapter I, subchapter N or O.

(i) For the purposes of this requirement, a method approved under 40 CFR part 136 or required under 40 CFR chapter I, subchapter N or O is "sufficiently sensitive" when:

(A) The method minimum level (ML) is at or below the level of the applicable water quality criterion for the measured pollutant or pollutant parameter; or

(B) The method ML is above the applicable water quality criterion, but the amount of the pollutant or pollutant parameter in a facility's discharge is high enough that the method detects and quantifies the level of the pollutant or pollutant parameter in the discharge; or

(C) The method has the lowest ML of the analytical methods approved under 40 CFR part 136 or required under 40 CFR chapter I, subchapter N or O for the measured pollutant or pollutant parameter.

Note to paragraph (e)(3)(i): Consistent with 40 CFR part 136, applicants have the option of providing matrix or sample specific minimum levels rather than the published levels. Further, where an applicant can demonstrate that, despite a good faith effort to use a method that would otherwise meet the definition of "sufficiently sensitive", the analytical results are not consistent with the QA/QC specifications for that method, then the Director may determine that the method is not performing adequately and the applicant should select a different method from the remaining EPA-approved methods that is sufficiently sensitive consistent with 40 CFR 122.21(e)(3)(i). Where no other EPA-approved methods exist, the applicant should select a method consistent with 40 CFR 122.21(e)(3)(ii).

(ii) When there is no analytical method that has been approved under 40 CFR part 136, required under 40 CFR chapter I, subchapter N or O, and is not otherwise required by the Director, the applicant may use any suitable method but shall provide a description of the method. When selecting a suitable method, other factors such as a method's precision, accuracy, or resolution, may be considered when assessing the performance of the method.

(f) Information requirements. All applicants for NPDES permits, other than POTWs and other TWTDS, must provide the following information to the Director, using the application form provided by the Director. Additional information required of applicants is set forth in paragraphs (g) through (k) of this section.

(1) The activities conducted by the applicant which require it to obtain an NPDES permit.

(2) Name, mailing address, and location of the facility for which the application is submitted.

(3) Up to four SIC codes which best reflect the principal products or services provided by the facility.

(4) The operator's name, address, telephone number, ownership status, and status as Federal, State, private, public, or other entity.

(5) Whether the facility is located on Indian lands.

(6) A listing of all permits or construction approvals received or applied for under any of the following programs:

- (i) Hazardous Waste Management program under RCRA.
- (ii) UIC program under SDWA.
- (iii) NPDES program under CWA.
- (iv) Prevention of Significant Deterioration (PSD) program under the Clean Air Act.
- (v) Nonattainment program under the Clean Air Act.
- (vi) National Emission Standards for Hazardous Pollutants (NESHAPS) preconstruction approval under the Clean Air Act.
- (vii) Ocean dumping permits under the Marine Protection Research and Sanctuaries Act.
- (viii) Dredge or fill permits under section 404 of CWA.
- (ix) Other relevant environmental permits, including State permits.

(7) A topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.

(8) A brief description of the nature of the business.

(g) Application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers. Existing manufacturing, commercial mining, and silvicultural dischargers applying for NPDES permits, except for those facilities subject to the requirements of § 122.21(h), shall provide the following information to the Director, using application forms provided by the Director.

(1) Outfall location. The latitude and longitude to the nearest 15 seconds and the name of the receiving water.

(2) Line drawing. A line drawing of the water flow through the facility with a water balance, showing operations contributing wastewater to the effluent and treatment units. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under paragraph (g)(3) of this section. The water balance must show approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined (for example, for certain mining activities), the applicant may provide instead a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

(3) Average flows and treatment. A narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outfall, including process wastewater, cooling water, and stormwater runoff; the average flow which each process contributes; and a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations, or production areas may be described in general terms (for example, "dye-making reactor", "distillation tower"). For a privately owned treatment works, this information shall include the identity of each user of

40 CFR 122.21

the treatment works. The average flow of point sources composed of storm water may be estimated. The basis for the rainfall event and the method of estimation must be indicated.

(4) Intermittent flows. If any of the discharges described in paragraph (g)(3) of this section are intermittent or seasonal, a description of the frequency, duration and flow rate of each discharge occurrence (except for stormwater runoff, spillage or leaks).

(5) Maximum production. If an effluent guideline promulgated under section 304 of CWA applies to the applicant and is expressed in terms of production (or other measure of operation), a reasonable measure of the applicant's actual production reported in the units used in the applicable effluent guideline. The reported measure must reflect the actual production of the facility as required by § 122.45(b)(2).

(6) Improvements. If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement requirement, a description of the abatement project, and a listing of the required and projected final compliance dates.

(7) Effluent characteristics.

(i) Information on the discharge of pollutants specified in this paragraph (g)(7) (except information on storm water discharges which is to be provided as specified in § 122.26). When "quantitative data" for a pollutant are required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under Part 136 of this chapter unless use of another method is required for the pollutant under 40 CFR subchapters N or O. When no analytical method is approved under Part 136 or required under subchapters N or O, the applicant may use any suitable method but must provide a description of the method. When an applicant has two or more outfalls with substantially identical effluents, the Director may allow the applicant to test only one outfall and report that quantitative data as applying to the substantially identical outfall. The requirements in paragraphs (g)(7)(vi) and (vii) of this section state that an applicant must provide quantitative data for certain pollutants known or believed to be present do not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. When paragraph (g)(7) of this section requires analysis of pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform (including *E. coli*), and Enterococci (previously known as fecal streptococcus at § 122.26 (d)(2)(iii)(A)(3)), or volatile organics, grab samples must be collected for those pollutants. For all other pollutants, a 24-hour composite sample, using a minimum of four (4) grab samples, must be used unless specified otherwise at 40 CFR Part 136. However, a minimum of one grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than 24 hours. In addition, for discharges other than storm water discharges, the Director may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of four (4) grab samples will be a representative sample of the effluent being discharged. Results of analyses of individual grab samples for any parameter may be averaged to obtain the daily average. Grab samples that are not required to be analyzed immediately (see Table II at *40 CFR 136.3 (e)*) may be composited in the laboratory, provided that container, preservation, and holding time requirements are met (see Table II at *40 CFR 136.3 (e)*) and that sample integrity is not compromised by compositing.

(ii) Storm water discharges. For storm water discharges, all samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inch and at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Where feasible, the variance in the duration of the event and the total rainfall of the event should not exceed 50 percent from the average or median rainfall event in that area. For all applicants, a flow-weighted composite shall be taken for either the entire discharge or for the first three hours of the discharge. The flow-weighted composite sample for a storm water discharge may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes (applicants submitting permit applications for storm water discharges under § 122.26(d) may collect flow-weighted composite samples using different protocols with respect to the time duration between the collection of sample aliquots, subject to the approval of the Director). However, a minimum of one grab sample may be taken for storm water discharges from holding ponds or other impoundments with a retention period greater than 24 hours. For a flow-weighted composite sample, only one analysis of the composite of aliquots is required. For storm water discharge samples taken from discharges associated with industrial activities, quantitative data must be reported for the grab sample taken during the first thirty minutes (or as soon thereafter as practicable) of the discharge for all pollutants specified in § 122.26(c)(1). For all storm water permit applicants taking flow-weighted composites, quantitative data must be reported for all pollutants specified in § 122.26 except pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform, and fecal streptococcus. The Director may allow or establish appropriate site-specific sampling procedures or requirements, including sampling locations, the season in which the sampling takes place, the minimum duration between the previous measurable storm event and the storm event sampled, the minimum or maximum level of precipitation required for an appropriate storm event, the form of precipitation sampled (snow melt or rain fall), protocols for collecting samples under part 136 of this chapter, and additional time for submitting data on a case-by-case basis. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.)

(iii) Reporting requirements. Every applicant must report quantitative data for every outfall for the following pollutants:

Biochemical Oxygen Demand (BOD5)

Chemical Oxygen Demand

Total Organic Carbon

Total Suspended Solids

Ammonia (as N)

Temperature (both winter and summer)

pH

(iv)The Director may waive the reporting requirements for individual point sources or for a particular industry category for one or more of the pollutants listed in paragraph (g)(7)(iii) of this section if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements.

(v)Each applicant with processes in one or more primary industry category (see appendix A of this part) contributing to a discharge must report quantitative data for the following pollutants in each outfall containing process wastewater:

(A)The organic toxic pollutants in the fractions designated in table I of appendix D of this part for the applicant's industrial category or categories unless the applicant qualifies as a small business under paragraph (g)(8) of this section. Table II of appendix D of this part lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure which uses gas chromatography/mass spectrometry. A determination that an applicant falls within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes. See Notes 2, 3, and 4 of this section.

(B)The pollutants listed in table III of appendix D of this part (the toxic metals, cyanide, and total phenols).

(vi)

(A)Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in table IV of appendix D of this part (certain conventional and nonconventional pollutants) is discharged from each outfall. If an applicable effluent limitations guideline either directly limits the pollutant or, by its express terms, indirectly limits the pollutant through limitations on an indicator, the applicant must report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline, the applicant must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

(B)Each applicant must indicate whether it knows or has reason to believe that any of the pollutants listed in table II or table III of appendix D of this part (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under paragraph (g)(7)(v) of this section are discharged from each outfall. For every pollutant expected to be discharged in concentrations of 10 ppb or greater the applicant must report quantitative data. For acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4, 6 dinitrophenol, where any of these four pollutants are expected to be discharged in concentrations of 100 ppb or greater the applicant must report quantitative data. For every pollutant expected to be discharged in concentrations less than 10 ppb, or in the case of acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4, 6 dinitrophenol, in concentrations less than 100 ppb, the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under paragraph (g)(8) of this section is not required to analyze for pollutants listed in table II of appendix D of this part (the organic toxic pollutants).

(vii)Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in table V of appendix D of this part (certain hazardous substances and asbestos) are

40 CFR 122.21

discharged from each outfall. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.

(viii) Each applicant must report qualitative data, generated using a screening procedure not calibrated with analytical standards, for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) if it:

(A) Uses or manufactures 2,4,5-trichlorophenoxy acetic acid (2,4,5,-T); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 2,4,5,-TP); 2-(2,4,5-trichlorophenoxy) ethyl, 2,2-dichloropropionate (Erbon); O,O-dimethyl O-(2,4,5-trichlorophenyl) phosphorothioate (Ronnel); 2,4,5-trichlorophenol (TCP); or hexachlorophene (HCP); or

(B) Knows or has reason to believe that TCDD is or may be present in an effluent.

(8) Small business exemption. An application which qualifies as a small business under one of the following criteria is exempt from the requirements in paragraph (g)(7)(v)(A) or (g)(7)(vi)(A) of this section to submit quantitative data for the pollutants listed in table II of appendix D of this part (the organic toxic pollutants):

(i) For coal mines, a probable total annual production of less than 100,000 tons per year.

(ii) For all other applicants, gross total annual sales averaging less than \$ 100,000 per year (in second quarter 1980 dollars).

(9) Used or manufactured toxics. A listing of any toxic pollutant which the applicant currently uses or manufactures as an intermediate or final product or byproduct. The Director may waive or modify this requirement for any applicant if the applicant demonstrates that it would be unduly burdensome to identify each toxic pollutant and the Director has adequate information to issue the permit.

(10) [Reserved]

(11) Biological toxicity tests. An identification of any biological toxicity tests which the applicant knows or has reason to believe have been made within the last 3 years on any of the applicant's discharges or on a receiving water in relation to a discharge.

(12) Contract analyses. If a contract laboratory or consulting firm performed any of the analyses required by paragraph (g)(7) of this section, the identity of each laboratory or firm and the analyses performed.

(13) Additional information. In addition to the information reported on the application form, applicants shall provide to the Director, at his or her request, such other information as the Director may reasonably require to assess the discharges of the facility and to determine whether to issue an NPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity of discharges to aquatic life and requirements to determine the cause of the toxicity.

(h) Application requirements for manufacturing, commercial, mining and silvicultural facilities which discharge only non-process wastewater. Except for stormwater discharges, all manufacturing, commercial, mining and silvicultural dischargers applying for NPDES permits which discharge only non-process wastewater not regulated by an effluent limitations guideline or new source performance standard shall provide the following information to the Director, using application forms provided by the Director:

(1) Outfall location. Outfall number, latitude and longitude to the nearest 15 seconds, and the name of the receiving water.

(2) Discharge date (for new dischargers). Date of expected commencement of discharge.

(3) Type of waste. An identification of the general type of waste discharged, or expected to be discharged upon commencement of operations, including sanitary wastes, restaurant or cafeteria wastes, or noncontact cooling water. An identification of cooling water additives (if any) that are used or expected to be used upon commencement of operations, along with their composition if existing composition is available.

(4) Effluent characteristics. (i) Quantitative data for the pollutants or parameters listed below, unless testing is waived by the Director. The quantitative data may be data collected over the past 365 days, if they remain representative of current operations, and must include maximum daily value, average daily value, and number of measurements taken. The applicant must collect and analyze samples in accordance with 40 CFR Part 136. When analysis of pH, temperature, residual chlorine, oil and grease, or fecal coliform (including *E. coli*), and Enterococci (previously known as fecal streptococcus) and volatile organics is required in paragraphs (h)(4)(i)(A) through (K) of this section, grab samples must be collected for those pollutants. For all other pollutants, a 24-hour composite sample, using a minimum of four (4) grab samples, must be used unless specified otherwise at 40 CFR Part 136. For a composite sample, only one analysis of the composite of aliquots is required. New dischargers must include estimates for the pollutants or parameters listed below instead of actual sampling data, along with the source of each estimate. All levels must be reported or estimated as concentration and as total mass, except for flow, pH, and temperature.

(A) Biochemical Oxygen Demand (BOD[5]).

(B) Total Suspended Solids (TSS).

(C) Fecal Coliform (if believed present or if sanitary waste is or will be discharged).

(D) Total Residual Chlorine (if chlorine is used).

(E) Oil and Grease.

(F) Chemical Oxygen Demand (COD) (if non-contact cooling water is or will be discharged).

(G) Total Organic Carbon (TOC) (if non-contact cooling water is or will be discharged).

(H) Ammonia (as N).

(I) Discharge Flow.

(J) pH.

(K) Temperature (Winter and Summer).

(ii) The Director may waive the testing and reporting requirements for any of the pollutants or flow listed in paragraph (h)(4)(i) of this section if the applicant submits a request for such a waiver before or with his application which demonstrates that information adequate to support issuance of a permit can be obtained through less stringent requirements.

(iii) If the applicant is a new discharger, he must complete and submit Item IV of Form 2e (see § 122.21(h)(4)) by providing quantitative data in accordance with that section no later than two years after commencement of discharge. However, the applicant need not

40 CFR 122.21

complete those portions of Item IV requiring tests which he has already performed and reported under the discharge monitoring requirements of his NPDES permit.

(iv)The requirements of parts i and iii of this section that an applicant must provide quantitative data or estimates of certain pollutants do not apply to pollutants present in a discharge solely as a result of their presence in intake water. However, an applicant must report such pollutants as present. Net credit may be provided for the presence of pollutants in intake water if the requirements of § 122.45(g) are met.

(5)Flow. A description of the frequency of flow and duration of any seasonal or intermittent discharge (except for stormwater runoff, leaks, or spills).

(6)Treatment system. A brief description of any system used or to be used.

(7)Optional information. Any additional information the applicant wishes to be considered, such as influent data for the purpose of obtaining "net" credits pursuant to § 122.45(g).

(8)Certification. Signature of certifying official under § 122.22.

(i)Application requirements for new and existing concentrated animal feeding operations and aquatic animal production facilities. New and existing concentrated animal feeding operations (defined in § 122.23) and concentrated aquatic animal production facilities (defined in § 122.24) shall provide the following information to the Director, using the application form provided by the Director:

(1)For concentrated animal feeding operations:

(i)The name of the owner or operator;

(ii)The facility location and mailing addresses;

(iii)Latitude and longitude of the production area (entrance to production area);

(iv)A topographic map of the geographic area in which the CAFO is located showing the specific location of the production area, in lieu of the requirements of paragraph (f)(7) of this section;

(v)Specific information about the number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

(vi)The type of containment and storage (anaerobic lagoon, roofed storage shed, storage ponds, underfloor pits, above ground storage tanks, below ground storage tanks, concrete pad, impervious soil pad, other) and total capacity for manure, litter, and process wastewater storage(tons/gallons);

(vii)The total number of acres under control of the applicant available for land application of manure, litter, or process wastewater;

(viii)Estimated amounts of manure, litter, and process wastewater generated per year (tons/gallons);

(ix)Estimated amounts of manure, litter and process wastewater transferred to other persons per year (tons/gallons); and

(x) A nutrient management plan that at a minimum satisfies the requirements specified in § 122.42(e), including, for all CAFOs subject to 40 CFR part 412, subpart C or subpart D, the requirements of *40 CFR 412.4(c)*, as applicable.

(2) For concentrated aquatic animal production facilities:

(i) The maximum daily and average monthly flow from each outfall.

(ii) The number of ponds, raceways, and similar structures.

(iii) The name of the receiving water and the source of intake water.

(iv) For each species of aquatic animals, the total yearly and maximum harvestable weight.

(v) The calendar month of maximum feeding and the total mass of food fed during that month.

(j) Application requirements for new and existing POTWs. Unless otherwise indicated, all POTWs and other dischargers designated by the Director must provide, at a minimum, the information in this paragraph to the Director, using Form 2A or another application form provided by the Director. Permit applicants must submit all information available at the time of permit application. The information may be provided by referencing information previously submitted to the Director. The Director may waive any requirement of this paragraph if he or she has access to substantially identical information. The Director may also waive any requirement of this paragraph that is not of material concern for a specific permit, if approved by the Regional Administrator. The waiver request to the Regional Administrator must include the State's justification for the waiver. A Regional Administrator's disapproval of a State's proposed waiver does not constitute final Agency action, but does provide notice to the State and permit applicant(s) that EPA may object to any State-issued permit issued in the absence of the required information.

(1) Basic application information. All applicants must provide the following information:

(i) Facility information. Name, mailing address, and location of the facility for which the application is submitted;

(ii) Applicant information. Name, mailing address, and telephone number of the applicant, and indication as to whether the applicant is the facility's owner, operator, or both;

(iii) Existing environmental permits. Identification of all environmental permits or construction approvals received or applied for (including dates) under any of the following programs:

(A) Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), Subpart C;

(B) Underground Injection Control program under the Safe Drinking Water Act (SDWA);

(C) NPDES program under Clean Water Act (CWA);

(D) Prevention of Significant Deterioration (PSD) program under the Clean Air Act;

(E) Nonattainment program under the Clean Air Act;

(F) National Emission Standards for Hazardous Air Pollutants (NESHAPS) preconstruction approval under the Clean Air Act;

(G) Ocean dumping permits under the Marine Protection Research and Sanctuaries Act;

(H) Dredge or fill permits under section 404 of the CWA; and

(I)Other relevant environmental permits, including State permits;

(iv)Population. The name and population of each municipal entity served by the facility, including unincorporated connector districts. Indicate whether each municipal entity owns or maintains the collection system and whether the collection system is separate sanitary or combined storm and sanitary, if known;

(v)Indian country. Information concerning whether the facility is located in Indian country and whether the facility discharges to a receiving stream that flows through Indian country;

(vi)Flow rate. The facility's design flow rate (the wastewater flow rate the plant was built to handle), annual average daily flow rate, and maximum daily flow rate for each of the previous 3 years;

(vii)Collection system. Identification of type(s) of collection system(s) used by the treatment works (i.e., separate sanitary sewers or combined storm and sanitary sewers) and an estimate of the percent of sewer line that each type comprises; and

(viii)Outfalls and other discharge or disposal methods. The following information for outfalls to waters of the United States and other discharge or disposal methods:

(A)For effluent discharges to waters of the United States, the total number and types of outfalls (e.g, treated effluent, combined sewer overflows, bypasses, constructed emergency overflows);

(B)For wastewater discharged to surface impoundments:

- (1)**The location of each surface impoundment;
- (2)**The average daily volume discharged to each surface impoundment; and
- (3)**Whether the discharge is continuous or intermittent;

(C)For wastewater applied to the land:

- (1)**The location of each land application site;
- (2)**The size of each land application site, in acres;
- (3)**The average daily volume applied to each land application site, in gallons per day; and
- (4)**Whether land application is continuous or intermittent;

(D)For effluent sent to another facility for treatment prior to discharge:

- (1)**The means by which the effluent is transported;
- (2)**The name, mailing address, contact person, and phone number of the organization transporting the discharge, if the transport is provided by a party other than the applicant;
- (3)**The name, mailing address, contact person, phone number, and NPDES permit number (if any) of the receiving facility; and
- (4)**The average daily flow rate from this facility into the receiving facility, in millions of gallons per day; and

40 CFR 122.21

(E)For wastewater disposed of in a manner not included in paragraphs (j)(1)(viii)(A) through (D) of this section (e.g., underground percolation, underground injection):

- (1)**A description of the disposal method, including the location and size of each disposal site, if applicable;
- (2)**The annual average daily volume disposed of by this method, in gallons per day; and
- (3)**Whether disposal through this method is continuous or intermittent;

(2)Additional Information. All applicants with a design flow greater than or equal to 0.1 mgd must provide the following information:

(i)Inflow and infiltration. The current average daily volume of inflow and infiltration, in gallons per day, and steps the facility is taking to minimize inflow and infiltration;

(ii)Topographic map. A topographic map (or other map if a topographic map is unavailable) extending at least one mile beyond property boundaries of the treatment plant, including all unit processes, and showing:

(A)Treatment plant area and unit processes;

(B)The major pipes or other structures through which wastewater enters the treatment plant and the pipes or other structures through which treated wastewater is discharged from the treatment plant. Include outfalls from bypass piping, if applicable;

(C)Each well where fluids from the treatment plant are injected underground;

(D)Wells, springs, and other surface water bodies listed in public records or otherwise known to the applicant within 1/4 mile of the treatment works' property boundaries;

(E)Sewage sludge management facilities (including on-site treatment, storage, and disposal sites); and

(F)Location at which waste classified as hazardous under RCRA enters the treatment plant by truck, rail, or dedicated pipe;

(iii)Process flow diagram or schematic.

(A)A diagram showing the processes of the treatment plant, including all bypass piping and all backup power sources or redundancy in the system. This includes a water balance showing all treatment units, including disinfection, and showing daily average flow rates at influent and discharge points, and approximate daily flow rates between treatment units; and

(B)A narrative description of the diagram; and

(iv)Scheduled improvements, schedules of implementation. The following information regarding scheduled improvements:

(A)The outfall number of each outfall affected;

(B)A narrative description of each required improvement;

(C)Scheduled or actual dates of completion for the following:

(I)Commencement of construction;

- (2) Completion of construction;
- (3) Commencement of discharge; and
- (4) Attainment of operational level;

(D) A description of permits and clearances concerning other Federal and/or State requirements;

(3) Information on effluent discharges. Each applicant must provide the following information for each outfall, including bypass points, through which effluent is discharged, as applicable:

(i) Description of outfall. The following information about each outfall:

- (A) Outfall number;
- (B) State, county, and city or town in which outfall is located;
- (C) Latitude and longitude, to the nearest second;
- (D) Distance from shore and depth below surface;
- (E) Average daily flow rate, in million gallons per day;
- (F) The following information for each outfall with a seasonal or periodic discharge:
 - (1) Number of times per year the discharge occurs;
 - (2) Duration of each discharge;
 - (3) Flow of each discharge; and
 - (4) Months in which discharge occurs; and
- (G) Whether the outfall is equipped with a diffuser and the type (e.g., high-rate) of diffuser used;

(ii) Description of receiving waters. The following information (if known) for each outfall through which effluent is discharged to waters of the United States:

- (A) Name of receiving water;
- (B) Name of watershed/river/stream system and United States Soil Conservation Service 14-digit watershed code;
- (C) Name of State Management/River Basin and United States Geological Survey 8-digit hydrologic cataloging unit code; and
- (D) Critical flow of receiving stream and total hardness of receiving stream at critical low flow (if applicable);

(iii) Description of treatment. The following information describing the treatment provided for discharges from each outfall to waters of the United States:

- (A) The highest level of treatment (e.g., primary, equivalent to secondary, secondary, advanced, other) that is provided for the discharge for each outfall and:
 - (1) Design biochemical oxygen demand (BOD[5] or CBOD[5]) removal (percent);
 - (2) Design suspended solids (SS) removal (percent); and, where applicable,

40 CFR 122.21

- (3) Design phosphorus (P) removal (percent);
- (4) Design nitrogen (N) removal (percent); and
- (5) Any other removals that an advanced treatment system is designed to achieve.

(B) A description of the type of disinfection used, and whether the treatment plant dechlorinates (if disinfection is accomplished through chlorination);

(4) Effluent monitoring for specific parameters.

(i) As provided in paragraphs (j)(4)(ii) through (x) of this section, all applicants must submit to the Director effluent monitoring information for samples taken from each outfall through which effluent is discharged to waters of the United States, except for CSOs. The Director may allow applicants to submit sampling data for only one outfall on a case-by-case basis, where the applicant has two or more outfalls with substantially identical effluent. The Director may also allow applicants to composite samples from one or more outfalls that discharge into the same mixing zone;

(ii) All applicants must sample and analyze for the pollutants listed in Appendix J, Table 1A of this part;

(iii) All applicants with a design flow greater than or equal to 0.1 mgd must sample and analyze for the pollutants listed in Appendix J, Table 1 of this part. Facilities that do not use chlorine for disinfection, do not use chlorine elsewhere in the treatment process, and have no reasonable potential to discharge chlorine in their effluent may delete chlorine from Table 1;

(iv) The following applicants must sample and analyze for the pollutants listed in Appendix J, Table 2 of this part, and for any other pollutants for which the State or EPA have established water quality standards applicable to the receiving waters:

(A) All POTWs with a design flow rate equal to or greater than one million gallons per day;

(B) All POTWs with approved pretreatment programs or POTWs required to develop a pretreatment program;

(C) Other POTWs, as required by the Director;

(v) The Director should require sampling for additional pollutants, as appropriate, on a case-by-case basis;

(vi) Applicants must provide data from a minimum of three samples taken within four and one-half years prior to the date of the permit application. Samples must be representative of the seasonal variation in the discharge from each outfall. Existing data may be used, if available, in lieu of sampling done solely for the purpose of this application. The Director should require additional samples, as appropriate, on a case-by-case basis.

(vii) All existing data for pollutants specified in paragraphs (j)(4)(ii) through (v) of this section that is collected within four and one-half years of the application must be included in the pollutant data summary submitted by the applicant. If, however, the applicant samples for a specific pollutant on a monthly or more frequent basis, it is only necessary, for such pollutant, to summarize all data collected within one year of the application.

(viii) Applicants must collect samples of effluent and analyze such samples for pollutants in accordance with analytical methods approved under 40 CFR Part 136 unless an alternative is

specified in the existing NPDES permit. When analysis of pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform (including E. coli), or volatile organics is required in paragraphs (j)(4)(ii) through (iv) of this section, grab samples must be collected for those pollutants. For all other pollutants, 24-hour composite samples must be used. For a composite sample, only one analysis of the composite of aliquots is required.

(ix) The effluent monitoring data provided must include at least the following information for each parameter:

(A) Maximum daily discharge, expressed as concentration or mass, based upon actual sample values;

(B) Average daily discharge for all samples, expressed as concentration or mass, and the number of samples used to obtain this value;

(C) The analytical method used; and

(D) The threshold level (i.e., method detection limit, minimum level, or other designated method endpoints) for the analytical method used.

(x) Unless otherwise required by the Director, metals must be reported as total recoverable.

(5) Effluent monitoring for whole effluent toxicity.

(i) All applicants must provide an identification of any whole effluent toxicity tests conducted during the four and one-half years prior to the date of the application on any of the applicant's discharges or on any receiving water near the discharge.

(ii) As provided in paragraphs (j)(5)(iii)-(ix) of this section, the following applicants must submit to the Director the results of valid whole effluent toxicity tests for acute or chronic toxicity for samples taken from each outfall through which effluent is discharged to surface waters, except for combined sewer overflows:

(A) All POTWs with design flow rates greater than or equal to one million gallons per day;

(B) All POTWs with approved pretreatment programs or POTWs required to develop a pretreatment program;

(C) Other POTWs, as required by the Director, based on consideration of the following factors:

(1) The variability of the pollutants or pollutant parameters in the POTW effluent (based on chemical-specific information, the type of treatment plant, and types of industrial contributors);

(2) The ratio of effluent flow to receiving stream flow;

(3) Existing controls on point or non-point sources, including total maximum daily load calculations for the receiving stream segment and the relative contribution of the POTW;

(4) Receiving stream characteristics, including possible or known water quality impairment, and whether the POTW discharges to a coastal water, one of the Great Lakes, or a water designated as an outstanding natural resource water; or

40 CFR 122.21

(5) Other considerations (including, but not limited to, the history of toxic impacts and compliance problems at the POTW) that the Director determines could cause or contribute to adverse water quality impacts.

(iii) Where the POTW has two or more outfalls with substantially identical effluent discharging to the same receiving stream segment, the Director may allow applicants to submit whole effluent toxicity data for only one outfall on a case-by-case basis. The Director may also allow applicants to composite samples from one or more outfalls that discharge into the same mixing zone.

(iv) Each applicant required to perform whole effluent toxicity testing pursuant to paragraph (j)(5)(ii) of this section must provide:

(A) Results of a minimum of four quarterly tests for a year, from the year preceding the permit application; or

(B) Results from four tests performed at least annually in the four and one half year period prior to the application, provided the results show no appreciable toxicity using a safety factor determined by the permitting authority.

(v) Applicants must conduct tests with multiple species (no less than two species; e.g., fish, invertebrate, plant), and test for acute or chronic toxicity, depending on the range of receiving water dilution. EPA recommends that applicants conduct acute or chronic testing based on the following dilutions:

(A) Acute toxicity testing if the dilution of the effluent is greater than 1000:1 at the edge of the mixing zone;

(B) Acute or chronic toxicity testing if the dilution of the effluent is between 100:1 and 1000:1 at the edge of the mixing zone. Acute testing may be more appropriate at the higher end of this range (1000:1), and chronic testing may be more appropriate at the lower end of this range (100:1); and

(C) Chronic testing if the dilution of the effluent is less than 100:1 at the edge of the mixing zone.

(vi) Each applicant required to perform whole effluent toxicity testing pursuant to paragraph (j)(5)(ii) of this section must provide the number of chronic or acute whole effluent toxicity tests that have been conducted since the last permit reissuance.

(vii) Applicants must provide the results using the form provided by the Director, or test summaries if available and comprehensive, for each whole effluent toxicity test conducted pursuant to paragraph (j)(5)(ii) of this section for which such information has not been reported previously to the Director.

(viii) Whole effluent toxicity testing conducted pursuant to paragraph (j)(5)(ii) of this section must be conducted using methods approved under 40 CFR part 136. West coast facilities in Washington, Oregon, California, Alaska, Hawaii, and the Pacific Territories are exempted from 40 CFR part 136 chronic methods and must use alternative guidance as directed by the permitting authority.

(ix) For whole effluent toxicity data submitted to the Director within four and one-half years prior to the date of the application, applicants must provide the dates on which the data were submitted and a summary of the results.

(x) Each POTW required to perform whole effluent toxicity testing pursuant to paragraph (j)(5)(ii) of this section must provide any information on the cause of toxicity and written details of any toxicity reduction evaluation conducted, if any whole effluent toxicity test conducted within the past four and one-half years revealed toxicity.

(6) Industrial discharges. Applicants must submit the following information about industrial discharges to the POTW:

(i) Number of significant industrial users (SIUs) and categorical industrial users (CIUs) discharging to the POTW; and

(ii) POTWs with one or more SIUs shall provide the following information for each SIU, as defined at 40 CFR 403.3(v), that discharges to the POTW:

(A) Name and mailing address;

(B) Description of all industrial processes that affect or contribute to the SIU's discharge;

(C) Principal products and raw materials of the SIU that affect or contribute to the SIU's discharge;

(D) Average daily volume of wastewater discharged, indicating the amount attributable to process flow and non-process flow;

(E) Whether the SIU is subject to local limits;

(F) Whether the SIU is subject to categorical standards, and if so, under which category(ies) and subcategory(ies); and

(G) Whether any problems at the POTW (e.g., upsets, pass through, interference) have been attributed to the SIU in the past four and one-half years.

(iii) The information required in paragraphs (j)(6)(i) and (ii) of this section may be waived by the Director for POTWs with pretreatment programs if the applicant has submitted either of the following that contain information substantially identical to that required in paragraphs (j)(6)(i) and (ii) of this section.

(A) An annual report submitted within one year of the application; or

(B) A pretreatment program;

(7) Discharges from hazardous waste generators and from waste cleanup or remediation sites. POTWs receiving Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or RCRA Corrective Action wastes or wastes generated at another type of cleanup or remediation site must provide the following information:

(i) If the POTW receives, or has been notified that it will receive, by truck, rail, or dedicated pipe any wastes that are regulated as RCRA hazardous wastes pursuant to 40 CFR part 261, the applicant must report the following:

- (A) The method by which the waste is received (i.e., whether by truck, rail, or dedicated pipe); and
- (B) The hazardous waste number and amount received annually of each hazardous waste;
- (ii) If the POTW receives, or has been notified that it will receive, wastewaters that originate from remedial activities, including those undertaken pursuant to CERCLA and sections 3004(u) or 3008(h) of RCRA, the applicant must report the following:
- (A) The identity and description of the site(s) or facility(ies) at which the wastewater originates;
- (B) The identities of the wastewater's hazardous constituents, as listed in Appendix VIII of part 261 of this chapter; if known; and
- (C) The extent of treatment, if any, the wastewater receives or will receive before entering the POTW;
- (iii) Applicants are exempt from the requirements of paragraph (j)(7)(ii) of this section if they receive no more than fifteen kilograms per month of hazardous wastes, unless the wastes are acute hazardous wastes as specified in 40 CFR 261.30(d) and 261.33(e).
- (8) Combined sewer overflows. Each applicant with combined sewer systems must provide the following information:
- (i) Combined sewer system information. The following information regarding the combined sewer system:
- (A) System map. A map indicating the location of the following:
- (1) All CSO discharge points;
 - (2) Sensitive use areas potentially affected by CSOs (e.g., beaches, drinking water supplies, shellfish beds, sensitive aquatic ecosystems, and outstanding national resource waters); and
 - (3) Waters supporting threatened and endangered species potentially affected by CSOs; and
- (B) System diagram. A diagram of the combined sewer collection system that includes the following information:
- (1) The location of major sewer trunk lines, both combined and separate sanitary;
 - (2) The locations of points where separate sanitary sewers feed into the combined sewer system;
 - (3) In-line and off-line storage structures;
 - (4) The locations of flow-regulating devices; and
 - (5) The locations of pump stations;
- (ii) Information on CSO outfalls. The following information for each CSO discharge point covered by the permit application:
- (A) Description of outfall. The following information on each outfall:

40 CFR 122.21

- (1) Outfall number;
- (2) State, county, and city or town in which outfall is located;
- (3) Latitude and longitude, to the nearest second; and
- (4) Distance from shore and depth below surface;
- (5) Whether the applicant monitored any of the following in the past year for this CSO:
 - (i) Rainfall;
 - (ii) CSO flow volume;
 - (iii) CSO pollutant concentrations;
 - (iv) Receiving water quality;
 - (v) CSO frequency; and

(6) The number of storm events monitored in the past year;

(B) CSO events. The following information about CSO overflows from each outfall:

- (1) The number of events in the past year;
- (2) The average duration per event, if available;
- (3) The average volume per CSO event, if available; and
- (4) The minimum rainfall that caused a CSO event, if available, in the last year;

(C) Description of receiving waters. The following information about receiving waters:

- (1) Name of receiving water;
- (2) Name of watershed/stream system and the United States Soil Conservation Service watershed (14-digit) code (if known); and
- (3) Name of State Management/River Basin and the United States Geological Survey hydrologic cataloging unit (8-digit) code (if known); and

(D) CSO operations. A description of any known water quality impacts on the receiving water caused by the CSO (e.g., permanent or intermittent beach closings, permanent or intermittent shellfish bed closings, fish kills, fish advisories, other recreational loss, or exceedance of any applicable State water quality standard);

(9) Contractors. All applicants must provide the name, mailing address, telephone number, and responsibilities of all contractors responsible for any operational or maintenance aspects of the facility; and

(10) Signature. All applications must be signed by a certifying official in compliance with § 122.22.

(k) Application requirements for new sources and new discharges. New manufacturing, commercial, mining and silvicultural dischargers applying for NPDES permits (except for new discharges of facilities subject to the requirements of paragraph (h) of this section or new discharges of storm water associated with industrial activity which are subject to the requirements of § 122.26(c)(1) and this

section (except as provided by § 122.26(c)(1)(ii)) shall provide the following information to the Director, using the application forms provided by the Director:

(1) Expected outfall location. The latitude and longitude to the nearest 15 seconds and the name of the receiving water.

(2) Discharge dates. The expected date of commencement of discharge.

(3) Flows, sources of pollution, and treatment technologies --

(i) Expected treatment of wastewater. Description of the treatment that the wastewater will receive, along with all operations contributing wastewater to the effluent, average flow contributed by each operation, and the ultimate disposal of any solid or liquid wastes not discharged.

(ii) Line drawing. A line drawing of the water flow through the facility with a water balance as described in § 122.21(g)(2).

(iii) Intermittent flows. If any of the expected discharges will be intermittent or seasonal, a description of the frequency, duration and maximum daily flow rate of each discharge occurrence (except for stormwater runoff, spillage, or leaks).

(4) Production. If a new source performance standard promulgated under section 306 of CWA or an effluent limitation guideline applies to the applicant and is expressed in terms of production (or other measure of operation), a reasonable measure of the applicant's expected actual production reported in the units used in the applicable effluent guideline or new source performance standard as required by § 122.45(b)(2) for each of the first three years. Alternative estimates may also be submitted if production is likely to vary.

(5) Effluent characteristics. The requirements in paragraphs (h)(4)(i), (ii), and (iii) of this section that an applicant must provide estimates of certain pollutants expected to be present do not apply to pollutants present in a discharge solely as a result of their presence in intake water; however, an applicant must report such pollutants as present. Net credits may be provided for the presence of pollutants in intake water if the requirements of § 122.45(g) are met. All levels (except for discharge flow, temperature, and pH) must be estimated as concentration and as total mass.

(i) Each applicant must report estimated daily maximum, daily average, and source of information for each outfall for the following pollutants or parameters. The Director may waive the reporting requirements for any of these pollutants and parameters if the applicant submits a request for such a waiver before or with his application which demonstrates that information adequate to support issuance of the permit can be obtained through less stringent reporting requirements.

(A) Biochemical Oxygen Demand (BOD).

(B) Chemical Oxygen Demand (COD).

(C) Total Organic Carbon (TOC).

(D) Total Suspended Solids (TSS).

(E) Flow.

(F) Ammonia (as N).

(G)Temperature (winter and summer).

(H)pH.

(ii)Each applicant must report estimated daily maximum, daily average, and source of information for each outfall for the following pollutants, if the applicant knows or has reason to believe they will be present or if they are limited by an effluent limitation guideline or new source performance standard either directly or indirectly through limitations on an indicator pollutant: all pollutants in table IV of appendix D of part 122 (certain conventional and nonconventional pollutants).

(iii)Each applicant must report estimated daily maximum, daily average and source of information for the following pollutants if he knows or has reason to believe that they will be present in the discharges from any outfall:

(A)The pollutants listed in table III of appendix D (the toxic metals, in the discharge from any outfall: Total cyanide, and total phenols);

(B)The organic toxic pollutants in table II of appendix D (except bis (chloromethyl) ether, dichlorofluoromethane and trichlorofluoromethane). This requirement is waived for applicants with expected gross sales of less than \$ 100,000 per year for the next three years, and for coal mines with expected average production of less than 100,000 tons of coal per year.

(iv)The applicant is required to report that 2,3,7,8 Tetrachlorodibenzo-P-Dioxin (TCDD) may be discharged if he uses or manufactures one of the following compounds, or if he knows or has reason to believe that TCDD will or may be present in an effluent:

(A)2,4,5-trichlorophenoxy acetic acid (2,4,5-T) (CAS #93-76-5);

(B)

2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 2,4,5-TP) (CAS #93-72-1);

(C)

2-(2,4,5-trichlorophenoxy) ethyl 2,2-dichloropropionate (Erbon) (CAS #136-25-4);

(D)0,0-dimethyl 0-(2,4,5-trichlorophenyl) phosphorothioate (Ronnel) (CAS #299-84-3);

(E)2,4,5-trichlorophenol (TCP) (CAS #95-95-4); or

(F)Hexachlorophene (HCP) (CAS #70-30-4);

(v)Each applicant must report any pollutants listed in table V of appendix D (certain hazardous substances) if he believes they will be present in any outfall (no quantitative estimates are required unless they are already available).

(vi)No later than two years after the commencement of discharge from the proposed facility, the applicant is required to complete and submit Items V and VI of NPDES application Form 2c (see § 122.21(g)). However, the applicant need not complete those portions of Item V requiring tests which he has already performed and reported under the discharge monitoring requirements of his NPDES permit.

(6)Engineering Report. Each applicant must report the existence of any technical evaluation concerning his wastewater treatment, along with the name and location of similar plants of which he has knowledge.

(7)Other information. Any optional information the permittee wishes to have considered.

(8)Certification. Signature of certifying official under § 122.22.

(l) Special provisions for applications from new sources.

(1)The owner or operator of any facility which may be a new source (as defined in § 122.2) and which is located in a State without an approved NPDES program must comply with the provisions of this paragraph (l)(1).

(2)

(i)Before beginning any on-site construction as defined in § 122.29, the owner or operator of any facility which may be a new source must submit information to the Regional Administrator so that he or she can determine if the facility is a new source. The Regional Administrator may request any additional information needed to determine whether the facility is a new source.

(ii)The Regional Administrator shall make an initial determination whether the facility is a new source within 30 days of receiving all necessary information under paragraph (l)(2)(i) of this section.

(3)The Regional Administrator shall issue a public notice in accordance with § 124.10 of this chapter of the new source determination under paragraph (l)(2) of this section. If the Regional Administrator has determined that the facility is a new source, the notice shall state that the applicant must comply with the environmental review requirements of 40 CFR 6.600 through 6.607.

(4)Any interested party may challenge the Regional Administrator's initial new source determination by requesting review of the determination under § 124.19 of this chapter within 30 days of the public notice of the initial determination. If all interested parties agree, the Environmental Appeals Board may defer review until after a final permit decision is made, and consolidate review of the determination with any review of the permit decision.

(m)Variance requests by non-POTWs. A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified in this paragraph:

(1)Fundamentally different factors. (i) A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be filed as follows:

(A)For a request from best practicable control technology currently available (BPT), by the close of the public comment period under § 124.10.

(B)For a request from best available technology economically achievable (BAT) and/or best conventional pollutant control technology (BCT), by no later than:

(1) July 3, 1989, for a request based on an effluent limitation guideline promulgated before February 4, 1987, to the extent July 3, 1989 is not later than that provided under previously promulgated regulations; or

(2) 180 days after the date on which an effluent limitation guideline is published in the FEDERAL REGISTER for a request based on an effluent limitation guideline promulgated on or after February 4, 1987.

(ii) The request shall explain how the requirements of the applicable regulatory and/or statutory criteria have been met.

(2) Non-conventional pollutants. A request for a variance from the BAT requirements for CWA section 301(b)(2)(F) pollutants (commonly called "non-conventional" pollutants) pursuant to section 301(c) of CWA because of the economic capability of the owner or operator, or pursuant to section 301(g) of the CWA (provided however that a § 301(g) variance may only be requested for ammonia; chlorine; color; iron; total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by section 301(b)(2)(F)) and any other pollutant which the Administrator lists under section 301(g)(4) of the CWA) must be made as follows:

(i) For those requests for a variance from an effluent limitation based upon an effluent limitation guideline by:

(A) Submitting an initial request to the Regional Administrator, as well as to the State Director if applicable, stating the name of the discharger, the permit number, the outfall number(s), the applicable effluent guideline, and whether the discharger is requesting a section 301(c) or section 301(g) modification or both. This request must have been filed not later than:

(1) September 25, 1978, for a pollutant which is controlled by a BAT effluent limitation guideline promulgated before December 27, 1977; or

(2) 270 days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977; and

(B) Submitting a completed request no later than the close of the public comment period under § 124.10 demonstrating that the requirements of § 124.13 and the applicable requirements of part 125 have been met. Notwithstanding this provision, the complete application for a request under section 301(g) shall be filed 180 days before EPA must make a decision (unless the Regional Division Director establishes a shorter or longer period).

(ii) For those requests for a variance from effluent limitations not based on effluent limitation guidelines, the request need only comply with paragraph (m)(2)(i)(B) of this section and need not be preceded by an initial request under paragraph (m)(2)(i)(A) of this section.

(3)-(4) [Reserved]

(5) Water quality related effluent limitations. A modification under section 302(b)(2) of requirements under section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.

(6) Thermal discharges. A variance under CWA section 316(a) for the thermal component of any discharge must be filed with a timely application for a permit under this section, except that if thermal effluent limitations are established under CWA section 402(a)(1) or are based on water quality standards the request for a variance may be filed by the close of the public comment period under § 124.10. A copy of the request as required under 40 CFR part 125, subpart H, shall be sent simultaneously to the appropriate State or interstate certifying agency as required under 40 CFR part 125. (See § 124.65 for special procedures for section 316(a) thermal variances.)

(n) Variance requests by POTWs. A discharger which is a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory provisions as specified in this paragraph:

(1) Discharges into marine waters. A request for a modification under CWA section 301(h) of requirements of CWA section 301(b)(1)(B) for discharges into marine waters must be filed in accordance with the requirements of 40 CFR part 125, subpart G.

(2) [Reserved]

(3) Water quality based effluent limitation. A modification under CWA section 302(b)(2) of the requirements under section 302(a) for achieving water quality based effluent limitations shall be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.

(o) Expedited variance procedures and time extensions.

(1) Notwithstanding the time requirements in paragraphs (m) and (n) of this section, the Director may notify a permit applicant before a draft permit is issued under § 124.6 that the draft permit will likely contain limitations which are eligible for variances. In the notice the Director may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of part 125 applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance.

(2) A discharger who cannot file a timely complete request required under paragraph (m)(2)(i)(B) or (m)(2)(ii) of this section may request an extension. The extension may be granted or denied at the discretion of the Director. Extensions shall be no more than 6 months in duration.

(p) Recordkeeping. Except for information required by paragraph (d)(3)(ii) of this section, which shall be retained for a period of at least five years from the date the application is signed (or longer as required by 40 CFR part 503), applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under this section for a period of at least 3 years from the date the application is signed.

(q) Sewage sludge management. All TWTDS subject to paragraph (c)(2)(i) of this section must provide the information in this paragraph to the Director, using Form 2S or another application form approved by the Director. New applicants must submit all information available at the time of permit application. The information may be provided by referencing information previously submitted to the Director. The Director may waive any requirement of this paragraph if he or she has access to substantially identical information. The Director may also waive any requirement of this paragraph that is not of material concern for a specific permit, if approved by the Regional Administrator. The

waiver request to the Regional Administrator must include the State's justification for the waiver. A Regional Administrator's disapproval of a State's proposed waiver does not constitute final Agency action, but does provide notice to the State and permit applicant(s) that EPA may object to any State-issued permit issued in the absence of the required information.

(1) Facility information. All applicants must submit the following information:

- (i)** The name, mailing address, and location of the TWTDS for which the application is submitted;
- (ii)** Whether the facility is a Class I Sludge Management Facility;
- (iii)** The design flow rate (in million gallons per day);
- (iv)** The total population served; and
- (v)** The TWTDS's status as Federal, State, private, public, or other entity;

(2) Applicant information. All applicants must submit the following information:

- (i)** The name, mailing address, and telephone number of the applicant; and
- (ii)** Indication whether the applicant is the owner, operator, or both;

(3) Permit information. All applicants must submit the facility's NPDES permit number, if applicable, and a listing of all other Federal, State, and local permits or construction approvals received or applied for under any of the following programs:

- (i)** Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA);
- (ii)** UIC program under the Safe Drinking Water Act (SDWA);
- (iii)** NPDES program under the Clean Water Act (CWA);
- (iv)** Prevention of Significant Deterioration (PSD) program under the Clean Air Act;
- (v)** Nonattainment program under the Clean Air Act;
- (vi)** National Emission Standards for Hazardous Air Pollutants (NESHAPS) preconstruction approval under the Clean Air Act;
- (vii)** Dredge or fill permits under section 404 of CWA;
- (viii)** Other relevant environmental permits, including State or local permits;

(4) Indian country. All applicants must identify any generation, treatment, storage, land application, or disposal of sewage sludge that occurs in Indian country;

(5) Topographic map. All applicants must submit a topographic map (or other map if a topographic map is unavailable) extending one mile beyond property boundaries of the facility and showing the following information:

- (i)** All sewage sludge management facilities, including on-site treatment, storage, and disposal sites; and
- (ii)** Wells, springs, and other surface water bodies that are within 1/4 mile of the property boundaries and listed in public records or otherwise known to the applicant;

40 CFR 122.21

(6) Sewage sludge handling. All applicants must submit a line drawing and/or a narrative description that identifies all sewage sludge management practices employed during the term of the permit, including all units used for collecting, dewatering, storing, or treating sewage sludge, the destination(s) of all liquids and solids leaving each such unit, and all processes used for pathogen reduction and vector attraction reduction;

(7) Sewage sludge quality. The applicant must submit sewage sludge monitoring data for the pollutants for which limits in sewage sludge have been established in 40 CFR part 503 for the applicant's use or disposal practices on the date of permit application.

(i) The Director may require sampling for additional pollutants, as appropriate, on a case-by-case basis;

(ii) Applicants must provide data from a minimum of three samples taken within four and one-half years prior to the date of the permit application. Samples must be representative of the sewage sludge and should be taken at least one month apart. Existing data may be used in lieu of sampling done solely for the purpose of this application;

(iii) Applicants must collect and analyze samples in accordance with analytical methods approved under SW-846 unless an alternative has been specified in an existing sewage sludge permit;

(iv) The monitoring data provided must include at least the following information for each parameter:

(A) Average monthly concentration for all samples (mg/kg dry weight), based upon actual sample values;

(B) The analytical method used; and

(C) The method detection level.

(8) Preparation of sewage sludge. If the applicant is a "person who prepares" sewage sludge, as defined at 40 CFR 503.9(r), the applicant must provide the following information:

(i) If the applicant's facility generates sewage sludge, the total dry metric tons per 365-day period generated at the facility;

(ii) If the applicant's facility receives sewage sludge from another facility, the following information for each facility from which sewage sludge is received:

(A) The name, mailing address, and location of the other facility;

(B) The total dry metric tons per 365-day period received from the other facility; and

(C) A description of any treatment processes occurring at the other facility, including blending activities and treatment to reduce pathogens or vector attraction characteristics;

(iii) If the applicant's facility changes the quality of sewage sludge through blending, treatment, or other activities, the following information:

(A) Whether the Class A pathogen reduction requirements in 40 CFR 503.32(a) or the Class B pathogen reduction requirements in 40 CFR 503.32(b) are met, and a description of any treatment processes used to reduce pathogens in sewage sludge;

40 CFR 122.21

(B) Whether any of the vector attraction reduction options of 40 CFR 503.33(b)(1) through (b)(8) are met, and a description of any treatment processes used to reduce vector attraction properties in sewage sludge; and

(C) A description of any other blending, treatment, or other activities that change the quality of sewage sludge;

(iv) If sewage sludge from the applicant's facility meets the ceiling concentrations in 40 CFR 503.13(b)(1), the pollutant concentrations in § 503.13(b)(3), the Class A pathogen requirements in § 503.32(a), and one of the vector attraction reduction requirements in § 503.33(b)(1) through (b)(8), and if the sewage sludge is applied to the land, the applicant must provide the total dry metric tons per 365-day period of sewage sludge subject to this paragraph that is applied to the land;

(v) If sewage sludge from the applicant's facility is sold or given away in a bag or other container for application to the land, and the sewage sludge is not subject to paragraph (q)(8)(iv) of this section, the applicant must provide the following information:

(A) The total dry metric tons per 365-day period of sewage sludge subject to this paragraph that is sold or given away in a bag or other container for application to the land; and

(B) A copy of all labels or notices that accompany the sewage sludge being sold or given away;

(vi) If sewage sludge from the applicant's facility is provided to another "person who prepares," as defined at 40 CFR 503.9(r), and the sewage sludge is not subject to paragraph (q)(8)(iv) of this section, the applicant must provide the following information for each facility receiving the sewage sludge:

(A) The name and mailing address of the receiving facility;

(B) The total dry metric tons per 365-day period of sewage sludge subject to this paragraph that the applicant provides to the receiving facility;

(C) A description of any treatment processes occurring at the receiving facility, including blending activities and treatment to reduce pathogens or vector attraction characteristic;

(D) A copy of the notice and necessary information that the applicant is required to provide the receiving facility under 40 CFR 503.12(g); and

(E) If the receiving facility places sewage sludge in bags or containers for sale or give-away to application to the land, a copy of any labels or notices that accompany the sewage sludge;

(9) Land application of bulk sewage sludge. If sewage sludge from the applicant's facility is applied to the land in bulk form, and is not subject to paragraphs (q)(8)(iv), (v), or (vi) of this section, the applicant must provide the following information:

(i) The total dry metric tons per 365-day period of sewage sludge subject to this paragraph that is applied to the land;

(ii) If any land application sites are located in States other than the State where the sewage sludge is prepared, a description of how the applicant will notify the permitting authority for the State(s) where the land application sites are located;

(iii) The following information for each land application site that has been identified at the time of permit application:

- (A) The name (if any), and location for the land application site;
- (B) The site's latitude and longitude to the nearest second, and method of determination;
- (C) A topographic map (or other map if a topographic map is unavailable) that shows the site's location;
- (D) The name, mailing address, and telephone number of the site owner, if different from the applicant;
- (E) The name, mailing address, and telephone number of the person who applies sewage sludge to the site, if different from the applicant;
- (F) Whether the site is agricultural land, forest, a public contact site, or a reclamation site, as such site types are defined under 40 CFR 503.11;
- (G) The type of vegetation grown on the site, if known, and the nitrogen requirement for this vegetation;
- (H) Whether either of the vector attraction reduction options of 40 CFR 503.33(b)(9) or (b)(10) is met at the site, and a description of any procedures employed at the time of use to reduce vector attraction properties in sewage sludge; and
- (I) Other information that describes how the site will be managed, as specified by the permitting authority.

(iv) The following information for each land application site that has been identified at the time of permit application, if the applicant intends to apply bulk sewage sludge subject to the cumulative pollutant loading rates in 40 CFR 503.13(b)(2) to the site:

- (A) Whether the applicant has contacted the permitting authority in the State where the bulk sewage sludge subject to § 503.13(b)(2) will be applied, to ascertain whether bulk sewage sludge subject to § 503.13(b)(2) has been applied to the site on or since July 20, 1993, and if so, the name of the permitting authority and the name and phone number of a contact person at the permitting authority;
- (B) Identification of facilities other than the applicant's facility that have sent, or are sending, sewage sludge subject to the cumulative pollutant loading rates in § 503.13(b)(2) to the site since July 20, 1993, if, based on the inquiry in paragraph (q)(iv)(A), bulk sewage sludge subject to cumulative pollutant loading rates in § 503.13(b)(2) has been applied to the site since July 20, 1993;

(v) If not all land application sites have been identified at the time of permit application, the applicant must submit a land application plan that, at a minimum:

- (A) Describes the geographical area covered by the plan;
- (B) Identifies the site selection criteria;
- (C) Describes how the site(s) will be managed;

(D)Provides for advance notice to the permit authority of specific land application sites and reasonable time for the permit authority to object prior to land application of the sewage sludge; and

(E)Provides for advance public notice of land application sites in the manner prescribed by State and local law. When State or local law does not require advance public notice, it must be provided in a manner reasonably calculated to apprise the general public of the planned land application.

(10)Surface disposal. If sewage sludge from the applicant's facility is placed on a surface disposal site, the applicant must provide the following information:

(i)The total dry metric tons of sewage sludge from the applicant's facility that is placed on surface disposal sites per 365-day period;

(ii)The following information for each surface disposal site receiving sewage sludge from the applicant's facility that the applicant does not own or operate:

(A)The site name or number, contact person, mailing address, and telephone number for the surface disposal site; and

(B)The total dry metric tons from the applicant's facility per 365-day period placed on the surface disposal site;

(iii)The following information for each active sewage sludge unit at each surface disposal site that the applicant owns or operates:

(A)The name or number and the location of the active sewage sludge unit;

(B)The unit's latitude and longitude to the nearest second, and method of determination;

(C)If not already provided, a topographic map (or other map if a topographic map is unavailable) that shows the unit's location;

(D)The total dry metric tons placed on the active sewage sludge unit per 365-day period;

(E)The total dry metric tons placed on the active sewage sludge unit over the life of the unit;

(F)A description of any liner for the active sewage sludge unit, including whether it has a maximum permeability of 1×10^{-7} cm/sec;

(G)A description of any leachate collection system for the active sewage sludge unit, including the method used for leachate disposal, and any Federal, State, and local permit number(s) for leachate disposal;

(H)If the active sewage sludge unit is less than 150 meters from the property line of the surface disposal site, the actual distance from the unit boundary to the site property line;

(I)The remaining capacity (dry metric tons) for the active sewage sludge unit;

(J)The date on which the active sewage sludge unit is expected to close, if such a date has been identified;

(K)The following information for any other facility that sends sewage sludge to the active sewage sludge unit:

- (1) The name, contact person, and mailing address of the facility; and
 - (2) Available information regarding the quality of the sewage sludge received from the facility, including any treatment at the facility to reduce pathogens or vector attraction characteristics;
- (L) Whether any of the vector attraction reduction options of 40 CFR 503.33(b)(9) through (b)(11) is met at the active sewage sludge unit, and a description of any procedures employed at the time of disposal to reduce vector attraction properties in sewage sludge;
- (M) The following information, as applicable to any ground-water monitoring occurring at the active sewage sludge unit:
- (1) A description of any ground-water monitoring occurring at the active sewage sludge unit;
 - (2) Any available ground-water monitoring data, with a description of the well locations and approximate depth to ground water;
 - (3) A copy of any ground-water monitoring plan that has been prepared for the active sewage sludge unit;
 - (4) A copy of any certification that has been obtained from a qualified ground-water scientist that the aquifer has not been contaminated; and
- (N) If site-specific pollutant limits are being sought for the sewage sludge placed on this active sewage sludge unit, information to support such a request;
- (11) Incineration.** If sewage sludge from the applicant's facility is fired in a sewage sludge incinerator, the applicant must provide the following information:
- (i) The total dry metric tons of sewage sludge from the applicant's facility that is fired in sewage sludge incinerators per 365-day period;
 - (ii) The following information for each sewage sludge incinerator firing the applicant's sewage sludge that the applicant does not own or operate:
 - (A) The name and/or number, contact person, mailing address, and telephone number of the sewage sludge incinerator; and
 - (B) The total dry metric tons from the applicant's facility per 365-day period fired in the sewage sludge incinerator;
 - (iii) The following information for each sewage sludge incinerator that the applicant owns or operates:
 - (A) The name and/or number and the location of the sewage sludge incinerator;
 - (B) The incinerator's latitude and longitude to the nearest second, and method of determination;
 - (C) The total dry metric tons per 365-day period fired in the sewage sludge incinerator;
 - (D) Information, test data, and documentation of ongoing operating parameters indicating that compliance with the National Emission Standard for Beryllium in 40 CFR part 61 will be achieved;

40 CFR 122.21

- (E) Information, test data, and documentation of ongoing operating parameters indicating that compliance with the National Emission Standard for Mercury in 40 CFR part 61 will be achieved;
- (F) The dispersion factor for the sewage sludge incinerator, as well as modeling results and supporting documentation;
- (G) The control efficiency for parameters regulated in 40 CFR 503.43, as well as performance test results and supporting documentation;
- (H) Information used to calculate the risk specific concentration (RSC) for chromium, including the results of incinerator stack tests for hexavalent and total chromium concentrations, if the applicant is requesting a chromium limit based on a site-specific RSC value;
- (I) Whether the applicant monitors total hydrocarbons (THC) or Carbon Monoxide (CO) in the exit gas for the sewage sludge incinerator;
- (J) The type of sewage sludge incinerator;
- (K) The maximum performance test combustion temperature, as obtained during the performance test of the sewage sludge incinerator to determine pollutant control efficiencies;
- (L) The following information on the sewage sludge feed rate used during the performance test:
- (1) Sewage sludge feed rate in dry metric tons per day;
 - (2) Identification of whether the feed rate submitted is average use or maximum design; and
 - (3) A description of how the feed rate was calculated;
- (M) The incinerator stack height in meters for each stack, including identification of whether actual or creditable stack height was used;
- (N) The operating parameters for the sewage sludge incinerator air pollution control device(s), as obtained during the performance test of the sewage sludge incinerator to determine pollutant control efficiencies;
- (O) Identification of the monitoring equipment in place, including (but not limited to) equipment to monitor the following:
- (1) Total hydrocarbons or Carbon Monoxide;
 - (2) Percent oxygen;
 - (3) Percent moisture; and
 - (4) Combustion temperature; and
- (P) A list of all air pollution control equipment used with this sewage sludge incinerator;
- (12) Disposal in a municipal solid waste landfill. If sewage sludge from the applicant's facility is sent to a municipal solid waste landfill (MSWLF), the applicant must provide the following information for each MSWLF to which sewage sludge is sent:

40 CFR 122.21

(i) The name, contact person, mailing address, location, and all applicable permit numbers of the MSWLF;

(ii) The total dry metric tons per 365-day period sent from this facility to the MSWLF;

(iii) A determination of whether the sewage sludge meets applicable requirements for disposal of sewage sludge in a MSWLF, including the results of the paint filter liquids test and any additional requirements that apply on a site-specific basis; and

(iv) Information, if known, indicating whether the MSWLF complies with criteria set forth in 40 CFR part 258;

(13) Contractors. All applicants must provide the name, mailing address, telephone number, and responsibilities of all contractors responsible for any operational or maintenance aspects of the facility related to sewage sludge generation, treatment, use, or disposal;

(14) Other information. At the request of the permitting authority, the applicant must provide any other information necessary to determine the appropriate standards for permitting under 40 CFR part 503, and must provide any other information necessary to assess the sewage sludge use and disposal practices, determine whether to issue a permit, or identify appropriate permit requirements; and

(15) Signature. All applications must be signed by a certifying official in compliance with § 122.22.

[Note 1: At 46 FR 2046, Jan. 8, 1981, the Environmental Protection Agency suspended until further notice § 122.21(g)(7)(v)(A) and the corresponding portions of Item V-C of the NPDES application Form 2C as they apply to coal mines. This suspension continues in effect.]

[Note 2: At 46 FR 22585, Apr. 20, 1981, the Environmental Protection Agency suspended until further notice § 122.21(g)(7)(v)(A) and the corresponding portions of Item V-C of the NPDES application Form 2C as they apply to:

a. Testing and reporting for all four organic fractions in the Greige Mills Subcategory of the Textile Mills industry (subpart C -- Low water use processing of 40 CFR part 410), and testing and reporting for the pesticide fraction in all other subcategories of this industrial category.

b. Testing and reporting for the volatile, base eutral and pesticide fractions in the Base and Precious Metals Subcategory of the Ore Mining and Dressing industry (subpart B of 40 CFR part 440), and testing and reporting for all four fractions in all other subcategories of this industrial category.

c. Testing and reporting for all four GC/MS fractions in the Porcelain Enameling industry.

This revision continues that suspension.] n1

[Note 3: At 46 FR 35090, July 1, 1981, the Environmental Protection Agency suspended until further notice § 122.21(g)(7)(v)(A) and the corresponding portions of Item V-C of the NPDES application Form 2C as they apply to:

a. Testing and reporting for the pesticide fraction in the Tall Oil Rosin Subcategory (subpart D) and Rosin-Based Derivatives Subcategory (subpart F) of the Gum and Wood Chemicals industry (40 CFR part 454), and testing and reporting for the pesticide and base-neutral fractions in all other subcategories of this industrial category.

b. Testing and reporting for the pesticide fraction in the Leather Tanning and Finishing, Paint and Ink Formulation, and Photographic Supplies industrial categories.

c. Testing and reporting for the acid, base neutral and pesticide fractions in the Petroleum Refining industrial category.

d. Testing and reporting for the pesticide fraction in the Papergrade Sulfite subcategories (subparts J and U) of the Pulp and Paper industry (40 CFR part 430); testing and reporting for the base neutral and pesticide fractions in the following subcategories: Deink (subpart Q), Dissolving Kraft (subpart F), and Paperboard from Waste Paper (subpart E); testing and reporting for the volatile, base neutral and pesticide fractions in the following subcategories: BCT Bleached Kraft (subpart H), Semi-Chemical (subparts B and C), and Nonintegrated-Fine Papers (subpart R); and testing and reporting for the acid, base neutral, and pesticide fractions in the following subcategories: Fine Bleached Kraft (subpart I), Dissolving Sulfite Pulp (subpart K), Groundwood-Fine Papers (subpart O), Market Bleached Kraft (subpart G), Tissue from Wastepaper (subpart T), and Nonintegrated-Tissue Papers (subpart S).

e. Testing and reporting for the base neutral fraction in the Once-Through Cooling Water, Fly Ash and Bottom Ash Transport Water process wastestreams of the Steam Electric Power Plant industrial category.

This revision continues that suspension.] n1

n1 EDITORIAL NOTE: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.

(r) Application requirements for facilities with cooling water intake structures -- (1)(i) New facilities with new or modified cooling water intake structures. New facilities (other than offshore oil and gas extraction facilities) with cooling water intake structures as defined in part 125, subpart I of this chapter, must submit to the Director for review the information required under paragraphs (r)(2) (except (r)(2)(iv)), (3), and (4) (except (r)(4)(ix), (x), (xi), and (xii)) of this section and § 125.86 of this chapter as part of the permit application. New offshore oil and gas extraction facilities with cooling water intake structures as defined in part 125, subpart N, of this chapter that are fixed facilities must submit to the Director for review the information required under paragraphs (r)(2) (except (r)(2)(iv)), (3), and (4) (except (r)(4)(ix), (x), (xi), and (xii)) of this section and § 125.136 of this chapter as part of their permit application.

(ii) Existing facilities. **(A)** All existing facilities. The owner or operator of an existing facility defined at 40 CFR 125.92(k) must submit to the Director for review the information required under paragraphs (r)(2) and (3) of this section and applicable provisions of paragraphs (r)(4), (5), (6), (7), and (8) of this section.

(B) Existing facilities greater than 125 mgd AIF. In addition, the owner or operator of an existing facility that withdraws greater than 125 mgd actual intake flow (AIF), as defined at 40 CFR 125.92 (a), of water for cooling purposes must also submit to the Director for review the information required under paragraphs (r)(9), (10), (11), (12), and (13) of this section. If the owner or operator of an existing facility intends to comply with the BTA (best technology available) standards for entrainment using a closed-cycle recirculating system as defined at 40

CFR 125.92(c), the Director may reduce or waive some or all of the information required under paragraphs (r)(9) through (13) of this section.

(C)Additional information. The owner or operator of an existing facility must also submit such additional information as the Director determines is necessary pursuant to 40 CFR 125.98(i).

(D)New units at existing facilities. The owner or operator of a new unit at an existing facility, as defined at 40 CFR 125.92(u), must submit or update any information previously provided to the Director by submitting the information required under paragraphs (r)(2), (3), (5), (8), and (14) of this section and applicable provisions of paragraphs (r)(4), (6), and (7) of this section. Requests for and approvals of alternative requirements sought under 40 CFR 125.94(e)(2) or 125.98(b)(7) must be submitted with the permit application.

(E)New units at existing facilities not previously subject to Part 125. The owner or operator of a new unit as defined at 40 CFR 125.92(u) at an existing facility not previously subject to part 125 of this chapter that increases the total capacity of the existing facility to more than 2 mgd DIF must submit the information required under paragraphs (r)(2), (3), (5), and (8) of this section and applicable provisions of paragraphs (r)(4), (6), and (7) of this section at the time of the permit application for the new unit. Requests for alternative requirements under 40 CFR 125.94(e)(2) or 125.98(b)(7) must be submitted with the permit application. If the total capacity of the facility will increase to more than 125 mgd AIF, the owner or operator must also submit the information required in paragraphs (r)(9) through (13) of this section. If the owner or operator of an existing facility intends to comply with the BTA (best technology available) standards for entrainment using a closed-cycle recirculating system as defined at 40 CFR 125.92(c), the Director may reduce or waive some or all of the information required under paragraphs (r)(9) through (13) of this section.

(F)If the owner or operator of an existing facility plans to retire the facility before the current permit expires, then the requirements of paragraphs (r)(1)(ii)(A), (B), (C), (D), and (E) of this section do not apply.

(G)If the owner or operator of an existing facility plans to retire the facility after the current permit expires but within one permit cycle, then the Director may waive the requirements of paragraphs (r)(7), (9), (10), (11), (12), and (13) of this section pending a signed certification statement from the owner or operator of the facility specifying the last operating date of the facility.

(H)All facilities. The owner or operator of any existing facility or new unit at any existing facility must also submit with its permit application all information received as a result of any communication with a Field Office of the Fish and Wildlife Service and/or Regional Office of the National Marine Fisheries Service.

(2)Source water physical data. These include:

(i)A narrative description and scaled drawings showing the physical configuration of all source water bodies used by your facility, including areal dimensions, depths, salinity and temperature regimes, and other documentation that supports your determination of the water body type where each cooling water intake structure is located;

(ii) Identification and characterization of the source waterbody's hydrological and geomorphological features, as well as the methods you used to conduct any physical studies to determine your intake's area of influence within the waterbody and the results of such studies;

(iii) Locational maps; and

(iv) For new offshore oil and gas facilities that are not fixed facilities, a narrative description and/or locational maps providing information on predicted locations within the waterbody during the permit term in sufficient detail for the Director to determine the appropriateness of additional impingement requirements under § 125.134(b)(4).

(3) Cooling water intake structure data. These include:

(i) A narrative description of the configuration of each of your cooling water intake structures and where it is located in the water body and in the water column;

(ii) Latitude and longitude in degrees, minutes, and seconds for each of your cooling water intake structures;

(iii) A narrative description of the operation of each of your cooling water intake structures, including design intake flows, daily hours of operation, number of days of the year in operation and seasonal changes, if applicable;

(iv) A flow distribution and water balance diagram that includes all sources of water to the facility, recirculating flows, and discharges; and

(v) Engineering drawings of the cooling water intake structure.

(4) Source water baseline biological characterization data. This information is required to characterize the biological community in the vicinity of the cooling water intake structure and to characterize the operation of the cooling water intake structures. The Director may also use this information in subsequent permit renewal proceedings to determine if your Design and Construction Technology Plan as required in § 125.86(b)(4) or § 125.136(b)(3) of this chapter should be revised. This supporting information must include existing data (if they are available). However, you may supplement the data using newly conducted field studies if you choose to do so. The information you submit must include:

(i) A list of the data in paragraphs (r)(4)(ii) through (vi) of this section that are not available and efforts made to identify sources of the data;

(ii) A list of species (or relevant taxa) for all life stages and their relative abundance in the vicinity of the cooling water intake structure;

(iii) Identification of the species and life stages that would be most susceptible to impingement and entrainment. Species evaluated should include the forage base as well as those most important in terms of significance to commercial and recreational fisheries;

(iv) Identification and evaluation of the primary period of reproduction, larval recruitment, and period of peak abundance for relevant taxa;

40 CFR 122.21

(v) Data representative of the seasonal and daily activities (e.g., feeding and water column migration) of biological organisms in the vicinity of the cooling water intake structure;

(vi) Identification of all threatened, endangered, and other protected species that might be susceptible to impingement and entrainment at your cooling water intake structures;

(vii) Documentation of any public participation or consultation with Federal or State agencies undertaken in development of the plan; and

(viii) If you supplement the information requested in paragraph (r)(4)(i) of this section with data collected using field studies, supporting documentation for the Source Water Baseline Biological Characterization must include a description of all methods and quality assurance procedures for sampling, and data analysis including a description of the study area; taxonomic identification of sampled and evaluated biological assemblages (including all life stages of fish and shellfish); and sampling and data analysis methods. The sampling and/or data analysis methods you use must be appropriate for a quantitative survey and based on consideration of methods used in other biological studies performed within the same source water body. The study area should include, at a minimum, the area of influence of the cooling water intake structure.

(ix) In the case of the owner or operator of an existing facility or new unit at an existing facility, the Source Water Baseline Biological Characterization Data is the information in paragraphs (r)(4)(i) through (xii) of this section.

(x) For the owner or operator of an existing facility, identification of protective measures and stabilization activities that have been implemented, and a description of how these measures and activities affected the baseline water condition in the vicinity of the intake.

(xi) For the owner or operator of an existing facility, a list of fragile species, as defined at 40 CFR 125.92(m), at the facility. The applicant need only identify those species not already identified as fragile at 40 CFR 125.92(m). New units at an existing facility are not required to resubmit this information if the cooling water withdrawals for the operation of the new unit are from an existing intake.

(xii) For the owner or operator of an existing facility that has obtained incidental take exemption or authorization for its cooling water intake structure(s) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, any information submitted in order to obtain that exemption or authorization may be used to satisfy the permit application information requirement of paragraph 40 CFR 125.95(f) if included in the application.

(5) Cooling Water System Data. The owner or operator of an existing facility must submit the following information for each cooling water intake structure used or intended to be used:

(i) A narrative description of the operation of the cooling water system and its relationship to cooling water intake structures; the proportion of the design intake flow that is used in the system; the number of days of the year the cooling water system is in

40 CFR 122.21

operation and seasonal changes in the operation of the system, if applicable; the proportion of design intake flow for contact cooling, non-contact cooling, and process uses; a distribution of water reuse to include cooling water reused as process water, process water reused for cooling, and the use of gray water for cooling; a description of reductions in total water withdrawals including cooling water intake flow reductions already achieved through minimized process water withdrawals; a description of any cooling water that is used in a manufacturing process either before or after it is used for cooling, including other recycled process water flows; the proportion of the source waterbody withdrawn (on a monthly basis);

(ii) Design and engineering calculations prepared by a qualified professional and supporting data to support the description required by paragraph (r)(5)(i) of this section; and

(iii) Description of existing impingement and entrainment technologies or operational measures and a summary of their performance, including but not limited to reductions in impingement mortality and entrainment due to intake location and reductions in total water withdrawals and usage.

(6) Chosen Method(s) of Compliance with Impingement Mortality Standard. The owner or operator of the facility must identify the chosen compliance method for the entire facility; alternatively, the applicant must identify the chosen compliance method for each cooling water intake structure at its facility. The applicant must identify any intake structure for which a BTA determination for Impingement Mortality under 40 CFR 125.94 (c)(11) or (12) is requested. In addition, the owner or operator that chooses to comply via 40 CFR 125.94 (c)(5) or (6) must also submit an impingement technology performance optimization study as described below:

(i) If the applicant chooses to comply with 40 CFR 125.94(c)(5), subject to the flexibility for timing provided in 40 CFR 125.95(a)(2), the impingement technology performance optimization study must include two years of biological data collection measuring the reduction in impingement mortality achieved by the modified traveling screens as defined at 40 CFR 125.92(s) and demonstrating that the operation has been optimized to minimize impingement mortality. A complete description of the modified traveling screens and associated equipment must be included, including, for example, type of mesh, mesh slot size, pressure sprays and fish return mechanisms. A description of any biological data collection and data collection approach used in measuring impingement mortality must be included:

(A) Collecting data no less frequently than monthly. The Director may establish more frequent data collection;

(B) Biological data collection representative of the impingement and the impingement mortality at the intakes subject to this provision;

(C) A taxonomic identification to the lowest taxon possible of all organisms collected;

(D) The method in which naturally moribund organisms are identified and taken into account;

40 CFR 122.21

(E)The method in which mortality due to holding times is taken into account;

(F)If the facility entraps fish or shellfish, a count of entrapment, as defined at 40 CFR 125.92(j), as impingement mortality; and

(G)The percent impingement mortality reflecting optimized operation of the modified traveling screen and all supporting calculations.

(ii)If the applicant chooses to comply with 40 CFR 125.94(c)(6), the impingement technology performance optimization study must include biological data measuring the reduction in impingement mortality achieved by operation of the system of technologies, operational measures and best management practices, and demonstrating that operation of the system has been optimized to minimize impingement mortality. This system of technologies, operational measures and best management practices may include flow reductions, seasonal operation, unit closure, credit for intake location, and behavioral deterrent systems. The applicant must document how each system element contributes to the system's performance. The applicant must include a minimum of two years of biological data measuring the reduction in impingement mortality achieved by the system. The applicant must also include a description of any sampling or data collection approach used in measuring the rate of impingement, impingement mortality, or flow reductions.

(A)Rate of Impingement. If the demonstration relies in part on a credit for reductions in the rate of impingement in the system, the applicant must provide an estimate of those reductions to be used as credit towards reducing impingement mortality, and any relevant supporting documentation, including previously collected biological data, performance reviews, and previously conducted performance studies not already submitted to the Director. The submission of studies more than 10 years old must include an explanation of why the data are still relevant and representative of conditions at the facility and explain how the data should be interpreted using the definitions of impingement and entrapment at 40 CFR 125.92(n) and (j), respectively. The estimated reductions in rate of impingement must be based on a comparison of the system to a once-through cooling system with a traveling screen whose point of withdrawal from the surface water source is located at the shoreline of the source waterbody. For impoundments that are waters of the United States in whole or in part, the facility's rate of impingement must be measured at a location within the cooling water intake system that the Director deems appropriate. In addition, the applicant must include two years of biological data collection demonstrating the rate of impingement resulting from the system. For this demonstration, the applicant must collect data no less frequently than monthly. The Director may establish more frequent data collection.

(B)Impingement Mortality. If the demonstration relies in part on a credit for reductions in impingement mortality already obtained at the facility, the applicant must include two years of biological data collection demonstrating the level of impingement mortality the system is capable of achieving. The applicant must submit any relevant supporting documentation, including previously collected biological data, performance reviews, and previously conducted performance studies not already submitted to the Director. The applicant must provide a

description of any sampling or data collection approach used in measuring impingement mortality. In addition, for this demonstration the applicant must:

- (1) Collect data no less frequently than monthly. The Director may establish more frequent data collection;
- (2) Conduct biological data collection that is representative of the impingement and the impingement mortality at an intake subject to this provision. In addition, the applicant must describe how the location of the cooling water intake structure in the waterbody and the water column are accounted for in the points of data collection;
- (3) Include a taxonomic identification to the lowest taxon possible of all organisms to be collected;
- (4) Describe the method in which naturally moribund organisms are identified and taken into account;
- (5) Describe the method in which mortality due to holding times is taken into account; and
- (6) If the facility entraps fish or shellfish, a count of the entrapment, as defined at 40 CFR 125.92(j), as impingement mortality.

(C) Flow reduction. If the demonstration relies in part on flow reduction to reduce impingement, the applicant must include two years of intake flows, measured daily, as part of the demonstration, and describe the extent to which flow reductions are seasonal or intermittent. The applicant must document how the flow reduction results in reduced impingement. In addition, the applicant must describe how the reduction in impingement has reduced impingement mortality.

(D) Total system performance. The applicant must document the percent impingement mortality reflecting optimized operation of the total system of technologies, operational measures, and best management practices and all supporting calculations. The total system performance is the combination of the impingement mortality performance reflected in paragraphs (r)(6)(ii)(A), (B), and (C) of this section.

(7) Entrainment Performance Studies. The owner or operator of an existing facility must submit any previously conducted studies or studies obtained from other facilities addressing technology efficacy, through-facility entrainment survival, and other entrainment studies. Any such submittals must include a description of each study, together with underlying data, and a summary of any conclusions or results. Any studies conducted at other locations must include an explanation as to why the data from other locations are relevant and representative of conditions at your facility. In the case of studies more than 10 years old, the applicant must explain why the data are still relevant and representative of conditions at the facility and explain how the data should be interpreted using the definition of entrainment at 40 CFR 125.92(h).

(8) Operational Status. The owner or operator of an existing facility must submit a description of the operational status of each generating, production, or process unit that uses cooling water, including but not limited to:

40 CFR 122.21

(i) For power production or steam generation, descriptions of individual unit operating status including age of each unit, capacity utilization rate (or equivalent) for the previous 5 years, including any extended or unusual outages that significantly affect current data for flow, impingement, entrainment, or other factors, including identification of any operating unit with a capacity utilization rate of less than 8 percent averaged over a 24-month block contiguous period, and any major upgrades completed within the last 15 years, including but not limited to boiler replacement, condenser replacement, turbine replacement, or changes to fuel type;

(ii) Descriptions of completed, approved, or scheduled uprates and Nuclear Regulatory Commission relicensing status of each unit at nuclear facilities;

(iii) For process units at your facility that use cooling water other than for power production or steam generation, if you intend to use reductions in flow or changes in operations to meet the requirements of 40 CFR 125.94(c), descriptions of individual production processes and product lines, operating status including age of each line, seasonal operation, including any extended or unusual outages that significantly affect current data for flow, impingement, entrainment, or other factors, any major upgrades completed within the last 15 years, and plans or schedules for decommissioning or replacement of process units or production processes and product lines;

(iv) For all manufacturing facilities, descriptions of current and future production schedules; and

(v) Descriptions of plans or schedules for any new units planned within the next 5 years.

(9) Entrainment Characterization Study. The owner or operator of an existing facility that withdraws greater than 125 mgd AIF, where the withdrawal of cooling water is measured at a location within the cooling water intake structure that the Director deems appropriate, must develop for submission to the Director an Entrainment Characterization Study that includes a minimum of two years of entrainment data collection. The Entrainment Characterization Study must include the following components:

(i) **Entrainment Data Collection Method.** The study should identify and document the data collection period and frequency. The study should identify and document organisms collected to the lowest taxon possible of all life stages of fish and shellfish that are in the vicinity of the cooling water intake structure(s) and are susceptible to entrainment, including any organisms identified by the Director, and any species protected under Federal, State, or Tribal law, including threatened or endangered species with a habitat range that includes waters in the vicinity of the cooling water intake structure. Biological data collection must be representative of the entrainment at the intakes subject to this provision. The owner or operator of the facility must identify and document how the location of the cooling water intake structure in the waterbody and the water column are accounted for by the data collection locations;

(ii) **Biological Entrainment Characterization.** Characterization of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal law (including threatened or endangered species), including a description of their abundance and their temporal and spatial characteristics in the vicinity of the cooling water intake structure(s), based on sufficient data to characterize annual, seasonal, and diel

variations in entrainment, including but not limited to variations related to climate and weather differences, spawning, feeding, and water column migration. This characterization may include historical data that are representative of the current operation of the facility and of biological conditions at the site. Identification of all life stages of fish and shellfish must include identification of any surrogate species used, and identification of data representing both motile and non-motile life-stages of organisms;

(iii) Analysis and Supporting Documentation. Documentation of the current entrainment of all life stages of fish, shellfish, and any species protected under Federal, State, or Tribal law (including threatened or endangered species). The documentation may include historical data that are representative of the current operation of the facility and of biological conditions at the site. Entrainment data to support the facility's calculations must be collected during periods of representative operational flows for the cooling water intake structure, and the flows associated with the data collection must be documented. The method used to determine latent mortality along with data for specific organism mortality or survival that is applied to other life-stages or species must be identified. The owner or operator of the facility must identify and document all assumptions and calculations used to determine the total entrainment for that facility together with all methods and quality assurance/quality control procedures for data collection and data analysis. The proposed data collection and data analysis methods must be appropriate for a quantitative survey.

(10) Comprehensive Technical Feasibility and Cost Evaluation Study. The owner or operator of an existing facility that withdraws greater than 125 mgd AIF must develop for submission to the Director an engineering study of the technical feasibility and incremental costs of candidate entrainment control technologies. In addition, the study must include the following:

(i) Technical feasibility. An evaluation of the technical feasibility of closed-cycle recirculating systems as defined at 40 CFR 125.92(c), fine mesh screens with a mesh size of 2 millimeters or smaller, and water reuse or alternate sources of cooling water. In addition, this study must include:

(A) A description of all technologies and operational measures considered (including alternative designs of closed-cycle recirculating systems such as natural draft cooling towers, mechanical draft cooling towers, hybrid designs, and compact or multi-cell arrangements);

(B) A discussion of land availability, including an evaluation of adjacent land and acres potentially available due to generating unit retirements, production unit retirements, other buildings and equipment retirements, and potential for repurposing of areas devoted to ponds, coal piles, rail yards, transmission yards, and parking lots;

(C) A discussion of available sources of process water, grey water, waste water, reclaimed water, or other waters of appropriate quantity and quality for use as some or all of the cooling water needs of the facility; and

40 CFR 122.21

(D) Documentation of factors other than cost that may make a candidate technology impractical or infeasible for further evaluation.

(ii) Other entrainment control technologies. An evaluation of additional technologies for reducing entrainment may be required by the Director.

(iii) Cost evaluations. The study must include engineering cost estimates of all technologies considered in paragraphs (r)(10)(i) and (ii) of this section. Facility costs must also be adjusted to estimate social costs. All costs must be presented as the net present value (NPV) and the corresponding annual value. Costs must be clearly labeled as compliance costs or social costs. The applicant must separately discuss facility level compliance costs and social costs, and provide documentation as follows:

(A) Compliance costs are calculated as after-tax, while social costs are calculated as pre-tax. Compliance costs include the facility's administrative costs, including costs of permit application, while the social cost adjustment includes the Director's administrative costs. Any outages, downtime, or other impacts to facility net revenue, are included in compliance costs, while only that portion of lost net revenue that does not accrue to other producers can be included in social costs. Social costs must also be discounted using social discount rates of 3 percent and 7 percent. Assumptions regarding depreciation schedules, tax rates, interest rates, discount rates and related assumptions must be identified;

(B) Costs and explanation of any additional facility modifications necessary to support construction and operation of technologies considered in paragraphs (r)(10)(i) and (ii) of this section, including but not limited to relocation of existing buildings or equipment, reinforcement or upgrading of existing equipment, and additional construction and operating permits. Assumptions regarding depreciation schedules, interest rates, discount rates, useful life of the technology considered, and any related assumptions must be identified; and

(C) Costs and explanation for addressing any non-water quality environmental and other impacts identified in paragraph (r)(12) of this section. The cost evaluation must include a discussion of all reasonable attempts to mitigate each of these impacts.

(11) Benefits Valuation Study. The owner or operator of an existing facility that withdraws greater than 125 mgd AIF must develop for submission to the Director an evaluation of the benefits of the candidate entrainment reduction technologies and operational measures evaluated in paragraph (r)(10) of this section including using the Entrainment Characterization Study completed in paragraph (r)(9) of this section. Each category of benefits must be described narratively, and when possible, benefits should be quantified in physical or biological units and monetized using appropriate economic valuation methods. The benefits valuation study must include, but is not limited to, the following elements:

(i) Incremental changes in the numbers of individual fish and shellfish lost due to impingement mortality and entrainment as defined in 40 CFR 125.92, for all life stages of each exposed species;

40 CFR 122.21

(ii) Description of basis for any estimates of changes in the stock sizes or harvest levels of commercial and recreational fish or shellfish species or forage fish species;

(iii) Description of basis for any monetized values assigned to changes in the stock size or harvest levels of commercial and recreational fish or shellfish species, forage fish, and to any other ecosystem or non use benefits;

(iv) A discussion of mitigation efforts completed prior to October 14, 2014 including how long they have been in effect and how effective they have been;

(v) Discussion, with quantification and monetization, where possible, of any other benefits expected to accrue to the environment and local communities, including but not limited to improvements for mammals, birds, and other organisms and aquatic habitats;

(vi) Discussion, with quantification and monetization, where possible, of any benefits expected to result from any reductions in thermal discharges from entrainment technologies.

(12) Non-water Quality Environmental and Other Impacts Study. The owner or operator of an existing facility that withdraws greater than 125 mgd AIF must develop for submission to the Director a detailed facility-specific discussion of the changes in non-water quality environmental and other impacts attributed to each technology and operational measure considered in paragraph (r)(10) of this section, including both impacts increased and impacts decreased. The study must include the following:

(i) Estimates of changes to energy consumption, including but not limited to auxiliary power consumption and turbine backpressure energy penalty;

(ii) Estimates of air pollutant emissions and of the human health and environmental impacts associated with such emissions;

(iii) Estimates of changes in noise;

(iv) A discussion of impacts to safety, including documentation of the potential for plumes, icing, and availability of emergency cooling water;

(v) A discussion of facility reliability, including but not limited to facility availability, production of steam, impacts to production based on process unit heating or cooling, and reliability due to cooling water availability;

(vi) Significant changes in consumption of water, including a facility-specific comparison of the evaporative losses of both once-through cooling and closed-cycle recirculating systems, and documentation of impacts attributable to changes in water consumption; and

(vii) A discussion of all reasonable attempts to mitigate each of these factors.

(13) Peer Review. If the applicant is required to submit studies under paragraphs (r)(10) through (12) of this section, the applicant must conduct an external peer review of each report to be submitted with the permit application. The applicant must select peer reviewers and notify the Director in advance of the peer review. The Director may disapprove of a peer reviewer or require additional peer reviewers. The Director may confer with EPA,

Federal, State and Tribal fish and wildlife management agencies with responsibility for fish and wildlife potentially affected by the cooling water intake structure, independent system operators, and state public utility regulatory agencies, to determine which peer review comments must be addressed. The applicant must provide an explanation for any significant reviewer comments not accepted. Peer reviewers must have appropriate qualifications and their names and credentials must be included in the peer review report.

(14)New Units. The applicant must identify the chosen compliance method for the new unit. In addition, the owner or operator that selects the BTA standards for new units at 40 CFR 125.94 (e)(2) as its route to compliance must submit information to demonstrate entrainment reductions equivalent to 90 percent or greater of the reduction that could be achieved through compliance with 40 CFR 125.94(e)(1). The demonstration must include the Entrainment Characterization Study at paragraph (r)(9) of this section. In addition, if data specific to your facility indicates that compliance with the requirements of § 125.94 of this chapter for each new unit would result in compliance costs wholly out of proportion to the costs EPA considered in establishing the requirements at issue, or would result in significant adverse impacts on local air quality, significant adverse impacts on local water resources other than impingement or entrainment, or significant adverse impacts on local energy markets, you must submit all supporting data as part of paragraph (r)(14) of this section. The Director may determine that additional data and information, including but not limited to monitoring, must be included as part of paragraph (r)(14) of this section.

Statutory Authority

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

History

[48 FR 14153, Apr. 1, 1983, as amended at 49 FR 31842, Aug. 8, 1984; 49 FR 38046, Sept. 26, 1984; 50 FR 6940, 6941, Feb. 19, 1985; 50 FR 35203, Aug. 29, 1985; 51 FR 26991, July 28, 1986; 53 FR 4158, Feb. 12, 1988; 53 FR 33007, Sept. 6, 1988; 54 FR 254, Jan. 4, 1989; 54 FR 18782, May 2, 1989; 55 FR 30128, July 24, 1990; 55 FR 48062, Nov. 16, 1990; 60 FR 17956, Apr. 7, 1995, as withdrawn at 60 FR 40235, Aug. 7, 1995; 60 FR 33931, June 29, 1995; 60 FR 40235, Aug. 7, 1995; 64 FR 42434, 42462, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 64 FR 68722, 68838, Dec. 8, 1999; 65 FR 30886, 30905, May 15, 2000; 66 FR 65256, 65337, Dec. 18, 2001; 68 FR 7176, 7265, Feb. 12, 2003; 69 FR 41576, 41682, July 9, 2004; 70 FR 60134, 60191, Oct. 14, 2005; 71 FR 6978, 6983, Feb. 10, 2006; 71 FR 35006, 35039, June 16, 2006; 72 FR 11200, 11211, Mar. 12, 2007; suspended in part at 72 FR 37107, 37109, July 9, 2007; 72 FR 40245, 40250, July 24, 2007; 73 FR 70418, 70480, Nov. 20, 2008; 79 FR 48300, 48424, Aug. 15, 2014; 79 FR 49001, 49013, Aug. 19, 2014, as corrected at 79 FR 56274, 56275, Sept. 19, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE 72 FR 37107, 37109, July 9, 2007, suspended paragraphs (r)(1)(ii) and (r)(5) for an indefinite period of time, effective July 9, 2007; 79 FR 48300, 48424, Aug. 15, 2014, lifted the suspension affecting paragraphs (r)(1)(ii) and (r)(5) published at 72 FR 37107, July 9, 2007, and amended paragraph (r), effective Oct. 14, 2014; 79 FR 49001, 49013, Aug. 19, 2014, added paragraph (e)(3), effective Sept. 18, 2014.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part

Administrative Law : Informal Agency Actions

Contracts Law : Negotiable Instruments : General Overview

Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances

Environmental Law : Hazardous Wastes & Toxic Substances : Treatment, Storage & Disposal

Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure

Environmental Law : National Environmental Policy Act : Environmental Assessments

Environmental Law : Water Quality : General Overview

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

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

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

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

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

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

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

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

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

Environmental Law : Water Quality : Clean Water Act : Water Quality Standards

Real Property Law : Zoning & Land Use : Special Permits & Variances

Transportation Law : Air Transportation : Charters

Case Notes Applicable to Entire Part

Part Note

Administrative Law : Informal Agency Actions

Nrdc v. United States EPA, 279 F.3d 1180, 2002 U.S. App. LEXIS 2311 (9th Cir Feb. 13, 2002).

Overview: *EPA's issuance of permits for discharges of bark and woody debris by log transfer facilities in Alaska which changed the existing "zone of deposit" did not comply with notice and opportunity requirements of the Administrative Procedures Act.*

- National Pollutant Discharge Elimination System permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. 40 C.F.R. §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. 49 C.F.R. § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. 40 C.F.R. § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. 40 C.F.R. § 122.28(b)(2)(iv). Whichever of these three authorization methods is used in the general permit, the permit issuer can require a particular discharger to undergo the individual permit application process. 40 C.F.R. § 122.28(b)(3). Go To Headnote

Nunam Kitlutsisti v. Arco Alaska, Inc., 1984 U.S. Dist. LEXIS 14689 (D Alaska July 24, 1984).

Overview: *Where the Federal Water Pollution Control Act (FWCPA) required that all discharge of pollutants in the nation's water was illegal unless the discharger had a permit, the oil exploration company violated the FWPCA for drilling without the permit.*

- A letter requesting coverage is not an application for a National Pollutant Discharge Elimination System permit. 40 C.F.R. §§. § 122.21, 124.3(a). Any application must be a "sufficient" application. Go To Headnote

Contracts Law : Negotiable Instruments : General Overview

Amigos Bravos v. Molycorp, Inc., 1998 U.S. App. LEXIS 28576 (10th Cir Nov. 13, 1998).

Overview: *Where environmentalists had not raised their claims about a company's discharge of pollutants during proceedings to renew its National Pollution Discharge Elimination System permit, they were barred from bringing the claims in a Clean Water Act suit.*

- An applicant seeking to renew an existing National Pollution Discharge Elimination System permit must submit an application to the Environmental Protection Agency (EPA) regional

administrator before the existing permit expires. 40 C.F.R. § 122.21(d)(2). Once the application is complete, the regional administrator makes a tentative decision either to issue or to deny a draft permit. 40 C.F.R. § 124.6(a). If the regional director decides to prepare a draft permit, the EPA will issue the draft permit and an explanatory fact sheet. 40 C.F.R. §§ 124.6, 124.8, 124.56. The regional administrator also must give public notice that a draft permit has been prepared and must allow at least 30 days for public comment. 40 C.F.R. § 124.10(a)(1)(ii), (b). During the public comment period, any interested person may submit comments on the draft permit and may request a public hearing if no hearing has been scheduled. 40 C.F.R. § 124.11. Anyone who believes that any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of his position before the end of the comment period. 40 C.F.R. § 124.13.
Go To Headnote

Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances

Mcclellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103 (ED Cal June 20, 1988).

Overview: A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.

- The Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES) regulations, codified at 40 C.F.R. § 122, contemplate that discharges of volatile organics will be addressed on a case-by-case basis. 40 C.F.R. § 122.21(g)(7)(ii) requires industrial permit applicants to report quantitative data for volatile organics in each outfall containing process wastewater. 40 C.F.R. § 122.42(a) requires permittees to notify the permitting authority as soon as they know or have reason to believe that an activity has occurred or will occur that would result in the discharge of a toxic pollutant which is not limited in the permit in excess of specified levels. These sections are specifically made applicable to state NPDES programs through 40 C.F.R. § 123.25. Go To Headnote

Environmental Law : Hazardous Wastes & Toxic Substances : Treatment, Storage & Disposal

Mcclellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103 (ED Cal June 20, 1988).

Overview: A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.

- The Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES) regulations, codified at 40 C.F.R. § 122, contemplate that discharges of volatile organics will be addressed on a case-by-case basis. 40 C.F.R. § 122.21(g)(7)(ii) requires industrial permit applicants to report quantitative data for volatile organics in each outfall containing process wastewater. 40 C.F.R. § 122.42(a) requires permittees to notify the permitting authority as soon as they know or have reason to believe that an activity has occurred or will occur that would result in the discharge of a toxic pollutant which is not limited in the permit in excess of specified levels.

These sections are specifically made applicable to state NPDES programs through 40 C.F.R. § 123.25. Go To Headnote

Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure

Amigos Bravos v. Molycorp, Inc., 1998 U.S. App. LEXIS 28576 (10th Cir Nov. 13, 1998).

Overview: Where environmentalists had not raised their claims about a company's discharge of pollutants during proceedings to renew its National Pollution Discharge Elimination System permit, they were barred from bringing the claims in a Clean Water Act suit.

- An applicant seeking to renew an existing National Pollution Discharge Elimination System permit must submit an application to the Environmental Protection Agency (EPA) regional administrator before the existing permit expires. 40 C.F.R. § 122.21(d)(2). Once the application is complete, the regional administrator makes a tentative decision either to issue or to deny a draft permit. 40 C.F.R. § 124.6(a). If the regional director decides to prepare a draft permit, the EPA will issue the draft permit and an explanatory fact sheet. 40 C.F.R. §§ 124.6, 124.8, 124.56. The regional administrator also must give public notice that a draft permit has been prepared and must allow at least 30 days for public comment. 40 C.F.R. § 124.10(a)(1)(ii), (b). During the public comment period, any interested person may submit comments on the draft permit and may request a public hearing if no hearing has been scheduled. 40 C.F.R. § 124.11. Anyone who believes that any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of his position before the end of the comment period. 40 C.F.R. § 124.13. Go To Headnote

Environmental Law : National Environmental Policy Act : Environmental Assessments

Manasota-88, Inc. v. Thomas, 799 F.2d 687, 1986 U.S. App. LEXIS 30677 (11th Cir Sept. 15, 1986).

Overview: Reissuance of permit to phosphate ore processor did not require an investigation by the EPA because it was not a new source, and permit could not be challenged to the extent it was based on the EPA's environmental determinations.

- Where the facility for which an National Pollution Distribution Elimination System permit is sought may be a new source, special information requirements are imposed to enable the EPA Regional Administrator to determine if the facility is a new source. 40 C.F.R. § 122.21(k)(2)(i). Once these special information requirements have been satisfied, the Regional Administrator is required to make an initial determination whether the facility is a new source within 30 days, 40 C.F.R. § 122.21(k)(ii), by applying the criteria set forth in 40 C.F.R. § 122.29(b). The Regional Administrator's initial new source determination, whether affirmative or negative, is subject to public notice and may be challenged within 30 days of issuance of the public notice of the initial new source determination by the submission of an evidentiary hearing request from any interested person. 40 C.F.R. § 122.21(k)(4). Go To Headnote
- It is clear that the National Environmental Policy Act, 42 U.S.C.S. §§ 4321 et seq., is applicable to the initial issuance of an National Pollution Distribution Elimination System (NPDES) permit to a new source. 33 U.S.C.S. § 1371(c)(1). Thus, where the Regional Administrator initially determines that a facility is a new source for NPDES permitting purposes, the requirement for

environmental review is triggered. 40 C.F.R. §§ 6.604(a), 122.29(c)(1), and 122.21(k)(3). The Environmental Protection Agency's environmental review proceeds concurrently with the processing and review of the new source NPDES permit application. 40 C.F.R. § 6.603. The review is based upon an environmental information document prepared by the permit applicant, from which a written "environmental assessment" is prepared. 40 C.F.R. § 6.604(b) and (c). Go To Headnote

Environmental Law : Water Quality : General Overview

United States Pub. Interest Research Group v. Heritage Salmon, Inc., 2002 U.S. Dist. LEXIS 2706 (D Me Feb. 19, 2002).

Overview: Magistrate determined net pen fish farming operations were concentrated aquatic animal production facilities and therefore required a National Pollutant Discharge Elimination System permit, which the fish farm operator did not have.

- Environmental regulations at 40 C.F.R. § 122.21(i)(2) state that the concentrated aquatic animal production facility application requires the applicant to provide (i) the maximum daily and average monthly flow from each outfall; (ii) the number of ponds, raceways, and similar structures; (iii) the name of the receiving water and the source of intake water; (iv) the total yearly and maximum harvestable weight for each species of aquatic animals; and (v) the calendar month of maximum feeding and the total mass of food feed during that month. 40 C.F.R. § 122.21(i)(2). Go To Headnote

Manasota-88, Inc. v. Thomas, 799 F.2d 687, 1986 U.S. App. LEXIS 30677 (11th Cir Sept. 15, 1986).

Overview: Reissuance of permit to phosphate ore processor did not require an investigation by the EPA because it was not a new source, and permit could not be challenged to the extent it was based on the EPA's environmental determinations.

- Where the facility for which an National Pollution Distribution Elimination System permit is sought may be a new source, special information requirements are imposed to enable the EPA Regional Administrator to determine if the facility is a new source. 40 C.F.R. § 122.21(k)(2)(i). Once these special information requirements have been satisfied, the Regional Administrator is required to make an initial determination whether the facility is a new source within 30 days, 40 C.F.R. § 122.21(k)(ii), by applying the criteria set forth in 40 C.F.R. § 122.29(b). The Regional Administrator's initial new source determination, whether affirmative or negative, is subject to public notice and may be challenged within 30 days of issuance of the public notice of the initial new source determination by the submission of an evidentiary hearing request from any interested person. 40 C.F.R. § 122.21(k)(4). Go To Headnote

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

W. Va. Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159, 2010 U.S. App. LEXIS 23170 (4th Cir Nov. 8, 2010).

Overview: *Injunction requiring defendant West Virginia Department of Environmental Protection to obtain National Pollutant Discharge Elimination System permits under the CWA for reclamation efforts at abandoned coal mining sites was affirmed; the CWA did not contain any exceptions for state agencies engaging in reclamation efforts.*

- Both the text of the Clean Water Act, 33 U.S.C.S. § 1342 et seq., and the Environmental Protection Agency's implementing regulations squarely reject any exemption for state agencies like the West Virginia Department of Environmental Protection. 33 U.S.C.S. § 1362(5); 40 C.F.R. § 122.2. Indeed, the regulations describing the content of a permit application require the operator to disclose its status as Federal, State, private, public, or other entity, thus denoting that state agencies are covered by the Act. 40 C.F.R. § 122.21(f)(4). *Go To Headnote*

W. Va. Highlands Conservancy, Inc. v. Huffman, 651 F. Supp. 2d 512, 2009 U.S. Dist. LEXIS 75033 (SD W Va Aug. 24, 2009).

Overview: *The claim that the Secretary was discharging pollutants without a permit retained its federal character notwithstanding state regulation of the permit program. 33 U.S.C.S. §§ 1311(a), 1342. As such, the Ex parte Young exception to the Eleventh Amendment was applicable, and the Secretary was in violation of the CWA.*

- While the Environmental Protection Agency (EPA) does not have authority to exempt categories of point sources from the permit requirements of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., under the regulations established by the EPA to effectuate the National Pollutant Discharge Elimination System (NPDES) permitting system provide further support for the plaintiffs' position, any person who discharges or proposes to discharge pollutants and who does not have an effective permit must submit a complete application to the Director in accordance with 40 C.F.R. § 122.21, 40 C.F.R. § 122.21(a). 40 C.F.R. § 122.2 defines "person" as an individual, association, partnership, corporation, municipality, state or federal agency, or an agent or employee thereof. 40 C.F.R. § 122.21(b) provides that when a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit. Owner or operator means the owner or operator of any facility of activity subject to regulation under the NPDES program. Facility or activity means any NPDES point source or any other facility or activity that is subject to regulation under the NPDES program. When an operator applies for a NPDES permit, the operator's name, address, telephone number, ownership status, and status as federal, state, private, public, or other entity must be provided. *Go To Headnote*

Manasota-88, Inc. v. Thomas, 799 F.2d 687, 1986 U.S. App. LEXIS 30677 (11th Cir Sept. 15, 1986).

Overview: *Reissuance of permit to phosphate ore processor did not require an investigation by the EPA because it was not a new source, and permit could not be challenged to the extent it was based on the EPA's environmental determinations.*

- The National Pollution Discharge Elimination System (NPDES) permitting process is triggered by the submission of an application by any person who discharges or proposes to discharge pollutants and who does not have an effective permit. 40 C.F.R. § 122.21(a). NPDES permits contain terms and conditions to implement various requirements of the Clean Water Act. The principal form of control is the imposition of effluent limitations on the type and amount of effluent that can be

discharged. An "effluent limitation" is a restriction on the quantity, rate, and concentration of chemical, physical, biological and other constituents discharged from point sources. 33 U.S.C.S. § 1362(11). Go To Headnote

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

In re Appalachian Fuels, Llc, 493 B.R. 1, 2013 Bankr. LEXIS 1599 (BAP6 Apr. 19, 2013).

Overview: While subsidiary bankruptcy debtor was not liable for environmental reclamation costs of affiliate as administrative expense since subsidiary did not participate in affiliate's coal mining operations, it was unclear whether parent debtor had such liability since parent potentially participated in affiliate's operations and environmental violations.

- The Water Pollution Prevention and Control Act of 1972 (Clean Water Act), 33 U.S.C.S. § 1251 et seq., prohibits, among other things, the discharge of any pollutant by any person, without a permit, into the navigable waters, which the Clean Water Act defines as the waters of the United States. The Clean Water Act provides for the issuance of permits that allow the discharge of certain pollutants into federal waters. 33 U.S.C.S. § 1342. Any person who discharges or proposes to discharge pollutants is required to obtain a National Pollutant Discharge Elimination System permit. 40 C.F.R. § 122.21(a). Go To Headnote

Lake Carriers' Ass'n v. EPA, 652 F.3d 1, 2011 U.S. App. LEXIS 14996 (DC Cir July 22, 2011).

Overview: The EPA correctly concluded that it could not amend or reject conditions in a state's Clean Water Act § 401 (33 U.S.C.S. § 1341) certification, so providing notice and an opportunity for comment on state Vessel General Permit certifications would have served no purpose, and the court declined to remand to require the EPA to do a futile thing.

- Section 301(a) of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., prohibits the discharge of any pollutant by any person into the waters of the United States, except in compliance with the terms of the Act. 33 U.S.C.S. § 1311(a). Section 402(a) of the CWA provides one way in which such discharges may take place without violating the CWA. Under that section, the Environmental Protection Agency (EPA) may issue a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of any pollutant, notwithstanding § 301(a) of the CWA, upon condition that such discharge will meet all applicable requirements of the CWA. 33 U.S.C.S. § 1342(a)(1). Environmental Protection Agency (EPA) regulations explain that permits may be individual (covering discharges from a single source, 40 C.F.R. § 122.21), or general (covering one or more categories or subcategories of discharges within a geographic area, 40 C.F.R. § 122.28(a)). Each permit must set out the specific conditions necessary to ensure that the permit holder's discharge of pollution will comply with the water standards mandated by the CWA. 33 U.S.C.S. § 1342(a)(2). Go To Headnote

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

Dubois v. United States Dep't of Agric., 1995 U.S. Dist. LEXIS 16608 (D NH Nov. 2, 1995).

Overview: *A motion for summary judgment by the Forest Service in a suit seeking to compel the Service to revoke any permits and approvals issued under a Record of Decision regarding a corporation's special use permit was granted. Court could not invalidate the EIS because Forest Service's actions were not arbitrary, capricious, or an abuse of discretion.*

- The Environmental Protection Agency's regulations implementing the Clean Water Act define "waters of the United States" to include any water from intrastate lakes, rivers, streams which are used or could be used for industrial purposes by industries in interstate commerce. 40 C.F.R. § 122.21 (1994). Go To Headnote

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

Save the Valley, Inc. v. United States EPA, 223 F. Supp. 2d 997, 2002 U.S. Dist. LEXIS 17785 (SD Ind Sept. 17, 2002).

Overview: *In a hog farm pollution matter, the court declined to compel EPA to act immediately to withdraw approval of Indiana's National Pollutant Discharge Elimination System program. Indiana's environmental department had to be first compelled to act.*

- The Clean Water Act, 33 U.S.C.S. § 1251 et seq., prohibits point sources from discharging pollutants into waters of the United States unless in conformance with a valid National Pollutant Discharge Elimination System (NPDES) permit obtained prior to the discharge. 33 U.S.C.S. §§ 1311, 1342. A point source is defined as any discernible, confined and discrete conveyance from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14). The term does not include agricultural stormwater discharges and return flows from irrigated agriculture. Under federal law and regulations, concentrated animal feeding operations (CAFOs), though not animal feeding operations (AFOs), are point sources subject to NPDES permitting requirements. 33 U.S.C.S. § 1362(14); 40 C.F.R. § 412.10, et. seq.; 40 C.F.R. § 122.23. Any point source, including a CAFO, that discharges or proposes to discharge must obtain an NPDES permit. 40 C.F.R. § 122.21(a). Further, any CAFO that discharges without an NPDES permit remains in a continuing state of violation of the Act until it either obtains an NPDES permit or no longer meets the definition of a point source. Go To Headnote

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

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

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

- There are two types of National Pollutant Discharge Elimination System (NPDES) permit: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. A general permit, by contrast, is issued for an entire class of hypothetical dischargers in a given geographical region and is issued pursuant to administrative

rulemaking procedures. 40 C.F.R. § 122.28. Once a general permit has been issued, an entity seeking coverage generally must submit a "notice of intent" to discharge pursuant to the permit. 40 C.F.R. § 122.28(b)(2). The date on which coverage commences depends on the terms of the particular general permit, such as, inter alia, upon receipt of the notice of intent or after a specified waiting period. 40 C.F.R. § 122.28(b)(2)(iv). Additionally, the permit issuer may require a potential discharger to apply for an individual permit. 40 C.F.R. § 122.28(b)(3). Go To Headnote

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

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

- National Pollutant Discharge Elimination System permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. 40 C.F.R. §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a notice of intent to discharge pursuant to the general permit. § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. § 122.28(b)(2)(iv). Go To Headnote

W. Va. Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159, 2010 U.S. App. LEXIS 23170 (4th Cir Nov. 8, 2010).

Overview: Injunction requiring defendant West Virginia Department of Environmental Protection to obtain National Pollutant Discharge Elimination System permits under the CWA for reclamation efforts at abandoned coal mining sites was affirmed; the CWA did not contain any exceptions for state agencies engaging in reclamation efforts.

- Both the text of the Clean Water Act, 33 U.S.C.S. § 1342 et seq., and the Environmental Protection Agency's implementing regulations squarely reject any exemption for state agencies like the West Virginia Department of Environmental Protection. 33 U.S.C.S. § 1362(5); 40 C.F.R. § 122.2. Indeed, the regulations describing the content of a permit application require the operator to disclose its status as Federal, State, private, public, or other entity, thus denoting that state agencies are covered by the Act. 40 C.F.R. § 122.21(f)(4). Go To Headnote

W. Va. Highlands Conservancy, Inc. v. Huffman, 651 F. Supp. 2d 512, 2009 U.S. Dist. LEXIS 75033 (SD W Va Aug. 24, 2009).

Overview: *The claim that the Secretary was discharging pollutants without a permit retained its federal character notwithstanding state regulation of the permit program. 33 U.S.C.S. §§ 1311(a), 1342. As such, the Ex parte Young exception to the Eleventh Amendment was applicable, and the Secretary was in violation of the CWA.*

- While the Environmental Protection Agency (EPA) does not have authority to exempt categories of point sources from the permit requirements of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., under the regulations established by the EPA to effectuate the National Pollutant Discharge Elimination System (NPDES) permitting system provide further support for the plaintiffs' position, any person who discharges or proposes to discharge pollutants and who does not have an effective permit must submit a complete application to the Director in accordance with 40 C.F.R. § 122.21. 40 C.F.R. § 122.21(a). 40 C.F.R. § 122.2 defines "person" as an individual, association, partnership, corporation, municipality, state or federal agency, or an agent or employee thereof. 40 C.F.R. § 122.21(b) provides that when a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit. Owner or operator means the owner or operator of any facility of activity subject to regulation under the NPDES program. Facility or activity means any NPDES point source or any other facility or activity that is subject to regulation under the NPDES program. When an operator applies for a NPDES permit, the operator's name, address, telephone number, ownership status, and status as federal, state, private, public, or other entity must be provided. Go To Headnote

Sierra Club v. City & County of Honolulu, 415 F. Supp. 2d 1119, 2005 U.S. Dist. LEXIS 40302 (D Haw Sept. 30, 2005).

Overview: *Claims brought by advocates in a citizens' suit under the Clean Water Act based on spills from a city and county's wastewater collection system were barred on res judicata grounds because the claims were identical to prosecutions by the Environmental Protection Agency, which agency was accorded a preeminent role on behalf of all citizens.*

- 40 C.F.R. § 122.6 expressly states that when the Environmental Protection Agency (EPA) is the permit issuing authority, the conditions of an expired permit continue in force under 5 U.S.C.S. 558(c) until the effective date of a new permit if a timely, complete application is submitted and the reason for the delay in issuing the new permit does not lie with the permittee. 40 C.F.R. § 122.6(a)(1)-(2). Under regulations governing the renewal of EPA-issued National Pollutant Discharge Elimination System permits, expired permits remain in effect if the permittee submits a re-application more than 180 days prior to the expiration date and the re-application is complete under 40 C.F.R. § 122.21(d) and (e). 40 C.F.R. § 122.21(d), (e). Go To Headnote

Save the Valley, Inc. v. United States EPA, 223 F. Supp. 2d 997, 2002 U.S. Dist. LEXIS 17785 (SD Ind Sept. 17, 2002).

Overview: *In a hog farm pollution matter, the court declined to compel EPA to act immediately to withdraw approval of Indiana's National Pollutant Discharge Elimination System program. Indiana's environmental department had to be first compelled to act.*

- Indiana and federal regulations require National Pollutant Discharge Elimination System (NPDES) permits for point sources that discharge or propose to discharge. Ind. Admin. Code tit. 327, § 5-2-2; 40 C.F.R. § 122.21(a). Go To Headnote

Sierra Club v. Martin, 71 F. Supp. 2d 1268, 1996 U.S. Dist. LEXIS 22453 (ND Ga Sept. 17, 1996).

Overview: *Environmental organizations were entitled to an indefinite preliminary injunction to prevent logging in two national forests where organizations were likely to prevail on merits and where the injunction would not be adverse to the public interest.*

- Assuming pollutants are being discharged into the waterways of the United States from discrete point sources, the regulations mandate that the operator of the facility from which the pollutants originate is required to obtain the National Pollutant Discharge Elimination System permit, not the owner of the land from which the pollutants originate. 40 C.F.R. § 122.21. Go To Headnote

Mcclellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103 (ED Cal June 20, 1988).

Overview: *A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.*

- The Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES) regulations, codified at 40 C.F.R. § 122, contemplate that discharges of volatile organics will be addressed on a case-by-case basis. 40 C.F.R. § 122.21(g)(7)(ii) requires industrial permit applicants to report quantitative data for volatile organics in each outfall containing process wastewater. 40 C.F.R. § 122.42(a) requires permittees to notify the permitting authority as soon as they know or have reason to believe that an activity has occurred or will occur that would result in the discharge of a toxic pollutant which is not limited in the permit in excess of specified levels. These sections are specifically made applicable to state NPDES programs through 40 C.F.R. § 123.25. Go To Headnote

Manasota-88, Inc. v. Thomas, 799 F.2d 687, 1986 U.S. App. LEXIS 30677 (11th Cir Sept. 15, 1986).

Overview: *Reissuance of permit to phosphate ore processor did not require an investigation by the EPA because it was not a new source, and permit could not be challenged to the extent it was based on the EPA's environmental determinations.*

- It is clear that the National Environmental Policy Act, 42 U.S.C.S. §§ 4321 et seq., is applicable to the initial issuance of an National Pollution Distribution Elimination System (NPDES) permit to a new source. 33 U.S.C.S. § 1371(c)(1). Thus, where the Regional Administrator initially determines that a facility is a new source for NPDES permitting purposes, the requirement for environmental review is triggered. 40 C.F.R. §§ 6.604(a), 122.29(c)(1), and 122.21(k)(3). The Environmental Protection Agency's environmental review proceeds concurrently with the processing and review of the new source NPDES permit application. 40 C.F.R. § 6.603. The review is based upon an environmental information document prepared by the permit applicant, from which a written "environmental assessment" is prepared. 40 C.F.R. § 6.604(b) and (c). Go To Headnote

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

Texas Oil & Gas Ass'n v. United States EPA, 161 F.3d 923, 1998 U.S. App. LEXIS 30989 (5th Cir Dec. 10, 1998).

Overview: EPA's decisions to set zero discharge limits on produced water and sand and to set more lenient discharge limits for certain facilities without special subcategory designation were affirmed, and challenge to general permit was moot.

- The Clean Water Act makes it unlawful to discharge any pollutant from any point source without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C.S. § 1311(a). These permits must generally incorporate, as a technology-based floor, all applicable effluent limitation guidelines (ELGs) promulgated by the Environmental Protection Agency (EPA) for the pertinent point source category or subcategory. 33 U.S.C.S. § 1342(a)(1). There are only two ways for an individual discharger to avoid the incorporation of applicable ELGs into an NPDES permit: first, where the discharger is operating under a permit that was issued prior to the promulgation of the ELGs; or second, in rare cases, where the EPA grants the discharger a variance based on the discharger's demonstration that it is "fundamentally different" from other dischargers in the category or subcategory. 33 U.S.C.S. § 1311(n); 40 C.F.R. §§ 122.21(m)(1), 125.30-125.32. Go To Headnote

Manasota-88, Inc. v. Thomas, 799 F.2d 687, 1986 U.S. App. LEXIS 30677 (11th Cir Sept. 15, 1986).

Overview: Reissuance of permit to phosphate ore processor did not require an investigation by the EPA because it was not a new source, and permit could not be challenged to the extent it was based on the EPA's environmental determinations.

- The National Pollution Discharge Elimination System (NPDES) permitting process is triggered by the submission of an application by any person who discharges or proposes to discharge pollutants and who does not have an effective permit. 40 C.F.R. § 122.21(a). NPDES permits contain terms and conditions to implement various requirements of the Clean Water Act. The principal form of control is the imposition of effluent limitations on the type and amount of effluent that can be discharged. An "effluent limitation" is a restriction on the quantity, rate, and concentration of chemical, physical, biological and other constituents discharged from point sources. 33 U.S.C.S. § 1362(11). Go To Headnote

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

Sierra Club v. Icg Hazard, Llc, 2015 U.S. App. LEXIS 1283 (6th Cir Jan. 27, 2015).

Overview: A coal mine operator's discharge of selenium was within the Kentucky Division of Water's reasonable contemplation because it knew at the time it issued the general permit that the mines in the area could have produced selenium, and thus, the permit shield set forth in 33 U.S.C.S. § 1342(k) covered the discharge.

- A permitting authority may issue individual permits, 40 C.F.R. § 122.21, and general permits, 40 C.F.R. § 122.28. While an individual permit applies to one specific discharger, a general permit covers an entire category of dischargers within a geographic area. Go To Headnote

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

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

- There are two types of National Pollutant Discharge Elimination System (NPDES) permit: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. A general permit, by contrast, is issued for an entire class of hypothetical dischargers in a given geographical region and is issued pursuant to administrative rulemaking procedures. 40 C.F.R. § 122.28. Once a general permit has been issued, an entity seeking coverage generally must submit a "notice of intent" to discharge pursuant to the permit. 40 C.F.R. § 122.28(b)(2). The date on which coverage commences depends on the terms of the particular general permit, such as, inter alia, upon receipt of the notice of intent or after a specified waiting period. 40 C.F.R. § 122.28(b)(2)(iv). Additionally, the permit issuer may require a potential discharger to apply for an individual permit. 40 C.F.R. § 122.28(b)(3). Go To Headnote

In re Appalachian Fuels, Llc, 493 B.R. 1, 2013 Bankr. LEXIS 1599 (BAP6 Apr. 19, 2013).

Overview: While subsidiary bankruptcy debtor was not liable for environmental reclamation costs of affiliate as administrative expense since subsidiary did not participate in affiliate's coal mining operations, it was unclear whether parent debtor had such liability since parent potentially participated in affiliate's operations and environmental violations.

- The Water Pollution Prevention and Control Act of 1972 (Clean Water Act), 33 U.S.C.S. § 1251 et seq., prohibits, among other things, the discharge of any pollutant by any person, without a permit, into the navigable waters, which the Clean Water Act defines as the waters of the United States. The Clean Water Act provides for the issuance of permits that allow the discharge of certain pollutants into federal waters. 33 U.S.C.S. § 1342. Any person who discharges or proposes to discharge pollutants is required to obtain a National Pollutant Discharge Elimination System permit. 40 C.F.R. § 122.21(a). Go To Headnote

Lake Carriers' Ass'n v. EPA, 652 F.3d 1, 2011 U.S. App. LEXIS 14996 (DC Cir July 22, 2011).

Overview: The EPA correctly concluded that it could not amend or reject conditions in a state's Clean Water Act § 401 (33 U.S.C.S. § 1341) certification, so providing notice and an opportunity for comment on state Vessel General Permit certifications would have served no purpose, and the court declined to remand to require the EPA to do a futile thing.

- Section 301(a) of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., prohibits the discharge of any pollutant by any person into the waters of the United States, except in compliance with the terms of the Act. 33 U.S.C.S. § 1311(a). Section 402(a) of the CWA provides one way in which such discharges may take place without violating the CWA. Under that section, the Environmental Protection Agency (EPA) may issue a National Pollutant Discharge Elimination System (NPDES)

permit for the discharge of any pollutant, notwithstanding § 301(a) of the CWA, upon condition that such discharge will meet all applicable requirements of the CWA. 33 U.S.C.S. § 1342(a)(1). Environmental Protection Agency (EPA) regulations explain that permits may be individual (covering discharges from a single source, 40 C.F.R. § 122.21), or general (covering one or more categories or subcategories of discharges within a geographic area, 40 C.F.R. § 122.28(a)). Each permit must set out the specific conditions necessary to ensure that the permit holder's discharge of pollution will comply with the water standards mandated by the CWA. 33 U.S.C.S. § 1342(a)(2). *Go To Headnote*

Northwest Env'tl. Def. Ctr. v. Brown, 640 F.3d 1063, 2011 U.S. App. LEXIS 10052 (9th Cir May 17, 2011), reversed by, remanded by 133 S. Ct. 1326, 185 L. Ed. 2d 447, 2013 U.S. LEXIS 2373, 81 U.S.L.W. 4190, 24 Fla. L. Weekly Fed. S 110, 76 Env't Rep. Cas. (BNA) 1001, 43 Env'tl. L. Rep. 20062 (U.S. 2013). *Overview: Stormwater runoff from logging roads into ditches, culverts, and channels being discharged into forest streams and rivers was a point source stormwater discharge associated with industrial activity under 33 U.S.C.S. § 1342(p) and 33 U.S.C.S. § 1362(14) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., for which a permit was required.*

- National Pollutant Discharge Elimination System permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. 40 C.F.R. §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a notice of intent to discharge pursuant to the general permit. § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. § 122.28(b)(2)(iv). *Go To Headnote*

Northwest Env'tl. Advocates v. EPA, 537 F.3d 1006, 2008 U.S. App. LEXIS 15576 (9th Cir July 23, 2008).

Overview: EPA acted ultra vires in promulgating 40 C.F.R. § 122.3(a) and the EPA's denial of plaintiffs' petition requesting the repeal of § 122.3(a) was not in accordance with law. The EPA failed to satisfy its burden of proof with regard to its argument that Congress acquiesced to the EPA's interpretation of the Clean Water Act.

- The National Pollutant Discharge Elimination System (NPDES) permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. 40 C.F.R. §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. 40 C.F.R. § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. 40 C.F.R. § 122.28(b)(2). A general permit can allow discharging to

commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. 40 C.F.R. § 122.28(b)(2)(iv). Go To Headnote

Sierra Club v. City & County of Honolulu, 415 F. Supp. 2d 1119, 2005 U.S. Dist. LEXIS 40302 (D Haw Sept. 30, 2005).

Overview: Claims brought by advocates in a citizens' suit under the Clean Water Act based on spills from a city and county's wastewater collection system were barred on res judicata grounds because the claims were identical to prosecutions by the Environmental Protection Agency, which agency was accorded a preeminent role on behalf of all citizens.

- 40 C.F.R. § 122.6 expressly states that when the Environmental Protection Agency (EPA) is the permit issuing authority, the conditions of an expired permit continue in force under 5 U.S.C.S. 558(c) until the effective date of a new permit if a timely, complete application is submitted and the reason for the delay in issuing the new permit does not lie with the permittee. 40 C.F.R. § 122.6(a)(1)-(2). Under regulations governing the renewal of EPA-issued National Pollutant Discharge Elimination System permits, expired permits remain in effect if the permittee submits a re-application more than 180 days prior to the expiration date and the re-application is complete under 40 C.F.R. § 122.21(d) and (e). 40 C.F.R. § 122.21(d), (e). Go To Headnote

Nrdc v. United States EPA, 279 F.3d 1180, 2002 U.S. App. LEXIS 2311 (9th Cir Feb. 13, 2002).

Overview: EPA's issuance of permits for discharges of bark and woody debris by log transfer facilities in Alaska which changed the existing "zone of deposit" did not comply with notice and opportunity requirements of the Administrative Procedures Act.

- National Pollutant Discharge Elimination System permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. 40 C.F.R. §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. 49 C.F.R. § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. 40 C.F.R. § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. 40 C.F.R. § 122.28(b)(2)(iv). Whichever of these three authorization methods is used in the general permit, the permit issuer can require a particular discharger to undergo the individual permit application process. 40 C.F.R. § 122.28(b)(3). Go To Headnote

Nunam Kitlutsisti v. Arco Alaska, Inc., 1984 U.S. Dist. LEXIS 14689 (D Alaska July 24, 1984).

Overview: Where the Federal Water Pollution Control Act (FWCPA) required that all discharge of pollutants in the nation's water was illegal unless the discharger had a permit, the oil exploration company violated the FWPCA for drilling without the permit.

- A letter requesting coverage is not an application for a National Pollutant Discharge Elimination System permit. 40 C.F.R. §§. § 122.21, 124.3(a). Any application must be a "sufficient" application. Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Am. Farm Bureau Fed'n v. United States EPA, 2016 U.S. App. LEXIS 16623 (8th Cir Sept. 9, 2016).

Overview: Associations established a concrete and particularized injury in fact traceable to the EPA's action and redressable by judicial relief. The EPA abused its discretion in deciding that the information concerning concentrated animal feeding operations was not exempt from mandatory disclosure under 5 U.S.C.S. § 552(b)(6).

- A person seeking a system permit for a concentrated animal feeding operation from either the EPA or an authorized state agency goes through the same application process, 40 C.F.R. §§ 122.21(i), 123.25(a)(4). An applicant submits an array of information, including the name of the owner or operator of the facility, the facility location and mailing address, a topographic map of the geographic area where the feeding operation is located, and the estimated amounts of manure, litter, and process wastewater generated per year, 40 C.F.R. § 122.21(i); § 122.23(d). The Clean Water Act requires that permit applications and issued permits must be available to the public, 33 U.S.C.S. § 1342(b)(3), (j). Go To Headnote

Amigos Bravos v. Molycorp, Inc., 1998 U.S. App. LEXIS 28576 (10th Cir Nov. 13, 1998).

Overview: Where environmentalists had not raised their claims about a company's discharge of pollutants during proceedings to renew its National Pollution Discharge Elimination System permit, they were barred from bringing the claims in a Clean Water Act suit.

- An applicant seeking to renew an existing National Pollution Discharge Elimination System permit must submit an application to the Environmental Protection Agency (EPA) regional administrator before the existing permit expires. 40 C.F.R. § 122.21(d)(2). Once the application is complete, the regional administrator makes a tentative decision either to issue or to deny a draft permit. 40 C.F.R. § 124.6(a). If the regional director decides to prepare a draft permit, the EPA will issue the draft permit and an explanatory fact sheet. 40 C.F.R. §§ 124.6, 124.8, 124.56. The regional administrator also must give public notice that a draft permit has been prepared and must allow at least 30 days for public comment. 40 C.F.R. § 124.10(a)(1)(ii), (b). During the public comment period, any interested person may submit comments on the draft permit and may request a public hearing if no hearing has been scheduled. 40 C.F.R. § 124.11. Anyone who believes that any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of his position before the end of the comment period. 40 C.F.R. § 124.13. Go To Headnote

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

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

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

- A storm event must be greater than 0.1 inch, at least 72 hours after the previously measured storm event, and the sample must be for a flow-weighted composite sample taken for either the entire discharge or for the first three hours of the discharge. 40 C.F.R. § 122.21(g)(7). Go To Headnote

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

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

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

Save the Valley, Inc. v. United States EPA, 223 F. Supp. 2d 997, 2002 U.S. Dist. LEXIS 17785 (SD Ind Sept. 17, 2002).

Overview: *In a hog farm pollution matter, the court declined to compel EPA to act immediately to withdraw approval of Indiana's National Pollutant Discharge Elimination System program. Indiana's environmental department had to be first compelled to act.*

- The Clean Water Act, 33 U.S.C.S. § 1251 et seq., prohibits point sources from discharging pollutants into waters of the United States unless in conformance with a valid National Pollutant Discharge Elimination System (NPDES) permit obtained prior to the discharge. 33 U.S.C.S. §§ 1311, 1342. A point source is defined as any discernible, confined and discrete conveyance from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14). The term does not include agricultural stormwater discharges and return flows from irrigated agriculture. Under federal law and regulations, concentrated animal feeding operations (CAFOs), though not animal feeding operations (AFOs), are point sources subject to NPDES permitting requirements. 33 U.S.C.S. § 1362(14); 40 C.F.R. § 412.10, et. seq.; 40 C.F.R. § 122.23. Any point source, including a CAFO, that discharges or proposes to discharge must obtain an NPDES permit. 40 C.F.R. § 122.21(a). Further, any CAFO that discharges without an NPDES permit remains in a continuing state of

violation of the Act until it either obtains an NPDES permit or no longer meets the definition of a point source. Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Water Quality Standards

Nrdc v. United States EPA, 279 F.3d 1180, 2002 U.S. App. LEXIS 2311 (9th Cir Feb. 13, 2002).

Overview: EPA's issuance of permits for discharges of bark and woody debris by log transfer facilities in Alaska which changed the existing "zone of deposit" did not comply with notice and opportunity requirements of the Administrative Procedures Act.

- National Pollutant Discharge Elimination System permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. 40 C.F.R. §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. 49 C.F.R. § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. 40 C.F.R. § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. 40 C.F.R. § 122.28(b)(2)(iv). Whichever of these three authorization methods is used in the general permit, the permit issuer can require a particular discharger to undergo the individual permit application process. 40 C.F.R. § 122.28(b)(3). Go To Headnote

Real Property Law : Zoning & Land Use : Special Permits & Variances

Texas Oil & Gas Ass'n v. United States EPA, 161 F.3d 923, 1998 U.S. App. LEXIS 30989 (5th Cir Dec. 10, 1998).

Overview: EPA's decisions to set zero discharge limits on produced water and sand and to set more lenient discharge limits for certain facilities without special subcategory designation were affirmed, and challenge to general permit was moot.

- The Clean Water Act makes it unlawful to discharge any pollutant from any point source without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C.S. § 1311(a). These permits must generally incorporate, as a technology-based floor, all applicable effluent limitation guidelines (ELGs) promulgated by the Environmental Protection Agency (EPA) for the pertinent point source category or subcategory. 33 U.S.C.S. § 1342(a)(1). There are only two ways for an individual discharger to avoid the incorporation of applicable ELGs into an NPDES permit: first, where the discharger is operating under a permit that was issued prior to the promulgation of the ELGs; or second, in rare cases, where the EPA grants the discharger a variance based on the discharger's demonstration that it is "fundamentally different" from other dischargers in the category or subcategory. 33 U.S.C.S. § 1311(n); 40 C.F.R. §§ 122.21(m)(1), 125.30-125.32. Go To Headnote

Transportation Law : Air Transportation : Charters

Save the Valley, Inc. v. United States EPA, 223 F. Supp. 2d 997, 2002 U.S. Dist. LEXIS 17785 (SD Ind Sept. 17, 2002).

Overview: In a hog farm pollution matter, the court declined to compel EPA to act immediately to withdraw approval of Indiana's National Pollutant Discharge Elimination System program. Indiana's environmental department had to be first compelled to act.

- The Clean Water Act, 33 U.S.C.S. § 1251 et seq., prohibits point sources from discharging pollutants into waters of the United States unless in conformance with a valid National Pollutant Discharge Elimination System (NPDES) permit obtained prior to the discharge. 33 U.S.C.S. §§ 1311, 1342. A point source is defined as any discernible, confined and discrete conveyance from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14). The term does not include agricultural stormwater discharges and return flows from irrigated agriculture. Under federal law and regulations, concentrated animal feeding operations (CAFOs), though not animal feeding operations (AFOs), are point sources subject to NPDES permitting requirements. 33 U.S.C.S. § 1362(14); 40 C.F.R. § 412.10, et. seq.; 40 C.F.R. § 122.23. Any point source, including a CAFO, that discharges or proposes to discharge must obtain an NPDES permit. 40 C.F.R. § 122.21(a). Further, any CAFO that discharges without an NPDES permit remains in a continuing state of violation of the Act until it either obtains an NPDES permit or no longer meets the definition of a point source. Go To Headnote

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

Tab 12

40 CFR 123.25

This document is current through the December 30, 2016 issue of the Federal Register with the exception of the amendments appearing at 81 FR 96572

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 123 -- STATE PROGRAM REQUIREMENTS > SUBPART B -- STATE PROGRAM SUBMISSIONS

§ 123.25 Requirements for permitting.

(a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.4 -- (Prohibitions);

(2) § 122.5(a) and (b) -- (Effect of permit);

(3) § 122.7(b) and (c) -- (Confidential information);

(4) § 122.21 (a)-(b), (c)(2), (e)-(k), (m)-(p), (q), and (r) -- (Application for a permit);

(5) § 122.22 -- (Signatories);

(6) § 122.23 -- (Concentrated animal feeding operations);

(7) § 122.24 -- (Concentrated aquatic animal production facilities);

(8) § 122.25 -- (Aquaculture projects);

(9) § 122.26 -- (Storm water discharges);

(10) § 122.27 -- (Silviculture);

(11) § 122.28 -- (General permits), Provided that States which do not seek to implement the general permit program under § 122.28 need not do so.

(12) Section 122.41 (a)(1) and (b) through (n) -- (Applicable permit conditions) (Indian Tribes can satisfy enforcement authority requirements under § 123.34);

(13) § 122.42 -- (Conditions applicable to specified categories of permits);

(14) § 122.43 -- (Establishing permit conditions);

(15) § 122.44 -- (Establishing NPDES permit conditions);

(16) § 122.45 -- (Calculating permit conditions);

(17) § 122.46 -- (Duration);

(18) § 122.47(a) -- (Schedules of compliance);

(19) § 122.48 -- (Monitoring requirements);

(20) § 122.50 -- (Disposal into wells);

- (21)§ 122.61 -- (Permit transfer);
- (22)§ 122.62 -- (Permit modification);
- (23)§ 122.64 -- (Permit termination);
- (24)§ 124.3(a) -- (Application for a permit);
- (25)§ 124.5 (a), (c), (d), and (f) -- (Modification of permits);
- (26)§ 124.6 (a), (c), (d), and (e) -- (Draft permit);
- (27)§ 124.8 -- (Fact sheets);
- (28)§ 124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e) -- (Public notice);
- (29)§ 124.11 -- (Public comments and requests for hearings);
- (30)§ 124.12(a) -- (Public hearings); and
- (31)§ 124.17 (a) and (c) -- (Response to comments);
- (32)§ 124.56 -- (Fact sheets);
- (33)§ 124.57(a) -- (Public notice);
- (34)§ 124.59 -- (Comments from government agencies);
- (35)§ 124.62 -- (Decision on variances);
- (36)Subparts A, B, D, H, I, J, and N of part 125 of this chapter;
- (37)40 CFR parts 129, 133, and subchapter N;
- (38)For a Great Lakes State or Tribe (as defined in 40 CFR 132.2), 40 CFR part 132 (NPDES permitting implementation procedures only);
- (39)§ 122.30 (What are the objectives of the storm water regulations for small MS4s?);
- (40)§ 122.31 (For Indian Tribes only) (As a Tribe, what is my role under the NPDES storm water program?);
- (41)§ 122.32 (As an operator of a small MS4, am I regulated under the NPDES storm water program?);
- (42)§ 122.33 (If I am an operator of a regulated small MS4, how do I apply for an NPDES permit? When do I have to apply?);
- (43)§ 122.34 (As an operator of a regulated small MS4, what will my NPDES MS4 storm water permit require?);
- (44)§ 122.35 (As an operator of a regulated small MS4, may I share the responsibility to implement the minimum control measures with other entities?);
- (45)§ 122.36 (As an operator of a regulated small MS4, what happens if I don't comply with the application or permit requirements in §§ 122.33 through 122.35?); and
- (46)40 CFR part 3 (Cross-Media Electronic Reporting Regulation) and 40 CFR part 127 (NPDES Electronic Reporting Requirements).

Note to paragraph (a): Except for paragraph (a)(46) of this section, states need not implement provisions identical to the above listed provisions. Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions. While States may impose more stringent requirements, they may not make one requirement more lenient as a tradeoff for making another requirement more stringent; for example, by requiring that public hearings be held prior to issuing any permit while reducing the amount of advance notice of such a hearing.

State programs may, if they have adequate legal authority, implement any of the provisions of parts 122 and 124. See, for example, §§ 122.5(d) (continuation of permits) and 124.4 (consolidation of permit processing) of this chapter.

For example, a State may impose more stringent requirements in an NPDES program by omitting the upset provision of § 122.41 of this chapter or by requiring more prompt notice of an upset.

(b) State NPDES programs shall have an approved continuing planning process under 40 CFR 130.5 and shall assure that the approved planning process is at all times consistent with the CWA.

(c) State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For the purposes of this paragraph:

(i) Board or body includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(ii) Significant portion of income means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(iii) Permit holders or applicants for a permit does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(iv) Income includes retirement benefits, consultant fees, and stock dividends.

(2) For the purposes of paragraph (c) of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

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

History

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985; 50 FR 7912, Feb. 27, 1985, as amended at 54 FR 18784, May 2, 1989; 55 FR 48075, Nov. 16, 1990; 58 FR 67981, Dec. 22, 1993; 60 FR 15386, Mar. 23, 1995; 63 FR 45114, 45122, Aug. 24, 1998; 64 FR 42434, 42470, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 64 FR 68722, 68849, Dec. 8, 1999; 65 FR 30886, 30909, May 15, 2000; 66 FR 65256, 65338, Dec. 18, 2001; 69 FR 41576, 41682, July 9, 2004; 70 FR 59848, 59888, Oct. 13, 2005; 71 FR 35006, 35040, June 16, 2006; 80 FR 64064, 64099, Oct. 22, 2015]

Annotations

Notes

[EFFECTIVE DATE NOTE:

70 FR 59848, 59888, Oct. 13, 2005, amended paragraph (a), effective Jan. 11, 2006; 71 FR 35006, 35040, June 16, 2006, revised paragraph (a)(36), effective July 17, 2006; 80 FR 64064, 64099, Oct. 22, 2015, revised paragraph (a)(46) and the note immediately following it, effective Dec. 21, 2015.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part

Administrative Law : Judicial Review : Administrative Record : General Overview

Business & Corporate Law : Corporations : Governing Documents & Procedures : Records & Inspection Rights :

Civil Procedure : Federal & State Interrelationships : General Overview

Constitutional Law : Supremacy Clause : General Overview

Environmental Law : Assessment & Information Access : Public Participation

Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances

Environmental Law : Hazardous Wastes & Toxic Substances : Treatment, Storage & Disposal

Environmental Law : Litigation & Administrative Proceedings : Nuisances, Trespasses & Strict Liability

Environmental Law : Water Quality : General Overview

Environmental Law : Water Quality : Clean Water Act : General Overview

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

40 CFR 123.25

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

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

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

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications

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

Environmental Law : Water Quality : Clean Water Act : Enforcement : General Overview

Environmental Law : Water Quality : Clean Water Act : Enforcement : Citizen Suits : Grounds

Environmental Law : Water Quality : Clean Water Act : Enforcement : Civil Penalties

Environmental Law : Water Quality : Clean Water Act : Enforcement : Criminal Prosecutions

Environmental Law : Water Quality : Clean Water Act : Enforcement : Injunctive Relief

Environmental Law : Water Quality : Clean Water Act : Recordkeeping & Reporting

Environmental Law : Zoning & Land Use : Conditional Use Permits & Variances

Case Notes Applicable to Entire Part

Part Note

Administrative Law : Judicial Review : Administrative Record : General Overview

Pennsylvania Pub. Interest Research Group v. P.H. Glatfelter Co., 128 F. Supp. 2d 747, 2001 U.S. Dist. LEXIS 2658 (MD Pa Feb. 7, 2001).

Overview: *Paper mill was liable for creek discoloration where mill repeatedly exceeded the wastewater discharge limits contained in a 1984 permit.*

- Modifications to National Pollution Discharge Elimination System (NPDES) permits must comport with the same procedures as the issuance of an original permit. 40 C.F.R. § 123.25(a)(22) & (25). The applicable federal regulation requires that all draft permits prepared by Environmental Protection Agency under this section shall be accompanied by a statement of basis or fact sheet, and shall be based on the administrative record, publicly noticed and made available for public comment. The Regional Administrator shall give notice of opportunity for a public hearing, issue a final decision and respond to comments. 40 C.F.R. § 124.6(e). States are permitted to establish their own procedures in lieu of those contained in the federal regulations, but in order to do so, states must establish requirements at least as stringent as the corresponding listed provisions. 40 C.F.R. § 123.25(a). Go To Headnote

Business & Corporate Law : Corporations : Governing Documents & Procedures : Records & Inspection Rights :

United States v. Murphy Oil Usa, Inc., 143 F. Supp. 2d 1054, 2001 U.S. Dist. LEXIS 10519 (WD Wis May 18, 2001).

Overview: Clean air statute claims were untimely, and refiner exceeded permissible discharge limits and violated hazardous waste requirements, but fact issues remained concerning refiner's compliance with documentation requirements.

- Under the Clean Water Act, 33 U.S.C.S. § 1251 et seq., each permittee must establish and maintain records, install and use monitoring equipment, sample its effluent according to a prescribed schedule, and report the results to the permitting agency. 33 U.S.C.S. § 1318(a); 40 C.F.R. §§ 122.41(j)(3), 122.48, 123.25. The effluent reports, which are submitted on standard Environmental Protection Agency prescribed forms, are known as Discharge Monitoring Reports. 40 C.F.R. §§ 122.2, 123.25. A permittee's Discharge Monitoring Reports must be signed by a responsible corporate officer or duly authorized representative, who certifies that the reported information was prepared by qualified personnel under his or her direction or supervision, and that the information is true, accurate and complete. 40 C.F.R. § 122.22. Accuracy is further encouraged by the availability of criminal penalties for false statements. 33 U.S.C.S. § 1319(c)(2). Go To Headnote

Civil Procedure : Federal & State Interrelationships : General Overview

Ohio Valley Envtl. Coalition, Inc. v. Apogee Coal Co., Llc, 555 F. Supp. 2d 640, 2008 U.S. Dist. LEXIS 41367 (SD W Va May 27, 2008).

Overview: Plaintiffs could not pursue their Clean Water Act claims for violations of effluent limits against a mining company, as that mining company was in compliance with the effluent limitations contained within its National Pollutant Discharge Elimination System permit; any violations were barred as wholly past.

- Under the Clean Water Act (CWA), a state may receive approval to administer a state-run National Pollutant Discharge Elimination System (NPDES) program under the authority of 33 U.S.C.S. § 1342. West Virginia has received such approval and its NPDES program is administered through the West Virginia Department of Environmental Protection. The CWA's regulations effectively incorporate state law into the unitary federal enforcement scheme. 40 C.F.R. 123.25. Go To Headnote

Constitutional Law : Supremacy Clause : General Overview

Proffitt v. Lower Bucks County Joint Municipal Authority, 1987 U.S. Dist. LEXIS 11759 (ED Pa Dec. 16, 1987).

Overview: In an action brought by citizens under the Federal Water Pollution Control Act, state authorities could not modify effluent limitations in a consent order without first following federal regulatory procedures that allowed for public participation.

- Section 1370 of the Federal Clean Water Act prohibits any state to adopt or enforce effluent standards or standards of performance which are less stringent than effluent standards or standards of performance required under the Act. When referring to the regulations requiring public notice and comment before modifying a permit, 40 C.F.R. § 123.25(a) provides that all state programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each; except, that states are not precluded from omitting or modifying any provisions to impose more stringent requirements. 40 C.F.R. § 124.5. Courts generally hold that states are free to set environmental and effluent standards that are more stringent than the federal criteria. Where federal regulations conflict with state law, the federal regulations take precedence under the Supremacy Clause of the United States Constitution. Go To Headnote

Environmental Law : Assessment & Information Access : Public Participation

Pennsylvania Pub. Interest Research Group v. P.H. Glatfelter Co., 128 F. Supp. 2d 747, 2001 U.S. Dist. LEXIS 2658 (MD Pa Feb. 7, 2001).

Overview: Paper mill was liable for creek discoloration where mill repeatedly exceeded the wastewater discharge limits contained in a 1984 permit.

- Modifications to National Pollution Discharge Elimination System (NPDES) permits must comport with the same procedures as the issuance of an original permit. 40 C.F.R. § 123.25(a)(22) & (25). The applicable federal regulation requires that all draft permits prepared by Environmental Protection Agency under this section shall be accompanied by a statement of basis or fact sheet, and shall be based on the administrative record, publicly noticed and made available for public comment. The Regional Administrator shall give notice of opportunity for a public hearing, issue a final decision and respond to comments. 40 C.F.R. § 124.6(e). States are permitted to establish their own procedures in lieu of those contained in the federal regulations, but in order to do so, states must establish requirements at least as stringent as the corresponding listed provisions. 40 C.F.R. § 123.25(a). Go To Headnote

Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances

McClellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103 (ED Cal June 20, 1988).

Overview: A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.

- The Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES) regulations, codified at 40 C.F.R. § 122, contemplate that discharges of volatile organics will be addressed on a case-by-case basis. 40 C.F.R. § 122.21(g)(7)(ii) requires industrial permit applicants to report quantitative data for volatile organics in each outfall containing process wastewater. 40 C.F.R. § 122.42(a) requires permittees to notify the permitting authority as soon as they know or have reason to believe that an activity has occurred or will occur that would result in the discharge of a toxic pollutant which is not limited in the permit in excess of specified levels.

These sections are specifically made applicable to state NPDES programs through 40 C.F.R. § 123.25. Go To Headnote

Environmental Law : Hazardous Wastes & Toxic Substances : Treatment, Storage & Disposal

Mcclellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103 (ED Cal June 20, 1988).

Overview: A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.

- The Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES) regulations, codified at 40 C.F.R. § 122, contemplate that discharges of volatile organics will be addressed on a case-by-case basis. 40 C.F.R. § 122.21(g)(7)(ii) requires industrial permit applicants to report quantitative data for volatile organics in each outfall containing process wastewater. 40 C.F.R. § 122.42(a) requires permittees to notify the permitting authority as soon as they know or have reason to believe that an activity has occurred or will occur that would result in the discharge of a toxic pollutant which is not limited in the permit in excess of specified levels. These sections are specifically made applicable to state NPDES programs through 40 C.F.R. § 123.25. Go To Headnote

Environmental Law : Litigation & Administrative Proceedings : Nuisances, Trespasses & Strict Liability

Natural Resources Defense Council v. Texaco Ref. & Mktg., 719 F. Supp. 281, 1989 U.S. Dist. LEXIS 9660 (D Del Aug. 18, 1989).

Overview: Non-profit environmental organizations were entitled to summary judgment against an oil company because if an entity reported a pollution level in excess of permit limits, it was strictly liable and civil actions were permitted.

- While the upset defense is provided in EPA regulations as a matter of federal law, those regulations authorize states to omit the upset defense from National Pollutant Discharge Elimination System permits. 40 C.F.R. §§ 122.41(n), 123.25(a). 40 C.F.R. § 122.41 provides that in order to be available to a permittee operating under a state-issued permit, the upset defense must be incorporated into the permit expressly or by reference to the relevant C.F.R. sections. Go To Headnote

Environmental Law : Water Quality : General Overview

United States v. Allegheny Ludlum Corp., 118 F. Supp. 2d 615, 2000 U.S. Dist. LEXIS 15680 (WD Pa Sept. 28, 2000).

Overview: United States and defendant were denied summary judgment on majority of claims brought by United States against defendant for thousands of alleged violations of the Clean Water Act.

- The Clean Water Act, 33 U.S.C.S. § 1251 et seq., allows a state to issue stricter pollution standards than those promulgated by the United States. 33 U.S.C.S. § 1370; 40 C.F.R. § 123.25. These standards then become enforceable by the United States. Go To Headnote

Environmental Law : Water Quality : Clean Water Act : General Overview

Assateague Coastkeeper v. Alan & Kristin Hudson Farm, 727 F. Supp. 2d 433, 2010 U.S. Dist. LEXIS 73525 (D Md July 20, 2010).

Overview: Citizens' notice sufficiently alleged violation of 33 U.S.C.S. § 1311(a) because citizens identified point source as a concentrated animal feeding operation, citizens alleged that the farm was discharging pollutants associated with poultry waste into river, and citizens provided farm and integrator with sufficient information to correct violation.

- The Clean Water Act (CWA) prohibits the discharge of pollutants from a point source to waters of the United States, except as authorized by a permit issued under the National Pollution Discharge Elimination System (NPDES) program. 33 U.S.C.S. §§ 1311, 1342, 1362. The U.S. Environmental Protection Agency administers the NPDES program, although the CWA provides for delegation of authority to the states. 33 U.S.C.S. §§ 1251(d), 1342(a)(5); 40 C.F.R. § 123.25(a). Accordingly, Maryland administers the federal NPDES program and issues federal discharge permits in the Maryland. A delegated state must implement all aspects of the NPDES program, including issuing permits that conform to federal standards. 33 U.S.C.S. § 1342(b)(1)(A). Go To Headnote

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

In re Appalachian Fuels, Llc, 493 B.R. 1, 2013 Bankr. LEXIS 1599 (BAP6 Apr. 19, 2013).

Overview: While subsidiary bankruptcy debtor was not liable for environmental reclamation costs of affiliate as administrative expense since subsidiary did not participate in affiliate's coal mining operations, it was unclear whether parent debtor had such liability since parent potentially participated in affiliate's operations and environmental violations.

- Under the Water Pollution Prevention and Control Act of 1972 (Clean Water Act), 33 U.S.C.S. § 1251 et seq., states may issue National Pollutant Discharge Elimination System permits for discharges into the navigable waters within the jurisdiction of each state and may administer permitting programs which govern the issuance and enforcement of point source discharges into non-federal waters. 33 U.S.C.S. § 1342(a)(5); 40 C.F.R. § 123.25. The Clean Water Act defines the term "point source" 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.S. § 1362 (14). Once the Environmental Protection Agency approves the state program, the state law becomes the primary mechanism for oversight of water pollution laws and regulations in state waters. § 1342(c)(1). Under the Clean Water Act, state regulations are incorporated into the unitary federal enforcement scheme, with federal provisions remaining in effect. What results is a system of cooperative federalism in which the state statutes operate alongside the federal ones. Go To Headnote

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

United States v. Hagerman, 2008 U.S. App. LEXIS 24606 (7th Cir Dec. 5, 2008).

Overview: In a prosecution where a company and its president were charged with making materially false statements in reports they were obligated to file under the Clean Water Act, a jury instruction stating that defendants were required to use testing methods approved by the EPA was accurate because that is what was certified in the company's reports.

- The Environmental Protection Agency (EPA) grants discharge permits to those who wish to release pollutants into waterways, but also allows certain states, including Indiana, to issue such permits. 33 U.S.C.S. § 1342(a), (b); 40 C.F.R. § 122.1. The EPA regulations require all permit holders (including those who obtain their permits through state programs) to monitor pollutants according to test procedures approved by the EPA. 40 C.F.R. §§ 122.41(j)(4), 123.25(a)(12). Furthermore, the regulations specify the certification language permit-holders must use when they report their pollutant levels. 40 C.F.R. §§ 122.22, 122.41(k)(1), 123.25(a)(5), (12). In line with the EPA's requirements, the Indiana statutes governing discharge permits contain virtually identical language regarding monitoring and certification requirements. 327 Ind. Admin. Code 5-2-8(14), 5-2-13(d)(1), 5-2-22. Go To Headnote

Natural Resources Defense Council v. Texaco Ref. & Mktg., 719 F. Supp. 281, 1989 U.S. Dist. LEXIS 9660 (D Del Aug. 18, 1989).

Overview: Non-profit environmental organizations were entitled to summary judgment against an oil company because if an entity reported a pollution level in excess of permit limits, it was strictly liable and civil actions were permitted.

- While the upset defense is provided in EPA regulations as a matter of federal law, those regulations authorize states to omit the upset defense from National Pollutant Discharge Elimination System permits. 40 C.F.R. §§ 122.41(n), 123.25(a). 40 C.F.R. § 122.41 provides that in order to be available to a permittee operating under a state-issued permit, the upset defense must be incorporated into the permit expressly or by reference to the relevant C.F.R. sections. Go To Headnote

Mcclellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103 (ED Cal June 20, 1988).

Overview: A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.

- The Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES) regulations, codified at 40 C.F.R. § 122, contemplate that discharges of volatile organics will be addressed on a case-by-case basis. 40 C.F.R. § 122.21(g)(7)(ii) requires industrial permit applicants to report quantitative data for volatile organics in each outfall containing process wastewater. 40 C.F.R. § 122.42(a) requires permittees to notify the permitting authority as soon as they know or have reason to believe that an activity has occurred or will occur that would result in the discharge of a toxic pollutant which is not limited in the permit in excess of specified levels.

These sections are specifically made applicable to state NPDES programs through 40 C.F.R. § 123.25. Go To Headnote

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

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

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

- Under 40 C.F.R. § 122.48(b), all permits shall specify required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring. Moreover, monitoring requirements must assure compliance with permit limitations. 40 C.F.R. § 122.44(i)(1). Both §§ 122.48(b) and 122.44(i) would appear to require that certain monitoring conditions be included in all permits. The Clean Water Act makes plain the Environmental Protection Agency's broad authority to set these requirements. 33 U.S.C.S. § 1318(a). The Environmental Protection Agency has wide discretion and authority to determine monitoring requirements in National Pollution Discharge Elimination System permits. These requirements apply to state programs. 40 C.F.R. § 123.25(15), (19). Go To Headnote

Andersen v. Dep't of Natural Res., 332 Wis. 2d 41, 796 N.W.2d 1, 2011 Wisc. LEXIS 153 (Wis Mar. 23, 2011).

Overview: Because a Wisconsin Pollutant Discharge Elimination System permit properly reissued under Wisconsin's statutory and regulatory authority necessarily complied with federal law absent a federal determination to the contrary, Wis. Stat. § 283.63 (2005-06) did not require the Wisconsin Department of Natural Resources to review federal law challenges.

- 40 C.F.R. § 122.45(d) provides that for continuous discharges, all permit effluent limitations, including those necessary to achieve water quality standards, shall be stated as maximum daily and average monthly discharge limitations, unless impracticable. Section 122.45(f)(1) provides that all pollutants limited in permits shall have their limitations expressed in terms of mass, with certain exceptions. Section 122.45 is applicable to the Wisconsin Pollutant Discharge Elimination System permit program via 40 C.F.R. § 123.25. Go To Headnote

N. Cheyenne Tribe v. Mont. Dep't of Env'tl. Quality, 356 Mont. 296, 234 P.3d 51, 234 P.3d 51, 2010 Mont. LEXIS 171 (Mont May 18, 2010).

Overview: CWA imposed duty to apply pre-discharge treatment standards when granting NPDES permit, 33 U.S.C.S. §§ 1311, 1342. States were required to use these treatment standards, 40 C.F.R. §§ 122.44, 123.25, 125.3. Montana Department of Environmental Quality violated CWA by issuing discharge permits without imposing pre-discharge treatment standards.

- The 1972 amendments to the Clean Water Act (CWA) refocused its purpose to eliminating pollutant discharge through the use of pre-discharge treatment standards in the National Pollutant

Discharge Elimination System (NPDES) program. The CWA imposes a duty to apply pre-discharge treatment standards when granting an NPDES permit, CWA §§ 402 and 301, 33 U.S.C.S. §§ 1342 and 1311. The Environmental Protection Agency's (EPA) regulations promulgated under § 301(b) require states to use pre-discharge treatment standards, 40 C.F.R. §§ 122.44, 123.25, and 125.3. Montana has adopted these EPA regulations, Mont. R. Admin. 17.30.1303. Courts routinely have interpreted the CWA's pre-discharge treatment standards to apply to states since EPA's adoption of regulations in 1979. The CWA's pre-discharge treatment standards apply to states. Go To Headnote

In re Alexandria Lake Area Sanitary Dist., 763 N.W.2d 303, 2009 Minn. LEXIS 64 (Minn Apr. 2, 2009).

Overview: *Under 33 U.S.C.S. § 1362(17) and Minn. Stat. § 115.01, subd. 16, a National Pollutant Discharge Elimination System/State Disposal System permit condition that required a wastewater treatment facility to comply with effluent limits set by a total-maximum-daily-load study and implementation plan upon their future completion was enforceable.*

- The Clean Water Act (CWA), 33 U.S.C.S. §§ 1251 to 1387, was enacted to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.S. § 1251. To effectuate this policy, the CWA authorizes states to implement the National Pollutant Discharge Elimination System/State Disposal System (NPDES) permit program under 33 U.S.C.S. § 1342(a)-(d). The Minnesota Pollution Control Agency implements the NPDES program in Minnesota by issuing permits that comply with or are more stringent than federal permit conditions. Minn. Stat. § 115.03 (2008); 40 C.F.R. § 123.25(a) (2008). Go To Headnote

Sierra Club v. Union Oil Co., 813 F.2d 1480, 1987 U.S. App. LEXIS 4267 (9th Cir Apr. 3, 1987).

Overview: *An oil company could not raise an "upset defense" for violations of its NPDES permit when its permit contained no such defense and it failed to exhaust available administrative routes to contest the issue; a sampling error defense was also denied.*

- 40 C.F.R. § 122.41 provides for incorporating an upset defense into all permits under the National Pollutant Discharge Elimination System, either explicitly or by reference to the relevant regulations. It defines "upset" as 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. The scope of the upset defense under § 122.41 does not include noncompliance caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. The regulation also imposes stringent procedural requirements for asserting the upset defense and places the burden of proof upon the party claiming the defense. States may omit or modify any of the conditions under § 122.41 to impose more stringent requirements. 40 C.F.R. § 123.25(a)(12). In particular, a state may omit an upset provision entirely. Go To Headnote

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

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

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

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

In re Appalachian Fuels, Llc, 493 B.R. 1, 2013 Bankr. LEXIS 1599 (BAP6 Apr. 19, 2013).

Overview: While subsidiary bankruptcy debtor was not liable for environmental reclamation costs of affiliate as administrative expense since subsidiary did not participate in affiliate's coal mining operations, it was unclear whether parent debtor had such liability since parent potentially participated in affiliate's operations and environmental violations.

- Under the Water Pollution Prevention and Control Act of 1972 (Clean Water Act), 33 U.S.C.S. § 1251 et seq., states may issue National Pollutant Discharge Elimination System permits for discharges into the navigable waters within the jurisdiction of each state and may administer permitting programs which govern the issuance and enforcement of point source discharges into non-federal waters. 33 U.S.C.S. § 1342(a)(5); 40 C.F.R. § 123.25. The Clean Water Act defines the term "point source" 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.S. § 1362 (14). Once the Environmental Protection Agency approves the state program, the state law becomes the primary mechanism for oversight of water pollution laws and regulations in state waters. § 1342(c)(1). Under the Clean Water Act, state regulations are incorporated into the unitary federal enforcement scheme, with federal provisions remaining in effect. What results is a system of cooperative federalism in which the state statutes operate alongside the federal ones. Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Am. Farm Bureau Fed'n v. United States EPA, 2016 U.S. App. LEXIS 16623 (8th Cir Sept. 9, 2016).

Overview: Associations established a concrete and particularized injury in fact traceable to the EPA's action and redressable by judicial relief. The EPA abused its discretion in deciding that the information

concerning concentrated animal feeding operations was not exempt from mandatory disclosure under 5 U.S.C.S. § 552(b)(6).

- A person seeking a system permit for a concentrated animal feeding operation from either the EPA or an authorized state agency goes through the same application process, 40 C.F.R. §§ 122.21(i), 123.25(a)(4). An applicant submits an array of information, including the name of the owner or operator of the facility, the facility location and mailing address, a topographic map of the geographic area where the feeding operation is located, and the estimated amounts of manure, litter, and process wastewater generated per year, 40 C.F.R. § 122.21(i); § 122.23(d). The Clean Water Act requires that permit applications and issued permits must be available to the public, 33 U.S.C.S. § 1342(b)(3), (j). Go To Headnote

Pennsylvania Pub. Interest Research Group v. P.H. Glatfelter Co., 128 F. Supp. 2d 747, 2001 U.S. Dist. LEXIS 2658 (MD Pa Feb. 7, 2001).

Overview: Paper mill was liable for creek discoloration where mill repeatedly exceeded the wastewater discharge limits contained in a 1984 permit.

- Modifications to National Pollution Discharge Elimination System (NPDES) permits must comport with the same procedures as the issuance of an original permit. 40 C.F.R. § 123.25(a)(22) & (25). The applicable federal regulation requires that all draft permits prepared by Environmental Protection Agency under this section shall be accompanied by a statement of basis or fact sheet, and shall be based on the administrative record, publicly noticed and made available for public comment. The Regional Administrator shall give notice of opportunity for a public hearing, issue a final decision and respond to comments. 40 C.F.R. § 124.6(e). States are permitted to establish their own procedures in lieu of those contained in the federal regulations, but in order to do so, states must establish requirements at least as stringent as the corresponding listed provisions. 40 C.F.R. § 123.25(a). Go To Headnote

Proffitt v. Lower Bucks County Joint Municipal Authority, 1987 U.S. Dist. LEXIS 11759 (ED Pa Dec. 16, 1987).

Overview: In an action brought by citizens under the Federal Water Pollution Control Act, state authorities could not modify effluent limitations in a consent order without first following federal regulatory procedures that allowed for public participation.

- Section 1370 of the Federal Clean Water Act prohibits any state to adopt or enforce effluent standards or standards of performance which are less stringent than effluent standards or standards of performance required under the Act. When referring to the regulations requiring public notice and comment before modifying a permit, 40 C.F.R. § 123.25(a) provides that all state programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each; except, that states are not precluded from omitting or modifying any provisions to impose more stringent requirements. 40 C.F.R. § 124.5. Courts generally hold that states are free to set environmental and effluent standards that are more stringent than the federal criteria. Where federal regulations conflict with state law, the federal regulations take precedence under the Supremacy Clause of the United States Constitution. Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications

In re Appalachian Fuels, Llc, 493 B.R. 1, 2013 Bankr. LEXIS 1599 (BAP6 Apr. 19, 2013).

Overview: *While subsidiary bankruptcy debtor was not liable for environmental reclamation costs of affiliate as administrative expense since subsidiary did not participate in affiliate's coal mining operations, it was unclear whether parent debtor had such liability since parent potentially participated in affiliate's operations and environmental violations.*

- Under the Water Pollution Prevention and Control Act of 1972 (Clean Water Act), 33 U.S.C.S. § 1251 et seq., states may issue National Pollutant Discharge Elimination System permits for discharges into the navigable waters within the jurisdiction of each state and may administer permitting programs which govern the issuance and enforcement of point source discharges into non-federal waters. 33 U.S.C.S. § 1342(a)(5); 40 C.F.R. § 123.25. The Clean Water Act defines the term "point source" 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.S. § 1362 (14). Once the Environmental Protection Agency approves the state program, the state law becomes the primary mechanism for oversight of water pollution laws and regulations in state waters. § 1342(c)(1). Under the Clean Water Act, state regulations are incorporated into the unitary federal enforcement scheme, with federal provisions remaining in effect. What results is a system of cooperative federalism in which the state statutes operate alongside the federal ones. Go To Headnote

Andersen v. Dep't of Natural Res., 332 Wis. 2d 41, 796 N.W.2d 1, 2011 Wisc. LEXIS 153 (Wis Mar. 23, 2011).

Overview: *Because a Wisconsin Pollutant Discharge Elimination System permit properly reissued under Wisconsin's statutory and regulatory authority necessarily complied with federal law absent a federal determination to the contrary, Wis. Stat. § 283.63 (2005-06) did not require the Wisconsin Department of Natural Resources to review federal law challenges.*

- 33 U.S.C.S. § 1342(b) sets forth the requirements that a state's proposed permit program must meet in order to gain approval by the United States Environmental Protection Agency (EPA). 40 C.F.R. § 123.25 sets forth the permitting requirements that a proposed permit program must meet. If the EPA determines that the proposed permit program meets the enumerated requirements, then the EPA must approve the program. Once a state program is approved, the EPA must suspend its own issuance of National Pollutant Discharge Elimination System permits covering the navigable waters subject to the state program. § 1342(c)(1); 40 C.F.R. § 123.61(c). Go To Headnote
- 40 C.F.R. § 122.44(d) provides generally that each National Pollutant Discharge Elimination System permit must include conditions that meet the requirements of water quality standards, when applicable. Section 122.44(d) is applicable to the Wisconsin Pollutant Discharge Elimination System permit program via 40 C.F.R. § 123.25. Go To Headnote
- 40 C.F.R. § 122.45(d) provides that for continuous discharges, all permit effluent limitations, including those necessary to achieve water quality standards, shall be stated as maximum daily

and average monthly discharge limitations, unless impracticable. Section 122.45(f)(1) provides that all pollutants limited in permits shall have their limitations expressed in terms of mass, with certain exceptions. Section 122.45 is applicable to the Wisconsin Pollutant Discharge Elimination System permit program via 40 C.F.R. § 123.25. *Go To Headnote*

- When the United States Environmental Protection Agency (EPA) approved the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program, the EPA deemed Wisconsin's statutory and regulatory authority adequate to issue permits that comply with the requirements of the Clean Water Act and of 40 C.F.R. pt. 123. 33 U.S.C.S. § 1342(b)(1)(A), (b)(2)(A), (c)(1); 40 C.F.R. § 123.61(b). 40 C.F.R. § 123.25 sets forth the permitting requirements that a proposed permit program must meet. Thus, when the EPA approved the WPDES permit program, the EPA necessarily determined that the program complies with those permitting requirements. Similarly, any substantial revisions to the WPDES permit program have been, and will continue to be, subject to the EPA's approval. 40 C.F.R. § 123.62(a). *Go To Headnote*

W. Va. Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159, 2010 U.S. App. LEXIS 23170 (4th Cir Nov. 8, 2010).

Overview: *Injunction requiring defendant West Virginia Department of Environmental Protection to obtain National Pollutant Discharge Elimination System permits under the CWA for reclamation efforts at abandoned coal mining sites was affirmed; the CWA did not contain any exceptions for state agencies engaging in reclamation efforts.*

- While National Pollutant Discharge Elimination System (NPDES) permits are normally issued by the Environmental Protection Agency, states can petition to run their own NPDES permit programs. 33 U.S.C.S. §§ 1342(a)-(b). In administering these programs, states are free to treat the Environmental Protection Agency's pollution limits as a floor and impose more stringent requirements. 40 C.F.R. §§ 123.1(i)(1), 123.25. Once an NPDES permit has been issued, however, the state, the Environmental Protection Agency, and citizens alike can sue to enforce it. 33 U.S.C.S. §§ 1319(a)(3), 1365(a). *Go To Headnote*

N. Cheyenne Tribe v. Mont. Dep't of Env'tl. Quality, 356 Mont. 296, 234 P.3d 51, 234 P.3d 51, 2010 Mont. LEXIS 171 (Mont May 18, 2010).

Overview: *CWA imposed duty to apply pre-discharge treatment standards when granting NPDES permit, 33 U.S.C.S. §§ 1311, 1342. States were required to use these treatment standards, 40 C.F.R. §§ 122.44, 123.25, 125.3. Montana Department of Environmental Quality violated CWA by issuing discharge permits without imposing pre-discharge treatment standards.*

- The 1972 amendments to the Clean Water Act (CWA) refocused its purpose to eliminating pollutant discharge through the use of pre-discharge treatment standards in the National Pollutant Discharge Elimination System (NPDES) program. The CWA imposes a duty to apply pre-discharge treatment standards when granting an NPDES permit, CWA §§ 402 and 301, 33 U.S.C.S. §§ 1342 and 1311. The Environmental Protection Agency's (EPA) regulations promulgated under § 301(b) require states to use pre-discharge treatment standards, 40 C.F.R. §§ 122.44, 123.25, and 125.3. Montana has adopted these EPA regulations, Mont. R. Admin. 17.30.1303. Courts routinely have interpreted the CWA's pre-discharge treatment standards to

apply to states since EPA's adoption of regulations in 1979. The CWA's pre-discharge treatment standards apply to states. Go To Headnote

United States v. Hagerman, 2008 U.S. App. LEXIS 24606 (7th Cir Dec. 5, 2008).

Overview: In a prosecution where a company and its president were charged with making materially false statements in reports they were obligated to file under the Clean Water Act, a jury instruction stating that defendants were required to use testing methods approved by the EPA was accurate because that is what was certified in the company's reports.

- The Environmental Protection Agency (EPA) grants discharge permits to those who wish to release pollutants into waterways, but also allows certain states, including Indiana, to issue such permits. 33 U.S.C.S. § 1342(a), (b); 40 C.F.R. § 122.1. The EPA regulations require all permit holders (including those who obtain their permits through state programs) to monitor pollutants according to test procedures approved by the EPA. 40 C.F.R. §§ 122.41(j)(4), 123.25(a)(12). Furthermore, the regulations specify the certification language permit-holders must use when they report their pollutant levels. 40 C.F.R. §§ 122.22, 122.41(k)(1), 123.25(a)(5), (12). In line with the EPA's requirements, the Indiana statutes governing discharge permits contain virtually identical language regarding monitoring and certification requirements. 327 Ind. Admin. Code 5-2-8(14), 5-2-13(d)(1), 5-2-22. Go To Headnote

Ohio Valley Envtl. Coalition, Inc. v. Apogee Coal Co., Llc, 555 F. Supp. 2d 640, 2008 U.S. Dist. LEXIS 41367 (SD W Va May 27, 2008).

Overview: Plaintiffs could not pursue their Clean Water Act claims for violations of effluent limits against a mining company, as that mining company was in compliance with the effluent limitations contained within its National Pollutant Discharge Elimination System permit; any violations were barred as wholly past.

- Under the Clean Water Act (CWA), a state may receive approval to administer a state-run National Pollutant Discharge Elimination System (NPDES) program under the authority of 33 U.S.C.S. § 1342. West Virginia has received such approval and its NPDES program is administered through the West Virginia Department of Environmental Protection. The CWA's regulations effectively incorporate state law into the unitary federal enforcement scheme. 40 C.F.R. 123.25. Go To Headnote

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

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

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

- Under 40 C.F.R. § 122.48(b), all permits shall specify required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity

including, when appropriate, continuous monitoring. Moreover, monitoring requirements must assure compliance with permit limitations. 40 C.F.R. § 122.44(i)(1). Both §§ 122.48(b) and 122.44(i) would appear to require that certain monitoring conditions be included in all permits. The Clean Water Act makes plain the Environmental Protection Agency's broad authority to set these requirements. 33 U.S.C.S. § 1318(a). The Environmental Protection Agency has wide discretion and authority to determine monitoring requirements in National Pollution Discharge Elimination System permits. These requirements apply to state programs. 40 C.F.R. § 123.25(15), (19). Go To Headnote

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

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

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

N. Cheyenne Tribe v. Mont. Dep't of Envtl. Quality, 356 Mont. 296, 234 P.3d 51, 234 P.3d 51, 2010 Mont. LEXIS 171 (Mont May 18, 2010).

Overview: CWA imposed duty to apply pre-discharge treatment standards when granting NPDES permit, 33 U.S.C.S. §§ 1311, 1342. States were required to use these treatment standards, 40 C.F.R. §§ 122.44, 123.25, 125.3. Montana Department of Environmental Quality violated CWA by issuing discharge permits without imposing pre-discharge treatment standards.

- The 1972 amendments to the Clean Water Act (CWA) refocused its purpose to eliminating pollutant discharge through the use of pre-discharge treatment standards in the National Pollutant Discharge Elimination System (NPDES) program. The CWA imposes a duty to apply pre-discharge treatment standards when granting an NPDES permit, CWA §§ 402 and 301, 33 U.S.C.S. §§ 1342 and 1311. The Environmental Protection Agency's (EPA) regulations promulgated under § 301(b) require states to use pre-discharge treatment standards, 40 C.F.R. §§ 122.44, 123.25, and 125.3. Montana has adopted these EPA regulations, Mont. R. Admin. 17.30.1303. Courts routinely have interpreted the CWA's pre-discharge treatment standards to

apply to states since EPA's adoption of regulations in 1979. The CWA's pre-discharge treatment standards apply to states. [Go To Headnote](#)

Environmental Law : Water Quality : Clean Water Act : Enforcement : General Overview

[Proffitt v. Lower Bucks County Joint Municipal Authority, 1987 U.S. Dist. LEXIS 11759](#) (ED Pa Dec. 16, 1987).

Overview: In an action brought by citizens under the Federal Water Pollution Control Act, state authorities could not modify effluent limitations in a consent order without first following federal regulatory procedures that allowed for public participation.

- Section 1370 of the Federal Clean Water Act prohibits any state to adopt or enforce effluent standards or standards of performance which are less stringent than effluent standards or standards of performance required under the Act. When referring to the regulations requiring public notice and comment before modifying a permit, [40 C.F.R. § 123.25\(a\)](#) provides that all state programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each; except, that states are not precluded from omitting or modifying any provisions to impose more stringent requirements. [40 C.F.R. § 124.5](#). Courts generally hold that states are free to set environmental and effluent standards that are more stringent than the federal criteria. Where federal regulations conflict with state law, the federal regulations take precedence under the Supremacy Clause of the United States Constitution. [Go To Headnote](#)

Environmental Law : Water Quality : Clean Water Act : Enforcement : Citizen Suits : Grounds

[Miss. River Revival, Inc. v. City of St. Paul, 2002 U.S. Dist. LEXIS 25384](#) (D Minn Dec. 2, 2002).

Overview: Because plaintiffs had not alleged any particularized injury to their environmental interests resulting from the alleged reporting defects, they did not have standing to prosecute those defects.

- In Minnesota, the responsibility for National Pollutant Discharge Elimination Systems (NPDES) permitting has shifted from the Environmental Protection Agency to the Minnesota Pollution Control Agency (MPCA). [33 U.S.C.S. 1342\(b\)-\(c\)](#); 40 C.R.F. § 123.25 (2000). The MPCA administers and executes NPDES permits pursuant to Minn. Stat. § 115.03, subd. 5. Noncompliance with a permit constitutes a violation of the Clean Water Act (CWA). [33 U.S.C.S. § 1342\(h\)](#). The CWA authorizes district courts in citizen-suit proceedings to enter injunctions and to assess civil penalties, which are payable to the United States Treasury. [33 U.S.C.S. § 1365\(a\)](#). [Go To Headnote](#)

Environmental Law : Water Quality : Clean Water Act : Enforcement : Civil Penalties

[Miss. River Revival, Inc. v. City of St. Paul, 2002 U.S. Dist. LEXIS 25384](#) (D Minn Dec. 2, 2002).

Overview: Because plaintiffs had not alleged any particularized injury to their environmental interests resulting from the alleged reporting defects, they did not have standing to prosecute those defects.

40 CFR 123.25

- In Minnesota, the responsibility for National Pollutant Discharge Elimination Systems (NPDES) permitting has shifted from the Environmental Protection Agency to the Minnesota Pollution Control Agency (MPCA). 33 U.S.C.S. 1342(b)-(c); 40 C.R.F. § 123.25 (2000). The MPCA administers and executes NPDES permits pursuant to Minn. Stat. § 115.03, subd. 5. Noncompliance with a permit constitutes a violation of the Clean Water Act (CWA). 33 U.S.C.S. § 1342(h). The CWA authorizes district courts in citizen-suit proceedings to enter injunctions and to assess civil penalties, which are payable to the United States Treasury. 33 U.S.C.S. § 1365(a).
Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Enforcement : Criminal Prosecutions

United States v. Murphy Oil Usa, Inc., 143 F. Supp. 2d 1054, 2001 U.S. Dist. LEXIS 10519 (WD Wis May 18, 2001).

Overview: Clean air statute claims were untimely, and refiner exceeded permissible discharge limits and violated hazardous waste requirements, but fact issues remained concerning refiner's compliance with documentation requirements.

- Under the Clean Water Act, 33 U.S.C.S. § 1251 et seq., each permittee must establish and maintain records, install and use monitoring equipment, sample its effluent according to a prescribed schedule, and report the results to the permitting agency. 33 U.S.C.S. § 1318(a); 40 C.F.R. §§ 122.41(j)(3), 122.48, 123.25. The effluent reports, which are submitted on standard Environmental Protection Agency prescribed forms, are known as Discharge Monitoring Reports. 40 C.F.R. §§ 122.2, 123.25. A permittee's Discharge Monitoring Reports must be signed by a responsible corporate officer or duly authorized representative, who certifies that the reported information was prepared by qualified personnel under his or her direction or supervision, and that the information is true, accurate and complete. 40 C.F.R. § 122.22. Accuracy is further encouraged by the availability of criminal penalties for false statements. 33 U.S.C.S. § 1319(c)(2).
Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Enforcement : Injunctive Relief

Miss. River Revival, Inc. v. City of St. Paul, 2002 U.S. Dist. LEXIS 25384 (D Minn Dec. 2, 2002).

Overview: Because plaintiffs had not alleged any particularized injury to their environmental interests resulting from the alleged reporting defects, they did not have standing to prosecute those defects.

- In Minnesota, the responsibility for National Pollutant Discharge Elimination Systems (NPDES) permitting has shifted from the Environmental Protection Agency to the Minnesota Pollution Control Agency (MPCA). 33 U.S.C.S. 1342(b)-(c); 40 C.R.F. § 123.25 (2000). The MPCA administers and executes NPDES permits pursuant to Minn. Stat. § 115.03, subd. 5. Noncompliance with a permit constitutes a violation of the Clean Water Act (CWA). 33 U.S.C.S. § 1342(h). The CWA authorizes district courts in citizen-suit proceedings to enter injunctions and to assess civil penalties, which are payable to the United States Treasury. 33 U.S.C.S. § 1365(a).
Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Recordkeeping & Reporting

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

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

- Under 40 C.F.R. § 122.48(b), all permits shall specify required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring. Moreover, monitoring requirements must assure compliance with permit limitations. 40 C.F.R. § 122.44(i)(1). Both §§ 122.48(b) and 122.44(i) would appear to require that certain monitoring conditions be included in all permits. The Clean Water Act makes plain the Environmental Protection Agency's broad authority to set these requirements. 33 U.S.C.S. § 1318(a). The Environmental Protection Agency has wide discretion and authority to determine monitoring requirements in National Pollution Discharge Elimination System permits. These requirements apply to state programs. 40 C.F.R. § 123.25(15), (19). Go To Headnote

United States v. Stabl, Inc., 2015 U.S. App. LEXIS 15121 (8th Cir Aug. 27, 2015).

Overview: *Discharge monitoring reports (DMRs) that a rendering plant operator was required to maintain by Clean Water Act regulations and the operator's pretreatment permit were nonhearsay adoptive admissions under Fed. R. Evid. 801(d)(2)(B), and the operator did not offer sufficient evidence to impeach its own DMRs.*

- Permit holders have a duty to monitor their wastewater discharges, maintain monitoring records, and submit to the government discharge monitoring reports (DMRs) summarizing the results of that monitoring. 40 C.F.R. §§ 122.41(j), (l)(4), 123.25. Federal regulations require that samples and measurements taken for the purpose of monitoring be representative of the monitored activity and that those submitting DMRs certify that, based on their 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 their knowledge and belief, true, accurate, and complete. 40 C.F.R. §§ 122.22(d), 122.41(j)(1), (k)(1), 123.25. Go To Headnote

United States v. Murphy Oil Usa, Inc., 143 F. Supp. 2d 1054, 2001 U.S. Dist. LEXIS 10519 (WD Wis May 18, 2001).

Overview: *Clean air statute claims were untimely, and refiner exceeded permissible discharge limits and violated hazardous waste requirements, but fact issues remained concerning refiner's compliance with documentation requirements.*

- Under the Clean Water Act, 33 U.S.C.S. § 1251 et seq., each permittee must establish and maintain records, install and use monitoring equipment, sample its effluent according to a prescribed schedule, and report the results to the permitting agency. 33 U.S.C.S. § 1318(a); 40 C.F.R. §§ 122.41(j)(3), 122.48, 123.25. The effluent reports, which are submitted on standard Environmental Protection Agency prescribed forms, are known as Discharge Monitoring Reports. 40 C.F.R. §§ 122.2, 123.25. A permittee's Discharge Monitoring Reports must be signed by a responsible corporate officer or duly authorized representative, who certifies that the reported

information was prepared by qualified personnel under his or her direction or supervision, and that the information is true, accurate and complete. 40 C.F.R. § 122.22. Accuracy is further encouraged by the availability of criminal penalties for false statements. 33 U.S.C.S. § 1319(c)(2).
Go To Headnote

Environmental Law : Zoning & Land Use : Conditional Use Permits & Variances

Natural Resources Defense Council v. Texaco Ref. & Mktg., 719 F. Supp. 281, 1989 U.S. Dist. LEXIS 9660 (D Del Aug. 18, 1989).

Overview: Non-profit environmental organizations were entitled to summary judgment against an oil company because if an entity reported a pollution level in excess of permit limits, it was strictly liable and civil actions were permitted.

- While the upset defense is provided in EPA regulations as a matter of federal law, those regulations authorize states to omit the upset defense from National Pollutant Discharge Elimination System permits. 40 C.F.R. §§ 122.41(n), 123.25(a). 40 C.F.R. § 122.41 provides that in order to be available to a permittee operating under a state-issued permit, the upset defense must be incorporated into the permit expressly or by reference to the relevant C.F.R. sections. Go To Headnote

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

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

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.]

Copyright © 2017, by Matthew Bender & Company, a member of the LexisNexis Group. All rights reserved.

End of Document

Tab 13

40 CFR 124.8

This document is current through the December 30, 2016 issue of the Federal Register with the exception of the amendments appearing at 81 FR 96572

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 124 -- PROCEDURES FOR DECISIONMAKING > SUBPART A -- GENERAL PROGRAM REQUIREMENTS

§ 124.8 Fact sheet.

(Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).)

(a) A fact sheet shall be prepared for every draft permit for a major HWM, UIC, 404, or NPDES facility or activity, for every Class I sludge management facility, for every 404 and NPDES general permit (§§ 237.37 and 122.28), for every NPDES draft permit that incorporates a variance or requires an explanation under § 124.56(b), for every draft permit that includes a sewage sludge land application plan under *40 CFR 501.15(a)(2)(ix)*, and for every draft permit which the Director finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

(b) The fact sheet shall include, when applicable:

- (1) A brief description of the type of facility or activity which is the subject of the draft permit;
- (2) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged.
- (3) For a PSD permit, the degree of increment consumption expected to result from operation of the facility or activity.
- (4) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by § 124.9 (for EPA-issued permits);
- (5) Reasons why any requested variances or alternatives to required standards do or do not appear justified;
- (6) A description of the procedures for reaching a final decision on the draft permit including:
 - (i) The beginning and ending dates of the comment period under § 124.10 and the address where comments will be received;
 - (ii) Procedures for requesting a hearing and the nature of that hearing; and
 - (iii) Any other procedures by which the public may participate in the final decision.
- (7) Name and telephone number of a person to contact for additional information.

(8) For NPDES permits, provisions satisfying the requirements of § 124.56.

(9) Justification for waiver of any application requirements under § 122.21(j) or (q) of this chapter.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.; Safe Drinking Water Act, 42 U.S.C. 300f et seq.; Clean Water Act, 33 U.S.C. 1251 et seq.; Clean Air Act, 42 U.S.C. 7401 et seq.

History

[48 FR 14264, Apr. 1, 1983, as amended at 54 FR 18786, May 2, 1989; 64 FR 42434, 42470, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 65 FR 43586, 43661, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001]

Annotations

Case Notes

LexisNexis® Notes

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview

Administrative Law : Judicial Review : Administrative Record : General Overview

Contracts Law : Negotiable Instruments : General Overview

Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure

Environmental Law : Water Quality : General Overview

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview

United States v. Metropolitan Dist. Com., 1985 U.S. Dist. LEXIS 16232 (D Mass Sept. 5, 1985).

Overview: *A publicly owned treatment works was enjoined from further discharge of sludge into navigable waterways because it failed to voluntarily comply with an administrative order, a permit, and statutory prohibitions against such discharge.*

- The Code of Federal Regulations sets out extensive regulatory procedures that must be followed before a National Pollutant Discharge Elimination System (NPDES) permit can be modified. 40 C.F.R. § 122.15 et seq. For example, the Environmental Protection Agency must prepare a fact

sheet and draft permit and allow for a period of public comment. 40 C.F.R. §§ 124.6, 124.8, 124.10. Where none of these steps are followed an administrative order can not properly modify a permit's limits. Go To Headnote

Administrative Law : Judicial Review : Administrative Record : General Overview

Adams v. United States EPA, 38 F.3d 43, 1994 U.S. App. LEXIS 29665 (1st Cir Oct. 25, 1994).

Overview: Home owner was not entitled to a hearing in regard to the issuance of a discharge permit, because he had not presented a genuine issue of material fact against the regulatory presumption that the discharge would not cause unreasonable degradation.

- Following certification, the EPA then prepares and issues a draft permit and explanatory fact sheet. 40 C.F.R. §§ 124.6, 124.8, 124.56. The EPA gives public notice, which initiates a 30-day public comment period. 40 C.F.R. § 124.10(a)(1)(ii), (b)(1). During the public comment period, all persons who believe any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of their positions. 40 C.F.R. § 124.13. During this period, any interested person can request a public hearing. 40 C.F.R. § 124.11. After the close of the public comment period, the Regional Administrator determines whether a final permit should be issued, based on the administrative record compiled during the public comment period. 40 C.F.R. §§ 124.15, 124.18. Go To Headnote

Contracts Law : Negotiable Instruments : General Overview

Amigos Bravos v. Molycorp, Inc., 1998 U.S. App. LEXIS 28576 (10th Cir Nov. 13, 1998).

Overview: Where environmentalists had not raised their claims about a company's discharge of pollutants during proceedings to renew its National Pollution Discharge Elimination System permit, they were barred from bringing the claims in a Clean Water Act suit.

- An applicant seeking to renew an existing National Pollution Discharge Elimination System permit must submit an application to the Environmental Protection Agency (EPA) regional administrator before the existing permit expires. 40 C.F.R. § 122.21(d)(2). Once the application is complete, the regional administrator makes a tentative decision either to issue or to deny a draft permit. 40 C.F.R. § 124.6(a). If the regional director decides to prepare a draft permit, the EPA will issue the draft permit and an explanatory fact sheet. 40 C.F.R. §§ 124.6, 124.8, 124.56. The regional administrator also must give public notice that a draft permit has been prepared and must allow at least 30 days for public comment. 40 C.F.R. § 124.10(a)(1)(ii), (b). During the public comment period, any interested person may submit comments on the draft permit and may request a public hearing if no hearing has been scheduled. 40 C.F.R. § 124.11. Anyone who believes that any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of his position before the end of the comment period. 40 C.F.R. § 124.13. Go To Headnote

Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure

Amigos Bravos v. Molycorp, Inc., 1998 U.S. App. LEXIS 28576 (10th Cir Nov. 13, 1998).

Overview: *Where environmentalists had not raised their claims about a company's discharge of pollutants during proceedings to renew its National Pollution Discharge Elimination System permit, they were barred from bringing the claims in a Clean Water Act suit.*

- An applicant seeking to renew an existing National Pollution Discharge Elimination System permit must submit an application to the Environmental Protection Agency (EPA) regional administrator before the existing permit expires. 40 C.F.R. § 122.21(d)(2). Once the application is complete, the regional administrator makes a tentative decision either to issue or to deny a draft permit. 40 C.F.R. § 124.6(a). If the regional director decides to prepare a draft permit, the EPA will issue the draft permit and an explanatory fact sheet. 40 C.F.R. §§ 124.6, 124.8, 124.56. The regional administrator also must give public notice that a draft permit has been prepared and must allow at least 30 days for public comment. 40 C.F.R. § 124.10(a)(1)(ii), (b). During the public comment period, any interested person may submit comments on the draft permit and may request a public hearing if no hearing has been scheduled. 40 C.F.R. § 124.11. Anyone who believes that any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of his position before the end of the comment period. 40 C.F.R. § 124.13. Go To Headnote

Environmental Law : Water Quality : General Overview

Adams v. United States EPA, 38 F.3d 43, 1994 U.S. App. LEXIS 29665 (1st Cir Oct. 25, 1994).

Overview: *Home owner was not entitled to a hearing in regard to the issuance of a discharge permit, because he had not presented a genuine issue of material fact against the regulatory presumption that the discharge would not cause unreasonable degradation.*

- Following certification, the EPA then prepares and issues a draft permit and explanatory fact sheet. 40 C.F.R. §§ 124.6, 124.8, 124.56. The EPA gives public notice, which initiates a 30-day public comment period. 40 C.F.R. § 124.10(a)(1)(ii), (b)(1). During the public comment period, all persons who believe any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of their positions. 40 C.F.R. § 124.13. During this period, any interested person can request a public hearing. 40 C.F.R. § 124.11. After the close of the public comment period, the Regional Administrator determines whether a final permit should be issued, based on the administrative record compiled during the public comment period. 40 C.F.R. §§ 124.15, 124.18. Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Amigos Bravos v. Molycorp, Inc., 1998 U.S. App. LEXIS 28576 (10th Cir Nov. 13, 1998).

Overview: *Where environmentalists had not raised their claims about a company's discharge of pollutants during proceedings to renew its National Pollution Discharge Elimination System permit, they were barred from bringing the claims in a Clean Water Act suit.*

- An applicant seeking to renew an existing National Pollution Discharge Elimination System permit must submit an application to the Environmental Protection Agency (EPA) regional administrator before the existing permit expires. 40 C.F.R. § 122.21(d)(2). Once the application is complete, the regional administrator makes a tentative decision either to issue or to deny a draft

permit. 40 C.F.R. § 124.6(a). If the regional director decides to prepare a draft permit, the EPA will issue the draft permit and an explanatory fact sheet. 40 C.F.R. §§ 124.6, 124.8, 124.56. The regional administrator also must give public notice that a draft permit has been prepared and must allow at least 30 days for public comment. 40 C.F.R. § 124.10(a)(1)(ii), (b). During the public comment period, any interested person may submit comments on the draft permit and may request a public hearing if no hearing has been scheduled. 40 C.F.R. § 124.11. Anyone who believes that any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of his position before the end of the comment period. 40 C.F.R. § 124.13.
Go To Headnote

Proffitt v. Lower Bucks County Joint Municipal Authority, 1987 U.S. Dist. LEXIS 11759 (ED Pa Dec. 16, 1987).

Overview: In an action brought by citizens under the Federal Water Pollution Control Act, state authorities could not modify effluent limitations in a consent order without first following federal regulatory procedures that allowed for public participation.

- The Code of Federal Regulations sets forth the required regulation procedures for modifying a National Pollutant Discharge Elimination System (NPDES) permit. 40 C.F.R. § 124.5. The Environmental Protection Agency must prepare a draft permit, 40 C.F.R. § 124.6, and a fact sheet, 40 C.F.R. § 124.8, and allow for a period of public comment, 40 C.F.R. § 124.10. This procedure supports the general policy of encouraging public participation in the administration of the NPDES permit program. Go To Headnote

United States v. Metropolitan Dist. Com., 1985 U.S. Dist. LEXIS 16232 (D Mass Sept. 5, 1985).

Overview: A publicly owned treatment works was enjoined from further discharge of sludge into navigable waterways because it failed to voluntarily comply with an administrative order, a permit, and statutory prohibitions against such discharge.

- The Code of Federal Regulations sets out extensive regulatory procedures that must be followed before a National Pollutant Discharge Elimination System (NPDES) permit can be modified. 40 C.F.R. § 122.15 et seq. For example, the Environmental Protection Agency must prepare a fact sheet and draft permit and allow for a period of public comment. 40 C.F.R. §§ 124.6, 124.8, 124.10. Where none of these steps are followed an administrative order can not properly modify a permit's limits. Go To Headnote

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 124 Establishment of Class VI Program, see: 76 FR 56982, Sept. 15, 2011.]

LEXISNEXIS' CODE OF FEDERAL REGULATIONS

Copyright © 2017, by Matthew Bender & Company, a member of the LexisNexis Group. All rights reserved.

End of Document

Tab 14

40 CFR 131.2

This document is current through the December 30, 2016 issue of the Federal Register with the exception of the amendments appearing at 81 FR 96572

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 131 -- WATER QUALITY STANDARDS > SUBPART A -- GENERAL PROVISIONS

§ 131.2 Purpose.

A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

Such standards serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act.

History

48 FR 51405, Nov. 8, 1983; 80 FR 51020, 51046, Aug. 21, 2015

Annotations

Notes

[EFFECTIVE DATE NOTE:

73 FR 51585, 51589, Sept. 4, 2008, added Part 1291, effective Sept. 5, 2008; 80 FR 51020, 51046, Aug. 21, 2015, revised the first sentence, effective Oct. 20, 2015.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part

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

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

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications

Environmental Law : Water Quality : Clean Water Act : Enforcement : General Overview

Environmental Law : Water Quality : Clean Water Act : Water Quality Standards

Case Notes Applicable to Entire Part

Part Note

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

El Dorado Chem. Co. v. United States EPA, 763 F.3d 950, 2014 U.S. App. LEXIS 15694 (8th Cir Aug. 15, 2014).

Overview: EPA was entitled to summary judgment, because the EPA had the authority to look at downstream effects, the company failed to adequately demonstrate the affected waters would be protected, and the EPA's refusal to approve the state's proposed water quality criteria on the basis of incomplete information was not arbitrary or capricious.

- The Clean Water Act (CWA) authorizes states to establish water quality standards for bodies of water within its borders. 33 U.S.C.S. § 1313(a)-(c). Water quality standards define the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. 40 C.F.R. § 131.2. They comprise (1) the designated use(s) of the waters (e.g., water supply, propagation of fish, or recreation), 40 C.F.R. § 131.10; (2) the water quality criteria necessary to safely permit those designated uses, 40 C.F.R. § 131.11; and (3) antidegradation requirements to protect waters whose quality is better than required, 40 C.F.R. § 131.12. 40 C.F.R. § 131.6. States must review their water quality standards at least every three years. 33 U.S.C.S. § 1313(c)(1). Under the CWA, each state must create a continuing planning process to, among other things, govern the process for revising its water quality standards. 40 C.F.R. § 130.5(a). In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters. 40 C.F.R. § 131.10(b). Go To Headnote

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

Westvaco Corp. v. United States EPA, 899 F.2d 1383, 1990 U.S. App. LEXIS 23383 (4th Cir Feb. 15, 1990).

Overview: *An Environmental Protection Agency's (EPA) proposal to disapprove lists of impaired waters submitted by two states was not immediately reviewable, but the affected corporation had to await final action in the form of an EPA permit issuance.*

- If standards are not established by a state, the Environmental Protection Agency (EPA) must establish the water quality standards for the waters in that state, 33 U.S.C.S. § 1311(b)(1)(C). Water quality standards consist of: (i) a designated use for the waters in question (e.g., public water supply), and (ii) water quality criteria specifying the amount of various pollutants which may be present in those waters and still achieve the designated use(s), 40 C.F.R. §§ 131.2, 131.3. The state water quality criteria may be expressed as numerical concentration limits or in narrative form, 40 C.F.R. § 131.3(b). *Go To Headnote*

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications

Nat'l Mining Ass'n v. Jackson, 768 F. Supp. 2d 34, 2011 U.S. Dist. LEXIS 3710 (DDC Jan. 14, 2011).

Overview: *Motion for a preliminary injunction was denied because the mining association had not shown that its members were likely to incur substantial economic losses as a result of the additional permitting conditions imposed by the guidance memorandum issued by the EPA. As such, the association failed to show irreparable harm.*

- Section 303 of the Clean Water Act allocates primary authority for the development of water quality standards to the states. 33 U.S.C.S. § 1313. A water quality standard designates uses for a particular body of water and establishes criteria for protecting and maintaining those uses. 40 C.F.R. § 131.2 (2010). These standards can be expressed as a specific numeric limitation on pollutants or as a general narrative statement. 40 C.F.R. § 131.3(b). While states have the responsibility to develop the water quality standards, the Environmental Protection Agency (EPA) reviews the standards for approval. 40 C.F.R. §§ 131.4, 131.5. The EPA may promulgate water quality standards to the exclusion of a state only if (1) it determines that a state's proposed new or revised standard does not measure up to the Clean Water Act's requirements and the state refuses to accept EPA-proposed revisions, or (2) a state does not act, but in the EPA's view a new or revised standard is necessary. 33 U.S.C.S. § 1313(a)(2). *Go To Headnote*

Environmental Law : Water Quality : Clean Water Act : Enforcement : General Overview

El Dorado Chem. Co. v. United States EPA, 763 F.3d 950, 2014 U.S. App. LEXIS 15694 (8th Cir Aug. 15, 2014).

Overview: *EPA was entitled to summary judgment, because the EPA had the authority to look at downstream effects, the company failed to adequately demonstrate the affected waters would be protected, and the EPA's refusal to approve the state's proposed water quality criteria on the basis of incomplete information was not arbitrary or capricious.*

- The Clean Water Act (CWA) authorizes states to establish water quality standards for bodies of water within its borders. 33 U.S.C.S. § 1313(a)-(c). Water quality standards define the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. 40 C.F.R. § 131.2. They comprise (1)

the designated use(s) of the waters (e.g., water supply, propagation of fish, or recreation), 40 C.F.R. § 131.10; (2) the water quality criteria necessary to safely permit those designated uses, 40 C.F.R. § 131.11; and (3) antidegradation requirements to protect waters whose quality is better than required, 40 C.F.R. § 131.12. 40 C.F.R. § 131.6. States must review their water quality standards at least every three years. 33 U.S.C.S. § 1313(c)(1). Under the CWA, each state must create a continuing planning process to, among other things, govern the process for revising its water quality standards. 40 C.F.R. § 130.5(a). In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters. 40 C.F.R. § 131.10(b). Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Water Quality Standards

Gulf Restoration Network v. McCarthy, 783 F.3d 227, 2015 U.S. App. LEXIS 5602 (5th Cir Apr. 7, 2015).

Overview: The EPA's act of declining to use its powers pursuant to the Clean Water Act, 33 U.S.C.S. § 1313(c)(4)(B), to control nitrogen and phosphorous pollution within the Mississippi River Basin and the Northern Gulf of Mexico was akin to a denial of a rulemaking petition and thus, was presumptively reviewable.

- The regulations define the water quality goals of a water body by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. 40 C.F.R. § 131.2. The states are the primary player in this process; they are responsible for reviewing, establishing, and revising water quality standards. 40 C.F.R. § 131.4(a). The federal government plays a secondary role, with important backstop responsibilities. State standards must be submitted to the Environmental Protection Agency (EPA), the agency tasked with reviewing and approving these standards, to ensure that they are sufficient to "protect the public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act. 33 U.S.C.S. § 1313(c)(2)(A). If the state's standards do not pass muster, the EPA specifies changes required for approval. 33 U.S.C.S. § 1313(c)(3). Go To Headnote
- see 40 C.F.R. § 131.2. Go To Headnote

El Dorado Chem. Co. v. United States EPA, 763 F.3d 950, 2014 U.S. App. LEXIS 15694 (8th Cir Aug. 15, 2014).

Overview: EPA was entitled to summary judgment, because the EPA had the authority to look at downstream effects, the company failed to adequately demonstrate the affected waters would be protected, and the EPA's refusal to approve the state's proposed water quality criteria on the basis of incomplete information was not arbitrary or capricious.

- The Clean Water Act (CWA) authorizes states to establish water quality standards for bodies of water within its borders. 33 U.S.C.S. § 1313(a)-(c). Water quality standards define the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. 40 C.F.R. § 131.2. They comprise (1) the designated use(s) of the waters (e.g., water supply, propagation of fish, or recreation), 40 C.F.R. § 131.10; (2) the water quality criteria necessary to safely permit those designated uses, 40

C.F.R. § 131.11; and (3) antidegradation requirements to protect waters whose quality is better than required, 40 C.F.R. § 131.12. 40 C.F.R. § 131.6. States must review their water quality standards at least every three years. 33 U.S.C.S. § 1313(c)(1). Under the CWA, each state must create a continuing planning process to, among other things, govern the process for revising its water quality standards. 40 C.F.R. § 130.5(a). In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters. 40 C.F.R. § 131.10(b). Go To Headnote

Friends of Merrymeeting Bay v. Olsen, 2012 U.S. Dist. LEXIS 35182 (D Me Mar. 15, 2012).

Overview: Motion to dismiss the action for a declaratory judgment that Me. Rev. Stat. Ann. tit. 12, § 6134 was preempted by the CWA was granted since the CWA was structured to provide an administrative process for working out conflict between a state law and the CWA, and the citizen suit provision provided a safety net for correcting administrative missteps.

- Under the Clean Water Act, 33 U.S.C.S. § 1251 states are responsible for establishing water quality standards for all of their water bodies. 33 U.S.C.S. § 1313(a)(1)-(3); 40 C.F.R. § 131.4 (2011). The Environmental Protection Agency duty is to review each state's standards, and either approve the standards, disapprove the standards, or promulgate its own standards if necessary. 40 C.F.R. §§ 131.5(a)-(b). Any water quality standard must include the designated uses of the waters and water quality criteria sufficient to protect the designated uses. 40 C.F.R. § 131.6. Water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water. 40 CFR § 131.2; 33 U.S.C.S. § 1313(c)(2)(A). Go To Headnote

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 131 Final interpretive rule, see: 81 FR 30183, May 16, 2016.]

LEXISNEXIS' CODE OF FEDERAL REGULATIONS

Copyright © 2017, by Matthew Bender & Company, a member of the LexisNexis Group. All rights reserved.

End of Document

Tab 15

40 CFR 131.3

This document is current through the December 30, 2016 issue of the Federal Register with the exception of the amendments appearing at 81 FR 96572

Code of Federal Regulations > **TITLE 40 -- PROTECTION OF ENVIRONMENT** > **CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY** > **SUBCHAPTER D -- WATER PROGRAMS** > **PART 131 -- WATER QUALITY STANDARDS** > **SUBPART A -- GENERAL PROVISIONS**

§ 131.3 Definitions.

- (a) The Act means the Clean Water Act (Pub. L. 92-500, as amended, 33 U.S.C. 1251 et seq.).
- (b) Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.
- (c) Section 304(a) criteria are developed by EPA under authority of section 304(a) of the Act based on the latest scientific information on the relationship that the effect of a constituent concentration has on particular aquatic species and/or human health. This information is issued periodically to the States as guidance for use in developing criteria.
- (d) Toxic pollutants are those pollutants listed by the Administrator under section 307(a) of the Act.
- (e) Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.
- (f) Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained.
- (g) Use attainability analysis is a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g).
- (h) Water quality limited segment means 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.
- (i) Water quality standards are 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.
- (j) States include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of the water quality standards program.

(k)Federal Indian Reservation, Indian Reservation, or Reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation."

(l)Indian Tribe or Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

(m)Highest attainable use is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable.

(n)Practicable, in the context of § 131.12(a)(2)(ii), means technologically possible, able to be put into practice, and economically viable.

(o)A water quality standards variance (WQS variance) is a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance.

(p)Pollutant Minimization Program, in the context of § 131.14, is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

(q)Non-101(a)(2) use is any use unrelated to the protection and propagation of fish, shellfish, wildlife or recreation in or on the water.

Annotations

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part

Administrative Law : Agency Rulemaking : Notice Requirements

Constitutional Law : Supremacy Clause : Federal Preemption

Environmental Law : National Environmental Policy Act : General Overview

Environmental Law : Water Quality : General Overview

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

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

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

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications

40 CFR 131.3

Environmental Law : Water Quality : Clean Water Act : Nonpoint Source Pollution

Environmental Law : Water Quality : Clean Water Act : Water Quality Standards

Governments : State & Territorial Governments : Water Rights

Real Property Law : Water Rights : Nonconsumptive Uses : General Overview

Case Notes Applicable to Entire Part

Part Note

Administrative Law : Agency Rulemaking : Notice Requirements

Miccosukee Tribe of Indians of Fla. v. United States, 2008 U.S. Dist. LEXIS 57809 (SD Fla July 29, 2008).

Overview: Indian Tribe and environmental group were granted summary judgment under APA because EPA acted arbitrarily and capriciously by concluding that 2003 amendments to Everglades Forever Act (EFA) did not change water quality standards under CWA and thus violated its duty to protect Everglades by extending deadline for meeting EFA's phosphorus criterion.

- An attainability analysis is a structured scientific assessment of factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in 40 C.F.R. § 131.10(g). 40 C.F.R. § 131.3(g). The process requires a notice and opportunity for a public hearing. 40 C.F.R. § 131.10(e). Go To Headnote

Constitutional Law : Supremacy Clause : Federal Preemption

Friends of Merrymeeting Bay v. Olsen, 2012 U.S. Dist. LEXIS 35182 (D Me Mar. 15, 2012).

Overview: Motion to dismiss the action for a declaratory judgment that Me. Rev. Stat. Ann. tit. 12, § 6134 was preempted by the CWA was granted since the CWA was structured to provide an administrative process for working out conflict between a state law and the CWA, and the citizen suit provision provided a safety net for correcting administrative missteps.

- Preemption is a concept grounded in U.S. Const. art. VI, cl. 2, which provides that, the Constitution, and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land. The United States Supreme Court has recognized two general types of preemption: express and implied. Preemption is strong medicine, not casually to be dispensed. The Supreme Court has emphasized that preemption inquiries should be guided and to the greatest extent possible, controlled, by Congressional intent. A Use Attainability Analysis is defined as a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in 40 C.F.R. § 131.10(g). 40 C.F.R. § 131.3(g). An existing use is defined as those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards. 40 C.F.R. § 131.3(e). Go To Headnote

Environmental Law : National Environmental Policy Act : General Overview

Idaho Mining Ass'n v. Browner, 90 F. Supp. 2d 1078, 2000 U.S. Dist. LEXIS 6878 (D Idaho Mar. 15, 2000).

Overview: Summary judgment partly granted and denied for plaintiff and defendants, thereby vacating, as arbitrary and capricious, the portion of defendants' rule designating a gulch for cold water biota uses, and granting remand.

- Environmental Protection Agency (EPA) regulations regarding use designations provide that a state must conduct a use attainability analysis as described in 40 C.F.R. § 131.3(g) whenever the state designates or has designated uses that do not include the uses specified in Section 101(a)(2) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq.; 40 C.F.R. §131.10(j)(1). Section 101(a)(2) provides that water quality shall provide for the protection of fish, shellfish, wildlife and recreation in and on the water, and, in EPA's view, the protection of fish, shellfish, and recreation necessarily includes ensuring that fish are not so contaminated that they are unhealthful for human consumption. Nonetheless, if a state fails to include designated uses that would protect such aquatic life for purposes of human consumption, or to perform a use attainability analysis demonstrating that the use was not attainable, the EPA appropriately concludes that the state's standards were not consistent with the goals of the Clean Water Act. Go To Headnote

Environmental Law : Water Quality : General Overview

McClellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103 (ED Cal June 20, 1988).

Overview: A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.

- The term water quality standards is defined in 40 C.F.R. § 131.3(i) as 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. Go To Headnote

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

Micosukee Tribe of Indians of Fla. v. United States, 2008 U.S. Dist. LEXIS 57809 (SD Fla July 29, 2008).

Overview: Indian Tribe and environmental group were granted summary judgment under APA because EPA acted arbitrarily and capriciously by concluding that 2003 amendments to Everglades Forever Act (EFA) did not change water quality standards under CWA and thus violated its duty to protect Everglades by extending deadline for meeting EFA's phosphorus criterion.

- As defined in the federal regulations which implement the Clean Water Act, 33 U.S.C.S. § 1251 et seq., water quality standards are 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. 40 C.F.R. § 131.3(i). Pursuant to the same regulation, criteria are defined as elements of a state's water quality standards which represent the quality of water that support a

designated use of a water body, and these criteria may include narrative statements and numeric concentrations or levels. 40 C.F.R. § 131.3(i). *Go To Headnote*

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

Am. Farm Bureau Fed'n v. United States EPA, 792 F.3d 281, 2015 U.S. App. LEXIS 11548 (3rd Cir July 6, 2015).

Overview: Because "total maximum daily load" was an ambiguous term appearing to mean more than a number, the U.S. Environmental Protection Agency acted within its regulatory authority under 33 U.S.C.S. § 1251(d) in including allocations of pollution levels among different kinds of sources, a compliance timetable, and reasonable assurance of implementation.

- 33 U.S.C.S. § 1313 anticipates that effluent limitations on point sources will be the front line of the defense against water pollution. But, acknowledging that effluent limitations may not be enough, § 1313(d) requires the states to submit to the U.S. Environmental Protection Agency (EPA) a list of all bodies of water (or, by regulation, any segment of a body of water) for which effluent limitations and technology-based point source controls are insufficient to meet the applicable water quality standard. These areas are known as water quality limited segments, as stated in 40 C.F.R. § 131.3(h), and the list on which they appear often goes by the "Section 303(d) list" after the part of the uncodified Clean Water Act to which § 1313(d) corresponds. Together with the Section 303(d) list, states must submit total maximum daily loads (TMDLs) for those pollutants that cannot be brought to an acceptable level by point source controls. § 1313(d)(1). After a state submits its Section 303(d) list and TMDL, the EPA must approve or disapprove them; if it disapproves, it must create its own list and TMDL. § 1313(d)(2). *Go To Headnote*

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

Am. Farm Bureau Fed'n v. United States EPA, 792 F.3d 281, 2015 U.S. App. LEXIS 11548 (3rd Cir July 6, 2015).

Overview: Because "total maximum daily load" was an ambiguous term appearing to mean more than a number, the U.S. Environmental Protection Agency acted within its regulatory authority under 33 U.S.C.S. § 1251(d) in including allocations of pollution levels among different kinds of sources, a compliance timetable, and reasonable assurance of implementation.

- 33 U.S.C.S. § 1313 anticipates that effluent limitations on point sources will be the front line of the defense against water pollution. But, acknowledging that effluent limitations may not be enough, § 1313(d) requires the states to submit to the U.S. Environmental Protection Agency (EPA) a list of all bodies of water (or, by regulation, any segment of a body of water) for which effluent limitations and technology-based point source controls are insufficient to meet the applicable water quality standard. These areas are known as water quality limited segments, as stated in 40 C.F.R. § 131.3(h), and the list on which they appear often goes by the "Section 303(d) list" after the part of the uncodified Clean Water Act to which § 1313(d) corresponds. Together with the Section 303(d) list, states must submit total maximum daily loads (TMDLs) for those pollutants that cannot be brought to an acceptable level by point source controls. § 1313(d)(1). After a state

40 CFR 131.3

submits its Section 303(d) list and TMDL, the EPA must approve or disapprove them; if it disapproves, it must create its own list and TMDL. § 1313(d)(2). Go To Headnote

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

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

- Water-quality standards are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels. Water-quality standards are developed in a two-step process. First, the Environmental Protection Agency or state water authorities establish a waterway's "beneficial use." Beneficial uses of the waters of a state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. Once the beneficial use is determined, water quality criteria that will yield the desired water conditions are formulated and implemented. 40 C.F.R. § 131.3(i) provides that water quality standards are 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. Go To Headnote

Am. Littoral Soc'y v. United States EPA Region, 199 F. Supp. 2d 217, 2002 U.S. Dist. LEXIS 6989 (D NJ Mar. 28, 2002).

Overview: The EPA's decision to approve New Jersey's § 303(d) Lists despite omission of 25 § 319 Waters was not arbitrary and capricious because New Jersey demonstrated good cause for its omissions.

- Section 303(d) of the Clean Water Act (CWA) provides the means by which states are required to implement water quality standards (WQSs). Section 303(d) requires each state to identify the WQLSs within its boundaries that do not meet or are not expected to meet applicable WQSs even after the imposition of best-practicable technology-based effluent limitations and other required controls. 33 U.S.C.S. § 1313(d)(1). WQLS means any segment where it is known that water quality does not meet applicable WQSs, and/or is not expected to meet applicable WQSs, even after the application of the technology-bases effluent limitations required by §§ 301(b) and 306 of the CWA. 40 C.F.R. § 131.3(h). Go To Headnote

Idaho Mining Ass'n v. Browner, 90 F. Supp. 2d 1078, 2000 U.S. Dist. LEXIS 6878 (D Idaho Mar. 15, 2000).

Overview: Summary judgment partly granted and denied for plaintiff and defendants, thereby vacating, as arbitrary and capricious, the portion of defendants' rule designating a gulch for cold water biota uses, and granting remand.

- Water quality standards generally consist of three elements: (1) one or more designated uses for the water body at issue; (2) water quality criteria which express the concentrations or levels of pollutants which may be present in the water and still support the designated uses; and (3) an anti-degradation policy. Section 303(c)(2) of the Clean Water Act, 33 U.S.C.S. § 1313(c)(2); Section 303(d)(4)(B) of the Clean Water Act, 33 U.S.C.S. § 1313(d)(4)(B); 40 C.F.R. § 131.3(i). Go To Headnote

Westvaco Corp. v. United States EPA, 899 F.2d 1383, 1990 U.S. App. LEXIS 23383 (4th Cir Feb. 15, 1990).

Overview: *An Environmental Protection Agency's (EPA) proposal to disapprove lists of impaired waters submitted by two states was not immediately reviewable, but the affected corporation had to await final action in the form of an EPA permit issuance.*

- If standards are not established by a state, the Environmental Protection Agency (EPA) must establish the water quality standards for the waters in that state, 33 U.S.C.S. § 1311(b)(1)(C). Water quality standards consist of: (i) a designated use for the waters in question (e.g., public water supply), and (ii) water quality criteria specifying the amount of various pollutants which may be present in those waters and still achieve the designated use(s), 40 C.F.R. §§ 131.2, 131.3. The state water quality criteria may be expressed as numerical concentration limits or in narrative form, 40 C.F.R. § 131.3(b). Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications

Nat'l Mining Ass'n v. Jackson, 768 F. Supp. 2d 34, 2011 U.S. Dist. LEXIS 3710 (DDC Jan. 14, 2011).

Overview: *Motion for a preliminary injunction was denied because the mining association had not shown that its members were likely to incur substantial economic losses as a result of the additional permitting conditions imposed by the guidance memorandum issued by the EPA. As such, the association failed to show irreparable harm.*

- Section 303 of the Clean Water Act allocates primary authority for the development of water quality standards to the states. 33 U.S.C.S. § 1313. A water quality standard designates uses for a particular body of water and establishes criteria for protecting and maintaining those uses. 40 C.F.R. § 131.2 (2010). These standards can be expressed as a specific numeric limitation on pollutants or as a general narrative statement. 40 C.F.R. § 131.3(b). While states have the responsibility to develop the water quality standards, the Environmental Protection Agency (EPA) reviews the standards for approval. 40 C.F.R. §§ 131.4, 131.5. The EPA may promulgate water quality standards to the exclusion of a state only if (1) it determines that a state's proposed new or revised standard does not measure up to the Clean Water Act's requirements and the state refuses to accept EPA-proposed revisions, or (2) a state does not act, but in the EPA's view a new or revised standard is necessary. 33 U.S.C.S. § 1313(a)(2). Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Nonpoint Source Pollution

Natural Resources Defense Council, Inc. v. United States EPA, 770 F. Supp. 1093, 1991 U.S. Dist. LEXIS 10091 (ED Va July 17, 1991).

Overview: Part of environmentalists' complaint against government under Clean Water Act was dismissed because acts by officials were discretionary with respect to development of numerical criteria for dioxin.

- Nowhere does 33 U.S.C.S. § 1314(a)(1) say the U.S. Environmental Protection Agency must develop numerical criteria for toxic pollutants. The accepted definition of water quality criteria does not compel numerical standards. U.S.E.P.A., Quality Criteria for Water 2-3 (July 1976); see also 40 C.F.R. § 131.3(c) and (i) (1990). Go To Headnote

Environmental Law : Water Quality : Clean Water Act : Water Quality Standards

Am. Farm Bureau Fed'n v. United States EPA, 792 F.3d 281, 2015 U.S. App. LEXIS 11548 (3rd Cir July 6, 2015).

Overview: Because "total maximum daily load" was an ambiguous term appearing to mean more than a number, the U.S. Environmental Protection Agency acted within its regulatory authority under 33 U.S.C.S. § 1251(d) in including allocations of pollution levels among different kinds of sources, a compliance timetable, and reasonable assurance of implementation.

- 33 U.S.C.S. § 1313 anticipates that effluent limitations on point sources will be the front line of the defense against water pollution. But, acknowledging that effluent limitations may not be enough, § 1313(d) requires the states to submit to the U.S. Environmental Protection Agency (EPA) a list of all bodies of water (or, by regulation, any segment of a body of water) for which effluent limitations and technology-based point source controls are insufficient to meet the applicable water quality standard. These areas are known as water quality limited segments, as stated in 40 C.F.R. § 131.3(h), and the list on which they appear often goes by the "Section 303(d) list" after the part of the uncodified Clean Water Act to which § 1313(d) corresponds. Together with the Section 303(d) list, states must submit total maximum daily loads (TMDLs) for those pollutants that cannot be brought to an acceptable level by point source controls. § 1313(d)(1). After a state submits its Section 303(d) list and TMDL, the EPA must approve or disapprove them; if it disapproves, it must create its own list and TMDL. § 1313(d)(2). Go To Headnote

Friends of Merrymeeting Bay v. Olsen, 2012 U.S. Dist. LEXIS 35182 (D Me Mar. 15, 2012).

Overview: Motion to dismiss the action for a declaratory judgment that Me. Rev. Stat. Ann. tit. 12, § 6134 was preempted by the CWA was granted since the CWA was structured to provide an administrative process for working out conflict between a state law and the CWA, and the citizen suit provision provided a safety net for correcting administrative missteps.

- Preemption is a concept grounded in U.S. Const. art. VI, cl. 2, which provides that, the Constitution, and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land. The United States Supreme Court has recognized two general types of preemption: express and implied. Preemption is strong medicine, not casually to be dispensed. The Supreme Court has emphasized that preemption inquiries should be guided and to the greatest extent possible, controlled, by Congressional intent. A Use Attainability Analysis is defined as a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in 40 C.F.R. § 131.10(g). 40 C.F.R. § 131.3(g). An existing use is defined as those uses actually attained in the

water body on or after November 28, 1975, whether or not they are included in the water quality standards. 40 C.F.R. § 131.3(e). Go To Headnote

Anacostia Riverkeeper, Inc. v. Jackson, 2011 U.S. Dist. LEXIS 80316 (DDC July 25, 2011).

Overview: *The nonprofit corporations were granted summary judgment based on the conclusion that the EPA acted arbitrarily and capriciously, in violation of the APA and the CWA, by approving a sediment/total suspended solids (TSS) TMDL that ignored the effects of sediment and TSS pollution on the recreational and aesthetic uses of a river.*

- The United States District Court for the District of Columbia finds that the phrase "applicable narrative and numeric WQSs," 40 C.F.R. § 130.7(c)(1), is easily harmonized with the Federal Water Pollution Control Amendments of 1972, 33 U.S.C.S. § 1251 et seq., and its implementing regulations by reference to the Environmental Protection Agency's (EPA's) explanation elsewhere that water quality criteria are based upon designated uses. 40 C.F.R. § 130.2(d). As EPA regulations make clear: When criteria are met, water quality will generally protect the designated use. 40 C.F.R. § 131.3(b). Because water quality criteria are measurable baselines, compared to less-tangible concepts such as designated uses, a state is apt to focus on these criteria when developing pollutant load limits for a total maximum daily load, comforted in the knowledge that attaining these criteria will generally ensure protection of the designated uses. Thus, the use of the phrase "narrative and numeric WQSs" is best understood to instruct the state to consider all water quality criteria, narrative or numeric, to ensure that all designated uses are preserved. Go To Headnote
- Under the Federal Water Pollution Control Amendments of 1972, 33 U.S.C.S. § 1251 et seq., water quality criteria are not arbitrary but based upon designated uses, 33 U.S.C.S. § 1313(c)(2)(A); specifically, Environmental Protection Agency regulations direct a state to set water quality criteria necessary to protect the uses of a water body. 40 C.F.R. § 130.3. This link between a water quality criterion and its designated use gives rise to a regulatory presumption: When criteria are met, water quality will generally protect the designated use. 40 C.F.R. § 131.3(b). A necessary corollary of this presumption, however, is that if the targeted criterion is not tied to particular designated uses, achievement of that criterion will not necessarily lead to water quality that supports such uses. Go To Headnote

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

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

- Water-quality standards are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels. Water-quality standards are developed in a two-step process. First, the Environmental Protection Agency or state water authorities establish a waterway's "beneficial use." Beneficial uses of the waters of a state

40 CFR 131.3

that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. Once the beneficial use is determined, water quality criteria that will yield the desired water conditions are formulated and implemented. 40 C.F.R. § 131.3(i) provides that water quality standards are 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. Go To Headnote

Miccosukee Tribe of Indians of Fla. v. United States, 2008 U.S. Dist. LEXIS 57809 (SD Fla July 29, 2008).

Overview: *Indian Tribe and environmental group were granted summary judgment under APA because EPA acted arbitrarily and capriciously by concluding that 2003 amendments to Everglades Forever Act (EFA) did not change water quality standards under CWA and thus violated its duty to protect Everglades by extending deadline for meeting EFA's phosphorus criterion.*

- When a state submits its water quality standards to the Environmental Protection Agency for review, the standards must include: (1) the designated uses for each body of water; (2) what methods were used and analyses conducted to support the revisions to state water quality standards; (3) water quality criteria, which constitutes specific limits on pollutants which protect the designated uses for each water body and which may be expressed as either a narrative standard or a numeric concentration level; and (4) an anti-degradation policy to protect existing uses of bodies of water and high-quality water. 40 C.F.R. §§ 131.3(i), 131.3, 131.6, 131.12. Go To Headnote
- While it is correct that the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., provides relief from a criterion in certain circumstances, it must first be demonstrated that the criterion cannot be met. To determine this, the CWA provides that: (1) states may authorize variances from the applicable water quality standard if a state can justify that the current use and supporting criterion is not attainable at the time for any one of the reasons specified in 40 C.F.R. § 131.10(g); or (2) states may authorize a compliance schedule for discharges to comply with discharge limits in 40 C.F.R. §122.47. The CWA regulations specifically provide that a state must conduct a use attainability analysis, as specified in 40 C.F.R. § 131.3(g), when it proposes to adopt subcategories of uses specified in § 101(a)(2) of the CWA which require less stringent criteria. 40 C.F.R. §131.10(j)(2). Go To Headnote
- An attainability analysis is a structured scientific assessment of factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in 40 C.F.R. § 131.10(g). 40 C.F.R. § 131.3(g). The process requires a notice and opportunity for a public hearing. 40 C.F.R. § 131.10(e). Go To Headnote

Am. Littoral Soc'y v. United States EPA Region, 199 F. Supp. 2d 217, 2002 U.S. Dist. LEXIS 6989 (D NJ Mar. 28, 2002).

Overview: *The EPA's decision to approve New Jersey's § 303(d) Lists despite omission of 25 § 319 Waters was not arbitrary and capricious because New Jersey demonstrated good cause for its omissions.*

- Section 303(d) of the Clean Water Act (CWA) provides the means by which states are required to implement water quality standards (WQSs). Section 303(d) requires each state to identify the WQLSs within its boundaries that do not meet or are not expected to meet applicable WQSs even after the imposition of best-practicable technology-based effluent limitations and other required controls. 33 U.S.C.S. § 1313(d)(1). WQLS means any segment where it is known that water quality does not meet applicable WQSs, and/or is not expected to meet applicable WQSs, even after the application of the technology-bases effluent limitations required by §§ 301(b) and 306 of the CWA. 40 C.F.R. § 131.3(h). Go To Headnote

Idaho Mining Ass'n v. Browner, 90 F. Supp. 2d 1078, 2000 U.S. Dist. LEXIS 6878 (D Idaho Mar. 15, 2000).

Overview: Summary judgment partly granted and denied for plaintiff and defendants, thereby vacating, as arbitrary and capricious, the portion of defendants' rule designating a gulch for cold water biota uses, and granting remand.

- Water quality standards generally consist of three elements: (1) one or more designated uses for the water body at issue; (2) water quality criteria which express the concentrations or levels of pollutants which may be present in the water and still support the designated uses; and (3) an anti-degradation policy. Section 303(c)(2) of the Clean Water Act, 33 U.S.C.S. § 1313(c)(2); Section 303(d)(4)(B) of the Clean Water Act, 33 U.S.C.S. § 1313(d)(4)(B); 40 C.F.R. § 131.3(i). Go To Headnote

Governments : State & Territorial Governments : Water Rights

Idaho Mining Ass'n v. Browner, 90 F. Supp. 2d 1078, 2000 U.S. Dist. LEXIS 6878 (D Idaho Mar. 15, 2000).

Overview: Summary judgment partly granted and denied for plaintiff and defendants, thereby vacating, as arbitrary and capricious, the portion of defendants' rule designating a gulch for cold water biota uses, and granting remand.

- Environmental Protection Agency (EPA) regulations regarding use designations provide that a state must conduct a use attainability analysis as described in 40 C.F.R. § 131.3(g) whenever the state designates or has designated uses that do not include the uses specified in Section 101(a)(2) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq.; 40 C.F.R. §131.10(j)(1). Section 101(a)(2) provides that water quality shall provide for the protection of fish, shellfish, wildlife and recreation in and on the water, and, in EPA's view, the protection of fish, shellfish, and recreation necessarily includes ensuring that fish are not so contaminated that they are unhealthful for human consumption. Nonetheless, if a state fails to include designated uses that would protect such aquatic life for purposes of human consumption, or to perform a use attainability analysis demonstrating that the use was not attainable, the EPA appropriately concludes that the state's standards were not consistent with the goals of the Clean Water Act. Go To Headnote

Real Property Law : Water Rights : Nonconsumptive Uses : General Overview

Idaho Mining Ass'n v. Browner, 90 F. Supp. 2d 1078, 2000 U.S. Dist. LEXIS 6878 (D Idaho Mar. 15, 2000).

Overview: Summary judgment partly granted and denied for plaintiff and defendants, thereby vacating, as arbitrary and capricious, the portion of defendants' rule designating a gulch for cold water biota uses, and granting remand.

- Environmental Protection Agency (EPA) regulations regarding use designations provide that a state must conduct a use attainability analysis as described in 40 C.F.R. § 131.3(g) whenever the state designates or has designated uses that do not include the uses specified in Section 101(a)(2) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq.; 40 C.F.R. §131.10(j)(1). Section 101(a)(2) provides that water quality shall provide for the protection of fish, shellfish, wildlife and recreation in and on the water, and, in EPA's view, the protection of fish, shellfish, and recreation necessarily includes ensuring that fish are not so contaminated that they are unhealthful for human consumption. Nonetheless, if a state fails to include designated uses that would protect such aquatic life for purposes of human consumption, or to perform a use attainability analysis demonstrating that the use was not attainable, the EPA appropriately concludes that the state's standards were not consistent with the goals of the Clean Water Act. Go To Headnote

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 131 Final interpretive rule, see: 81 FR 30183, May 16, 2016.]

LEXISNEXIS' CODE OF FEDERAL REGULATIONS

Copyright © 2017, by Matthew Bender & Company, a member of the LexisNexis Group. All rights reserved.

Tab 16

Cal Evid Code § 452

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > EVIDENCE CODE > Division 4. Judicial Notice

§ 452. Matters which may be judicially noticed

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

- (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.
- (b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.
- (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.
- (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (f) The law of an organization of nations and of foreign nations and public entities in foreign nations.
- (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
- (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

History

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

Historical Derivation:

- (a) Former CCP § 1827, as enacted Stats 1872.
- (b) Former CCP § 1875, as enacted Stats 1872, amended Stats 1927 p 110, Stats 1957 ch 249 § 1.
- (c) Former CCP § 2102, as enacted Stats 1872.

Tab 17

Cal Gov Code § 11515

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > GOVERNMENT CODE > Title 2. Government of the State of California > Division 3. Executive Department > Part 1. State Departments and Agencies > Chapter 5. Administrative Adjudication: Formal Hearing

§ 11515. Official notice

In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

History

Added Stats 1945 ch 867 § 1.

Deering's California Codes Annotated

Copyright © 2017 by Matthew Bender & Company, Inc. a member of the LexisNexis Group. All rights reserved.

Tab 18

Cal Wat Code § 13050

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 2. Definitions

§ 13050. Terms used in this division

As used in this division:

- (a) "State board" means the State Water Resources Control Board.
- (b) "Regional board" means any California regional water quality control board for a region as specified in Section 13200.
- (c) "Person" includes any city, county, district, the state, and the United States, to the extent authorized by federal law.
- (d) "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.
- (e) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.
- (f) "Beneficial uses" of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.
- (g) "Quality of the water" refers to chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use.
- (h) "Water quality objectives" means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.
- (i) "Water quality control" means the regulation of any activity or factor which may affect the quality of the waters of the state and includes the prevention and correction of water pollution and nuisance.
- (j) "Water quality control plan" consists of a designation or establishment for the waters within a specified area of all of the following:
 - (1) Beneficial uses to be protected.
 - (2) Water quality objectives.
 - (3) A program of implementation needed for achieving water quality objectives.

- (k) "Contamination" means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. "Contamination" includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.
- (l)
- (1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:
- (A) The waters for beneficial uses.
- (B) Facilities which serve these beneficial uses.
- (2) "Pollution" may include "contamination."
- (m) "Nuisance" means anything which meets all of the following requirements:
- (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
- (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.
- (3) Occurs during, or as a result of, the treatment or disposal of wastes.
- (n) "Recycled water" means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefor considered a valuable resource.
- (o) "Citizen or domiciliary" of the state includes a foreign corporation having substantial business contacts in the state or which is subject to service of process in this state.
- (p)
- (1) "Hazardous substance" means either of the following:
- (A) For discharge to surface waters, any substance determined to be a hazardous substance pursuant to Section 311(b)(2) of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.).
- (B) For discharge to groundwater, any substance listed as a hazardous waste or hazardous material pursuant to Section 25140 of the Health and Safety Code, without regard to whether the substance is intended to be used, reused, or discarded, except that "hazardous substance" does not include any substance excluded from Section 311(b)(2) of the Federal Water Pollution Control Act because it is within the scope of Section 311(a)(1) of that act.
- (2) "Hazardous substance" does not include any of the following:
- (A) Nontoxic, nonflammable, and noncorrosive stormwater runoff drained from underground vaults, chambers, or manholes into gutters or storm sewers.
- (B) Any pesticide which is applied for agricultural purposes or is applied in accordance with a cooperative agreement authorized by Section 116180 of the Health and Safety

Code, and is not discharged accidentally or for purposes of disposal, the application of which is in compliance with all applicable state and federal laws and regulations.

- (C) Any discharge to surface water of a quantity less than a reportable quantity as determined by regulations issued pursuant to Section 311(b)(4) of the Federal Water Pollution Control Act.
- (D) Any discharge to land which results, or probably will result, in a discharge to groundwater if the amount of the discharge to land is less than a reportable quantity, as determined by regulations adopted pursuant to Section 13271, for substances listed as hazardous pursuant to Section 25140 of the Health and Safety Code. No discharge shall be deemed a discharge of a reportable quantity until regulations set a reportable quantity for the substance discharged.

(q)

- (1) "Mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in Section 2732 of the Public Resources Code, and tailings, slag, and other processed waste materials, including cementitious materials that are managed at the cement manufacturing facility where the materials were generated.
- (2) For the purposes of this subdivision, "cementitious material" means cement, cement kiln dust, clinker, and clinker dust.
- (r) "Master recycling permit" means a permit issued to a supplier or a distributor, or both, of recycled water, that includes waste discharge requirements prescribed pursuant to Section 13263 and water recycling requirements prescribed pursuant to Section 13523.1.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1969 ch 800 § 2.5; Stats 1970 ch 202 § 1; Stats 1980 ch 877 § 1; Stats 1989 ch 642 § 2; Stats 1991 ch 187 § 1 (AB 673); Stats 1992 ch 211 § 1 (AB 3012); Stats 1995 ch 28 § 17 (AB 1247), ch 847 § 2 (SB 206); Stats 1996 ch 1023 § 429 (SB 1497), effective September 29, 1996.

Historical Derivation:

- (a) Former Wat C § 13005, as added Stats 1949 ch 1549 § 1, amended Stats 1957 ch 603 § 1, Stats 1959 ch 1299 § 5, Stats 1963 ch 1463 § 4, Stats 1965 ch 1656 § 1, ch 1657 § 7, Stats 1967 ch 70 § 1, ch 284 § 139, ch 1447 § 6.
- (b) Former Wat C § 13005.1, as added Stats 1967 ch 1446 § 2, amended Stats 1967 ch 1447 § 20.

Tab 19

Cal Wat Code § 13170.2

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 3. State Water Quality Control > Article 4. Other Powers and Duties of the State Board

§ 13170.2. California Ocean Plan

- (a) The state board shall formulate and adopt a water quality control plan for ocean waters of the state which shall be known as the California Ocean Plan.
- (b) The plan shall be reviewed at least every three years to guarantee that the current standards are adequate and are not allowing degradation to indigenous marine species or posing a threat to human health.
- (c) In formulating the plan, the state board shall develop bioassay protocols to evaluate the effect of municipal and industrial waste discharges on the marine environment.
- (d) The state board shall adopt the bioassay protocols and complementary chemical testing methods and shall require their use in the monitoring of complex effluent ocean discharges. For purposes of this section, "complex effluent" means an effluent in which all chemical constituents are not known or monitored. The state board shall adopt bioassay protocols and complementary chemical testing methods for complex effluent ocean monitoring by January 1, 1990, and shall require their use in monitoring complex effluent ocean discharges by entities discharging 100 million gallons per day or more by January 1, 1991. The state board shall also adopt a schedule for requiring the use of these protocols for complex effluent ocean discharges of under 100 million gallons per day by January 1, 1992.

History

Added Stats 1986 ch 1478 § 2.

Deering's California Codes Annotated

Copyright © 2017 by Matthew Bender & Company, Inc. a member of the LexisNexis Group. All rights reserved.

End of Document

Tab 20

Cal Wat Code § 13201

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 4. Regional Water Quality Control > Article 1. Organization and Membership of Regional Boards

§ 13201. Regional boards established; Appointment and qualifications of members; Vacancies

- (a) There is a regional board for each of the regions described in Section 13200. Each board shall consist of seven members appointed by the Governor, each of whom shall represent, and act on behalf of, all the people and shall reside or have a principal place of business within the region.
- (b) Except as specified in subdivision (c), each member shall be appointed on the basis of his or her demonstrated interest or proven ability in the field of water quality, including water pollution control, water resource management, water use, or water protection. The Governor shall consider appointments from the public and nonpublic sectors. In regard to appointments from the nonpublic sector, the Governor shall consider including members from key economic sectors in a given region, such as agriculture, industry, commercial activities, forestry, and fisheries.
- (c) At least one member shall be appointed as a public member who is not required to meet the criteria established pursuant to subdivision (b).
- (d) All persons appointed to a regional board shall be subject to Senate confirmation, but shall not be required to appear before any committee of the Senate for purposes of such confirmation unless specifically requested to appear by the Senate Committee on Rules.
- (e) Insofar as practicable, appointments shall be made in such manner as to result in representation on the board from all parts of the region.
- (f) Insofar as practicable, appointments shall be made in a manner as to result in representation on the board from diverse experiential backgrounds.
- (g) Each member shall be appointed on the basis of his or her ability to attend substantially all meetings of the board and to actively discharge all duties and responsibilities of a member of the board.
- (h) The reduction in the number of members of each regional board required by the act that added this subdivision shall be achieved according to the ordinary expiration of the terms of incumbents and other vacancies. Notwithstanding Section 13202 the Governor shall not fill a vacancy on any regional board until the number of members serving on that regional board falls below seven members. When the numbers of members serving on the regional board falls below seven members, the Governor shall appoint or reappoint individuals pursuant to this section.

History

Cal Wat Code § 13201

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1978 ch 622 § 1; Stats 1979 ch 721 § 1. Amended Stats 2003 ch 272 § 1 (SB 196); Stats 2012 ch 39 § 117 (SB 1018), effective June 27, 2012.

Historical Derivation:

Former § 13041, as added Stats 1949 ch 1549 § 1, amended Stats 1959 ch 1299 § 10, Stats 1967 ch 1447 § 7.

Deering's California Codes Annotated

Copyright © 2017 by Matthew Bender & Company, Inc. a member of the LexisNexis Group. All rights reserved.

End of Document

Tab 21

Cal Wat Code § 13240

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 4. Regional Water Quality Control > Article 3. Regional Water Quality Control Plans

§ 13240. Formulation, adoption, and revision of plans

Each regional board shall formulate and adopt water quality control plans for all areas within the region. Such plans shall conform to the policies set forth in Chapter 1 (commencing with Section 13000) of this division and any state policy for water quality control. During the process of formulating such plans the regional boards shall consult with and consider the recommendations of affected state and local agencies. Such plans shall be periodically reviewed and may be revised.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970.

Historical Derivation:

Former § 13053, as added Stats 1949 ch 1549 § 1.

Deering's California Codes Annotated

Copyright © 2017 by Matthew Bender & Company, Inc. a member of the LexisNexis Group. All rights reserved.

End of Document

Tab 22

Cal Wat Code § 13241

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 4. Regional Water Quality Control > Article 3. Regional Water Quality Control Plans

§ 13241. Water quality objectives; Establishment; Factors considered

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:

- (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.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1979 ch 947 § 8; Stats 1991 ch 187 § 2 (AB 673).

Deering's California Codes Annotated

Copyright © 2017 by Matthew Bender & Company, Inc. a member of the LexisNexis Group. All rights reserved.

End of Document

Tab 23

Cal Wat Code § 13260

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > WATER CODE > **Division 7. Water Quality** > **Chapter 4. Regional Water Quality Control** > **Article 4. Waste Discharge Requirements**

§ 13260. Reports; Fees; Recoverable Costs; Waiver; Exemptions

- (a) Each of the following persons shall file with the appropriate regional board a report of the discharge, containing the information that may be required by the regional board:
 - (1) A person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system.
 - (2) A person who is a citizen, domiciliary, or political agency or entity of this state discharging waste, or proposing to discharge waste, outside the boundaries of the state in a manner that could affect the quality of the waters of the state within any region.
 - (3) A person operating, or proposing to construct, an injection well.
- (b) No report of waste discharge need be filed pursuant to subdivision (a) if the requirement is waived pursuant to Section 13269.
- (c) Each person subject to subdivision (a) shall file with the appropriate regional board a report of waste discharge relative to any material change or proposed change in the character, location, or volume of the discharge.
- (d)
 - (1)
 - (A) Each person who is subject to subdivision (a) or (c) shall submit an annual fee according to a fee schedule established by the state board.
 - (B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.
 - (C) Recoverable costs may include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, adopting, reviewing, and revising water quality control plans and state policies for water quality control, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out these actions.

- (D) In establishing the amount of a fee that may be imposed on a confined animal feeding and holding operation pursuant to this section, including, but not limited to, a dairy farm, the state board shall consider all of the following factors:
- (i) The size of the operation.
 - (ii) Whether the operation has been issued a permit to operate pursuant to Section 1342 of Title 33 of the United States Code.
 - (iii) Any applicable waste discharge requirement or conditional waiver of a waste discharge requirement.
 - (iv) The type and amount of discharge from the operation.
 - (v) The pricing mechanism of the commodity produced.
 - (vi) Any compliance costs borne by the operation pursuant to state and federal water quality regulations.
 - (vii) Whether the operation participates in a quality assurance program certified by a regional water quality control board, the state board, or a federal water quality control agency.
- (2)
- (A) Subject to subparagraph (B), the fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund, which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, solely for the purposes of carrying out this division.
- (B)
- (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.
 - (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region.
 - (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.
- (3) A person who would be required to pay the annual fee prescribed by paragraph (1) for waste discharge requirements applicable to discharges of solid waste, as defined in *Section 40191 of the Public Resources Code*, at a waste management unit that is also regulated under Division 30 (commencing with *Section 40000 of the Public Resources Code*), shall be entitled to a waiver of the annual fee for the discharge of solid waste at the waste management unit imposed by paragraph (1) upon verification by the state board of payment of the fee imposed by *Section 48000 of the Public Resources Code*, and provided that the fee established pursuant

to Section 48000 of the Public Resources Code generates revenues sufficient to fund the programs specified in Section 48004 of the Public Resources Code and the amount appropriated by the Legislature for those purposes is not reduced.

- (e) Each person that discharges waste in a manner regulated by this section shall pay an annual fee to the state board. The state board shall establish, by regulation, a timetable for the payment of the annual fee. If the state board or a regional board determines that the discharge will not affect, or have the potential to affect, the quality of the waters of the state, all or part of the annual fee shall be refunded.
- (f)
 - (1) The state board shall adopt, by emergency regulations, a schedule of fees authorized under subdivision (d). The total revenue collected each year through annual fees shall be set at an amount equal to the revenue levels set forth in the Budget Act for this activity. The state board shall automatically adjust the annual fees each fiscal year to conform with the revenue levels set forth in the Budget Act for this activity. If the state board determines that the revenue collected during the preceding year was greater than, or less than, the revenue levels set forth in the Budget Act, the state board may further adjust the annual fees to compensate for the over and under collection of revenue.
 - (2) The emergency regulations adopted pursuant to this subdivision, any amendment thereto, or subsequent adjustments to the annual fees, shall be adopted by the state board in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any emergency regulations adopted by the state board, or adjustments to the annual fees made by the state board pursuant to this section, shall not be subject to review by the Office of Administrative Law and shall remain in effect until revised by the state board.
- (g) The state board shall adopt regulations setting forth reasonable time limits within which the regional board shall determine the adequacy of a report of waste discharge submitted under this section.
- (h) Each report submitted under this section shall be sworn to, or submitted under penalty of perjury.
- (i) The regulations adopted by the state board pursuant to subdivision (f) shall include a provision that annual fees shall not be imposed on those who pay fees under the national pollutant discharge elimination system until the time when those fees are again due, at which time the fees shall become due on an annual basis.
- (j) A person operating or proposing to construct an oil, gas, or geothermal injection well subject to paragraph (3) of subdivision (a) shall not be required to pay a fee pursuant to subdivision (d) if the injection well is regulated by the Division of Oil and Gas of the Department of Conservation, in lieu of the appropriate California regional water quality control board, pursuant to the memorandum of understanding, entered into between the state board and the Department of Conservation on May 19, 1988. This subdivision shall remain operative until the memorandum of understanding is revoked by the state board or the Department of Conservation.

- (k) In addition to the report required by subdivision (a), before a person discharges mining waste, the person shall first submit both of the following to the regional board:
- (1) A report on the physical and chemical characteristics of the waste that could affect its potential to cause pollution or contamination. The report shall include the results of all tests required by regulations adopted by the board, any test adopted by the Department of Toxic Substances Control pursuant to *Section 25141 of the Health and Safety Code* for extractable, persistent, and bioaccumulative toxic substances in a waste or other material, and any other tests that the state board or regional board may require, including, but not limited to, tests needed to determine the acid-generating potential of the mining waste or the extent to which hazardous substances may persist in the waste after disposal.
 - (2) A report that evaluates the potential of the discharge of the mining waste to produce, over the long term, acid mine drainage, the discharge or leaching of heavy metals, or the release of other hazardous substances.
- () Except upon the written request of the regional board, a report of waste discharge need not be filed pursuant to subdivision (a) or (c) by a user of recycled water that is being supplied by a supplier or distributor of recycled water for whom a master recycling permit has been issued pursuant to Section 13523.1.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1980 ch 656 § 1; Stats 1984 ch 268 § 32.8, effective June 30, 1984; Stats 1985 ch 653 § 1, ch 1591 § 4; Stats 1986 ch 31 § 1, effective March 21, 1986, ch 1013 § 5, effective September 23, 1986; *Stats 1988 ch 1026 § 1*; *Stats 1989 ch 627 § 1*, ch 642 § 5. Supplemented by the Governor's Reorganization Plan No. 1 of 1991 § 194, effective July 17, 1991. Amended *Stats 1992 ch 211 § 2 (AB 3012)*; *Stats 1993 ch 656 § 57 (AB 1220)*, effective October 1, 1993; *Stats 1995 ch 28 § 20 (AB 1247)*; *Stats 1997 ch 775 § 1 (AB 1186)*; *Stats 2002 ch 1124 § 56 (AB 3000)*, effective September 30, 2002. Amended Stats 2003 1st Ex Sess 2003-2004 ch 1 § 3 (AB 10X); *Stats 2011 ch 2 § 28 (AB 95)*, effective March 24, 2011.

Historical Derivation:

- (a) Former Wat C § 13054, as added Stats 1949 ch 1549 § 1, amended Stats 1951 ch 1139 § 3, Stats 1959 ch 1299 § 15, Stats 1967 ch 1447 § 9.
- (b) Former Wat C § 13054.1, as added Stats 1959 ch 1299 § 16, amended Stats 1967 ch 1447 § 10.

Deering's California Codes Annotated

Copyright © 2017 by Matthew Bender & Company, Inc. a member of the LexisNexis Group. All rights reserved.

Tab 24

Cal Wat Code § 13263

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > WATER CODE > **Division 7. Water Quality** > **Chapter 4. Regional Water Quality Control** > **Article 4. Waste Discharge Requirements**

§ 13263. Requirements prescribed by board; Review, revision, and notice; Absence of vested right to discharge waste

- (a) The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system, with relation to the conditions existing in the disposal area or receiving waters upon, or into which, the discharge is made or proposed. 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.
- (b) A regional board, in prescribing requirements, need not authorize the utilization of the full waste assimilation capacities of the receiving waters.
- (c) The requirements may contain a time schedule, subject to revision in the discretion of the board.
- (d) The regional board may prescribe requirements although no discharge report has been filed.
- (e) Upon application by any affected person, or on its own motion, the regional board may review and revise requirements. All requirements shall be reviewed periodically.
- (f) The regional board shall notify in writing the person making or proposing the discharge or the change therein of the discharge requirements to be met. After receipt of the notice, the person so notified shall provide adequate means to meet the requirements.
- (g) No discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights.
- (h) The regional board may incorporate the requirements prescribed pursuant to this section into a master recycling permit for either a supplier or distributor, or both, of recycled water.
- (i) The state board or a regional board may prescribe general waste discharge requirements for a category of discharges if the state board or that regional board finds or determines that all of the following criteria apply to the discharges in that category:
 - (1) The discharges are produced by the same or similar operations.
 - (2) The discharges involve the same or similar types of waste.
 - (3) The discharges require the same or similar treatment standards.

- (4) The discharges are more appropriately regulated under general discharge requirements than individual discharge requirements.
- (j) The state board, after any necessary hearing, may prescribe waste discharge requirements in accordance with this section.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended *Stats 1992 ch 211 § 3 (AB 3012)*; *Stats 1995 ch 28 § 21 (AB 1247)*, ch 421 § 2 (SB 572).

Historical Derivation:

- (a) Former Wat C § 13002, as added Stats 1949 ch 1549 § 1, amended Stats 1959 ch 1299 § 4, Stats 1967 ch 1447 § 5.3.
- (b) Former Wat C § 13054.2, as added Stats 1959 ch 1299 § 17.
- (c) Former Wat C § 13054.3, as added Stats 1959 ch 1299 § 18, amended Stats 1967 ch 1447 § 11.

Deering's California Codes Annotated

Copyright © 2017 by Matthew Bender & Company, Inc. a member of the LexisNexis Group. All rights reserved.

Tab 25

Cal Wat Code § 13376

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

§ 13376. Reports as to discharge of pollutants to navigable waters

A person who discharges pollutants or proposes to discharge pollutants to the navigable waters of the United States within the jurisdiction of this state or a person who discharges dredged or fill material or proposes to discharge dredged or fill material into the navigable waters of the United States within the jurisdiction of this state shall file a report of the discharge in compliance with the procedures set forth in Section 13260. Unless required by the state board or a regional board, a report need not be filed under this section for discharges that are not subject to the permit application requirements of the Federal Water Pollution Control Act, as amended. A person who proposes to discharge pollutants or dredged or fill material or to operate a publicly owned treatment works or other treatment works treating domestic sewage shall file a report at least 180 days in advance of the date on which it is desired to commence the discharge of pollutants or dredged or fill material or the operation of the treatment works. A person who owns or operates a publicly owned treatment works or other treatment works treating domestic sewage, which treatment works commenced operation before January 1, 1988, and does not discharge to navigable waters of the United States, shall file a report within 45 days of a written request by a regional board or the state board, or within 45 days after the state has an approved permit program for the use and disposal of sewage sludge, whichever occurs earlier. The discharge of pollutants or dredged or fill material or the operation of a publicly owned treatment works or other treatment works treating domestic sewage by any person, except as authorized by waste discharge requirements or dredged or fill material permits, is prohibited. This prohibition does not apply to discharges or operations if a state or federal permit is not required under the Federal Water Pollution Control Act, as amended.

History

Added Stats 1987 ch 1189 § 6. Amended Stats 2010 ch 288 § 32 (SB 1169), effective January 1, 2011.

Former Sections:

Former § 13376, similar to the present section, was added Stats 1972 ch 1256 § 1, effective December 19, 1972, amended Stats 1978 ch 746 § 2, and repealed Stats 1987 ch 1189 § 5.

Deering's California Codes Annotated

Copyright © 2017 by Matthew Bender & Company, Inc. a member of the LexisNexis Group. All rights reserved.

Tab 26

Cal Wat Code § 13377

Current through all 2016 legislation and propositions (2016 Regular and 2015-2016 2nd Ex. Sessions)

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 5.5.
Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

§ 13377. Boards' issuance of requirements pursuant to federal act

Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

History

Added Stats 1972 ch 1256 § 1, effective December 19, 1972. Amended Stats 1978 ch 746 § 3.

Deering's California Codes Annotated

Copyright © 2017 by Matthew Bender & Company, Inc. a member of the LexisNexis Group. All rights reserved.

End of Document

Tab 27

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. G1C780263), *affd.* *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(l). 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(f), the non-applicability is less clear cut. USEPA promulgated 40 Code of Federal Regulations section 122.44(f)(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(f) 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(f)(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(f). (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(f)(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(f)(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 422.44(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 data 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

(continued from previous page)

part of the Administrative Record. We nevertheless take this opportunity to state that we expect any revisions and updates to the guidance to be subject to a public process as part of reissuance of the Los Angeles MS4 Order.

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

(continued from previous page)

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(f), 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 sections 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

(continued from previous page)

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

Tab 28

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

FACT SHEET / TECHNICAL REPORT

FOR

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

WASTE DISCHARGE REQUIREMENTS

FOR

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

December 16, 2009

TABLE OF CONTENTS

LIST OF ACRONYMS AND ABBREVIATIONS	2
I. FACT SHEET FORMAT	4
II. CONTACT INFORMATION	5
III. PUBLIC PROCESS AND NOTIFICATION PROCEDURES	6
IV. BACKGROUND	7
V. PERMITTING APPROACH	10
VI. ECONOMIC ISSUES	12
VII. LEGAL AUTHORITY	19
VIII. FINDINGS	21
A. Basis For the Order	21
B. Regulated Parties	23
C. Discharge Characteristics	24
D. Runoff Management Programs	50
E. Statute and Regulatory Considerations	84
F. Public Process	101
IX. DIRECTIVES	102
A. Prohibitions and Receiving Water Limitations	102
B. Non-Storm Water Discharges	105
C. Non Storm Water Dry Weather Action Levels	108
D. Storm Water Action Levels	119
E. Legal Authority	122
F. Jurisdictional Runoff Management Program	124
F.1. Development Planning	124
F.2. Construction	138
F.3 Existing Development	144
F.4. Illicit Discharge Detection and Elimination	155
G. Watershed Runoff Management Programs	159
H. Fiscal Analysis	162
I. Total Maximum Daily Loads	165
J. Program Effectiveness Component	165
K. Reporting	167
L. Modification of Programs	170
M. Principal Permittee Responsibilities	171
N. Receiving Waters Monitoring and Reporting	172
O. Standard Provisions, Reporting Requirements, And Notifications	173
P. Attachment A – Basin Plan Prohibitions	174
Q. Attachment B – Standard Provisions	175
R. Attachment C – Definitions	176
S. Attachment D – Summary of Submittals	177
T. Attachment E - Receiving Waters and MS4 Discharge Monitoring and Reporting Program	178
U. Attachment F - Source Data	190

LIST OF ACRONYMS AND ABBREVIATIONS

ADT - Average Daily Traffic
ASBS - Area of Special Biological Significance
AST - Active Sediment Treatment
BAT - Best Available Technology
BIA - Building Industry Association of San Diego County
BMP - Best Management Practice
Basin Plan - Water Quality Control Plan for the San Diego Basin
BU - Beneficial Uses
CASQA - California Stormwater Quality Association
CCC - California Coastal Commission
CDFG - California Department of Fish and Game
CEQA - California Environmental Quality Act
CFR - Code of Federal Regulations
Copermittees - County of Orange, the 11 incorporated cities within the County of Orange in the San Diego Region, and the Orange County Flood Control District
CWA - Clean Water Act
CWC - California Water Code
CZARA - Coastal Zone Act Reauthorization Amendments of 1990
DAMP - Drainage Area Management Plan
ESAs - Environmentally Sensitive Areas
FR - Federal Register
GIS - Geographic Information System
HMP - Hydromodification Management Plan
IBI - Index of Biotic Integrity
IC/ID - Illicit Connections and Illicit Discharges
JRMP - Jurisdictional Runoff Management Plan
LARWQCB - California Regional Water Quality Control Board, Los Angeles Region
LID - Low Impact Development
MEP - Maximum Extent Practicable
MRP - Receiving Waters Monitoring and Reporting Program
MS4 - Municipal Separate Storm Sewer System
NOI - Notice of Intent
NPDES - National Pollutant Discharge Elimination System
NRDC - Natural Resources Defense Council
NURP - Nationwide Urban Runoff Program
OCVCD - Orange County Vector Control District
Regional Board - California Regional Water Quality Control Board, San Diego Region
RGOs - Retail Gasoline Outlets
ROWD - Orange County Copermittees' Report of Waste Discharge (application for NPDES reissuance)
RWLs - Receiving Water Limitations
SAL - Storm Water Action Level
SIC - Standard Industrial Classification Code
SSMP - Standard Storm Water Mitigation Plan
State Board - State Water Resources Control Board
SWMP - Storm Water Management Plan
SWPPP - Storm Water Pollution Prevention Plan
SWQPA - State Water Quality Protected Area
TAC - State Water Resources Control Board Urban Runoff Technical Advisory Committee
TIE - Toxicity Identification Evaluation
TMDL - Total Maximum Daily Load
USEPA - United States Environmental Protection Agency

LIST OF ACRONYMS AND ABBREVIATIONS

USACE – United States Army Corps of Engineers
WDRs - Waste Discharge Requirements
WLA - Waste Load Allocation
WQC - Water Quality Criteria
WQBEL - Water Quality Based Effluent Limitations
WQMP – Water Quality Management Plan
WSPA - Western States Petroleum Association
WRMP - Watershed Runoff Management Plan

I. FACT SHEET FORMAT

This Fact Sheet briefly sets forth the principle facts and the significant factual, legal, methodological, and policy questions that the California Regional Water Quality Control Board, San Diego Region (Regional Board) considered in preparing Order No. R9-2009-0002. In accordance with the Code of Federal Regulations (CFR) title 40 parts 124.8 and 124.56, this Fact Sheet includes, but is not limited to, the following information:

- A. Contact information
- B. Public process and notification procedures
- C. Background information
- D. Permitting approach
- E. Economic issues
- F. Legal authority
- G. Findings
- H. Directives

Tentative Order No. R9-2008-0001 was distributed for review on February 9, 2007. A public hearing was subsequently held on April 11, 2007 in the City of Mission Viejo to receive oral comments from interested persons, and the Regional Board accepted written comments on the Tentative Order until April 25, 2007. Following review of the comments, a Revised Tentative Order was distributed on July 6, 2007 with a Response to Comments document (RTC 1). A second set of written comments were received on the revisions until August 23, 2007. Following review of the second round of written comments, the Regional Board further revised specific sections of the Order and distributed a second Response to Comments document (RTC 2). Tentative Order No. R9-2008-0001 was submitted to the Board for adoption on February 13, 2008. Upon review and comment, the Board chose not to adopt Tentative Order No. R9-2008-0001 and sent the Order back to staff with comments for changes. Tentative Order No. R9-2009-0002 was distributed for review on March 13, 2009. Written comments received on the tentative Order prior to June 19, 2009 were provided to Regional Board members for a public hearing regarding the Tentative Order held on July 1, 2009. On August 12, 2009, the sixth version of the Tentative Order was distributed for review. On November 18, 2009 an adoption hearing was held on the Tentative Order. The Regional Board directed staff to make specific changes and bring the Tentative Order back for consideration.

The Regional Board's files applicable to the issuance of Order No. R9-2009-0002 are incorporated into the administrative record in support of the findings and requirements of Order No. R9-2009-0002.

II. CONTACT INFORMATION

Regional Board

James Smith
Senior Environmental Scientist
9174 Sky Park Court, Suite 100
San Diego, CA 92123
858-467-2732
858-571-6972 (fax)
email: jsmith@waterboards.ca.gov

Benjamin Neill,
Water Resource Control Engineer
9174 Sky Park Court, Suite 100
San Diego, CA 92123
858-467-2983
858-571-6972 (fax)
email: bneill@waterboards.ca.gov

The Order and other related documents can be downloaded from the Regional Board website at http://www.waterboards.ca.gov/sandiego/programs/oc_stormwater.html.

All documents referenced in this Fact Sheet and in Order No. R9-2009-0002 are available for public review at the Regional 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 Sylvia Wellnitz at 858-637-5593 or DiAnne Broussard at 858-492-1763.

Copermittees

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

III. PUBLIC PROCESS AND NOTIFICATION PROCEDURES

The Regional Board followed the schedule listed below for the preparation of Order No. R9-2009-0002:

- A. In April 2006 and July 2006, the Northern Watershed Unit of the Regional Board met with the Copermitees to discuss the Report of Waste Discharge (ROWD) and potential changes to the permit based on the annual reports and the tentative permit for San Diego County.
- B. On August 18, 2006, the Regional Board received the ROWD for the permit renewal.
- C. On October 20, 2006 the Regional Board provided written comments on the ROWD to the Copermitees.
- D. On November 15, 2006, the Regional Board received the 2005-06 annual reports from the Copermitees for the existing permit.
- E. On January 11, 2007, the Regional Board notified all known interested parties that an electronic email listserv had been established to provide information and notices on the reissuance of the municipal storm water NPDES permit for southern Orange County.
- F. On February 9, 2007, the Regional Board released the tentative Order and notified interested parties of a planned workshop. Written comments were accepted until April 25, 2007.
- G. A public workshop was held on March 12, 2007.
- H. A public hearing of the tentative Order was conducted on April 11, 2007.
- I. A revised tentative Order was released on July 6, 2007. Written comments were accepted until August 23, 2007.
- J. A second revised tentative Order was released on December 12, 2007.
- K. A public hearing was conducted on February 13, 2008. The Regional Board chose not to adopt the tentative Order, and sent it back to staff for revision.
- L. On March 13, 2009 the Regional Board released a fourth version of the revised tentative Order and notified interested parties of a planned workshop.
- M. On April 03, 2009 and May 06, 2009 the Regional Board held public workshops.
- N. A public hearing of the tentative Order was held on July 01, 2009.
- O. On August 12, 2009 the Regional Board released an additional version of the revised tentative Order for public review. Written comments were accepted until September 28, 2009.
- P. An adoption hearing of the tentative Order was conducted on November 18, 2009. The Regional Board chose not to adopt the tentative Order and directed staff to make specific changes.

IV. BACKGROUND

Tentative Order No. R9-2009-0002 is the fourth iteration of the storm water permit for the municipal separate storm sewer systems (MS4s) in the Orange County portion of the San Diego region. The first permit was adopted in 1990, and the permit was reissued in 1996 and 2002.

Municipal Storm Water Permits are required by the Federal Clean Water Act 1987 Amendments. The federal Clean Water Act (CWA) was amended in 1987 to address storm water runoff from municipal and industrial dischargers. One requirement of the amendment was that 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 runoff from their MS4s. In response to the CWA amendment (and the pending federal NPDES regulations which would implement the amendment), the Regional Board issued a municipal storm water permit, Order No. 90-38, in July 1990 to the Copermittees for their MS4 discharges.¹

The First and Second Term Permits, Order Nos. 90-38 and 96-03, provided maximum flexibility. Order No. 90-38 contained the “essentials” of the 1990 regulations, but the requirements were written in very broad, generic terms. This was done in order to provide the maximum amount of flexibility to the Copermittees in implementing the new requirements (flexibility was, in fact, the stated reason for issuing the permit in advance of the final regulations). This lack of specificity was reflected in the Drainage Area Management Plan (DAMP) implemented under this First Term Permit in 1993 and renewed under the Second Term Permit in 1996. From staff’s perspective however, this same lack of specificity, combined with the lack of funding and political will, also provided the Copermittees with ample reasons to take few substantive steps towards permit compliance. The situation was exacerbated by the Regional Board’s own lack of storm water resources.

By 2000 the Regional Board and Copermittees recognized the importance of an improved storm water program. Although renewed in 1996 as Order No. 96-03, the 1993 DAMP implemented by the Copermittees was not significantly updated until 2000. The 2000 DAMP submitted to the Regional Board for the Third-Term Permit renewal was improved over the earlier DAMP. Regional Board staff concluded, however, that it reflected only the basic requirements of the 1990 Federal Regulations and in most cases did not represent significant improvement over the 1993 DAMP. Continued implementation of the DAMP without amendment would not have adequately addressed the impacts to receiving waters resulting from the discharge of storm water runoff and would not have achieved the maximum extent practicable standard (MEP) as defined in the Order.

¹ The 1990 permit was issued to the County of Orange, the Orange County Flood Control District, and six incorporated cities. Additional municipalities have been added to the MS4 NPDES permit as they have incorporated.

In order to provide the Copermitees with the minimum requirements to meet the MEP standard for storm water of the Regional Board, a more detailed Order was adopted (Order No. R9-2002-01) that emphasized the strong jurisdictional level programs developed by the Copermitees during the First and Second Term Permits as well as the watershed-level approach embodied in the proposed DAMP.

The Third-Term Permit introduced specific requirements. The regulatory approach incorporated into Order No. R9-2002-01 was a significant departure from the regulatory approach of the First and Second-Term Permits. Where Order Nos. 90-38 and 96-03 included broad, nonspecific requirements in order to provide the Copermitees with the maximum amount of flexibility in developing their programs, Order No. R9-2002-01 used detailed, specific requirements which outlined the minimum level of implementation required for the Copermitees' programs. The shift in permitting approaches resulted from the Regional Board's conclusion that the lack of specificity in earlier Orders resulted in frequently unenforceable permit requirements, which in turn allowed some Copermitees to only make limited progress in implementing their programs.

The Third-Term Permit followed the San Diego County permit template. The shift in regulatory approaches for MS4 permits was first manifested in the 2001 MS4 permit to the owners and operators of San Diego County MS4s (Order No. R9-2001-01). The Third-Term Orange County Permit included similar requirements as the 2001 San Diego County Permit. Both the San Diego and Orange County Permits were appealed to the State Water Resources Control Board (State Board).² Minor modifications of each were made by the State Board, but the vast majority of the requirements were upheld. The San Diego County permit was also challenged in the Superior Court of the State of California and the Court of Appeal, Fourth Appellate District. Further litigation on the Orange County permit was held pending the precedential decisions on the San Diego Permit. The San Diego Permit was largely upheld in the Superior and Appellate Courts. The State of California Supreme Court declined to hear a final appeal from the Building Industry Association in March 2005. Thus, the Third-Term Orange County permit requirements remained as slightly modified by the State Board.

² Seven petitions were filed with the State Board over the Third-Term Orange County Permit. Six were placed in abeyance. Three of the petitioners sought stays. One stay request was dismissed and one was withdrawn. The active petition and stays were addressed by the State Board in Order No. WQO 2002-0014. That Order stayed provision F.5.f regarding sewage spills and modified Finding No. 26 regarding chronic toxicity.

The Third-Term Permit was adopted following substantial public participation.

Public participation was extensive during the adoption process of the Third-Term Permit. The draft permit was released for public review and comment on July 2, 2001, and revised in response to comments and State Board Order WQ 2001-15 on the petition to review the San Diego Municipal Storm Water Permit. Because the proposed requirements for Orange County were similar to those that had recently been adopted and contested in San Diego County, much of the public participation dialogue echoed the discussions held during the San Diego renewal. Approximately 684 comments were received and responded to during two public workshops and a written comment period on the Tentative Order for the Third-Term Orange County permit. Following the extensive public participation process, the Regional Board adopted Order No. R9-2002-01 on February 13, 2002.

Storm water programs have improved under the Third-Term Permit. Since adoption of Order No. R9-2002-01, the Copermittees' storm water programs have expanded dramatically. Audits of the Copermittees' programs and reviews of annual reports exhibit that the Copermittees' jurisdictional programs are largely in compliance with the Order. Some of the efforts currently being conducted on a regular basis by the Copermittees that were not conducted on a widespread basis prior to adoption of Order No. R9-2002-01, include: construction site storm water inspections, industrial and commercial facility storm water inspections, municipal facility storm water inspections, management of storm water quality from new development, development of BMP requirements for existing development, interdepartmental coordination, comprehensive water quality monitoring, and assessment of storm water program effectiveness.

Significant challenges remain. When viewed relative to the magnitude of the storm water runoff problem, enormous challenges remain, particularly regarding the management of storm water runoff on a watershed scale. Today, storm and non-storm water discharges from the MS4 continue to be the leading cause of water quality impairment in the San Diego Region.³ The Copermittees' monitoring data exhibits persistent exceedances of water quality objectives in most watersheds.⁴ Many watersheds also have conditions that are frequently toxic to aquatic life. Bioassessment data from the watersheds further reflects these conditions, finding that macroinvertebrate communities in creeks have widespread Poor to Very Poor Index of Biotic Integrity ratings. Finally, the now too familiar "health advisory" or "beach closure" signs, which often result from high levels of bacteria in storm and non-storm water, exhibit the continued threat to public health by such discharges.

³ The potential sources of impairments are identified on the CWA section 303(d) list of impaired water bodies for the San Diego Region.

⁴ Data is provided in annual reports to the Regional Board. A summary of data collected during the third-term permit is provided in the Copermittees' application for permit reissuance. That summary is available on-line at: http://www.ocwatersheds.com/StormWater/documents_ROWd.asp

V. PERMITTING APPROACH (PROGRAM INTEGRATION, FLEXIBILITY, AND DETAIL)

The Order contains an increased emphasis on storm water discharge management on a watershed basis. This shift towards increased watershed management is consistent with planning efforts conducted by the Regional Board regarding reissuance of the San Diego Permit (Order No. R9-2007-0001), and it is also consistent with the Copermittees' most recent Report of Waste Discharge (ROWD).⁵ This shift reflects recognition of the maturity of the storm water programs since they began implementing the Third-Term Permit. Addressing storm water discharge management on a watershed basis is only possible if effective jurisdictional programs have been established, and maintaining effective jurisdictional programs is crucial to the success of watershed-focused management.

There are several reasons for this shift in emphasis. First, the Copermittees are generally doing an effective job at implementing their jurisdictional programs; while on the other hand, an emphasis on watersheds is necessary to shift the focus of the Copermittees from program development and implementation to water quality results. After over 15 years of Copermittee program implementation, it is critical that the Copermittees link their efforts with positive impacts on water quality. Addressing storm water on a watershed scale focuses on water quality results by emphasizing the receiving waters within the watershed. The conditions of the receiving waters drive management actions, which in turn focus on the water quality problems in each watershed.

Focusing on watershed implementation does not mean that the Copermittees must expend funds outside of their jurisdictions. Rather, the Copermittees within each watershed are expected to collaborate to develop a watershed strategy to address the high priority water quality problems within each watershed. They have the option of implementing the strategy in the manner they find to be most effective. Each Copermittee can implement the strategy individually within its jurisdiction, or the Copermittees can group together to implement the strategy throughout the watershed.

While the Order includes a new emphasis on addressing storm water discharges on a watershed basis, the Order includes recognition of the importance of continued program implementation on jurisdictional and countywide levels. The Order also acknowledges that jurisdictional, watershed, and countywide efforts are not always mutually exclusive. For this reason, an attempt has been made to allow for the Copermittees' jurisdictional, watershed, and countywide programs to integrate.

⁵ The Report of Waste Discharge (ROWD) was submitted to the Regional Board on August 18, 2006 by the Principal Permittee (County of Orange) on behalf of all Copermittees.

In the Order, the watershed requirements serve as the mechanism for this program integration. Since jurisdictional and countywide activities can also serve watershed purposes, such activities can be integrated into the Copermitees' watershed programs, provided the activities meet certain criteria. In this manner, the Copermitees' activities do not always need to distinguish between jurisdictional, watershed, and countywide levels of implementation. Instead, they can be integrated on multiple levels.

Such opportunities for program integration inherently provide flexibility to the Copermitees in implementing their programs. Program integration can be expanded or minimized as the Copermitees see fit. For example, there is flexibility provided in determining the activities to be integrated and implemented in the watershed programs – watershed-based efforts, countywide efforts, enhanced jurisdictional efforts, or a mixture of the three. Significant flexibility is also provided throughout other portions of the Order.

Copermitees can choose the best management practices (BMPs) to be implemented, or required to be implemented, for development, construction, and existing development areas. Flexibility to determine which industrial or commercial sites are to be inspected is also provided to the Copermitees. Educational approaches are also to be determined by the Copermitees under the Order. Implementation of certain efforts on a countywide basis is largely optional for the Copermitees as well. Significant leeway is also provided to the Copermitees in using methods to assess the effectiveness of their various runoff management programs. This flexibility is further extended to the monitoring program requirements, which allow the Copermitees to develop monitoring approaches to several aspects of the monitoring program.

The challenge in drafting the Order is to provide the flexibility described above while ensuring that the Order is still enforceable. To achieve this, the Order frequently prescribes minimum measurable outcomes, while providing the Copermitees with flexibility in the approaches they use to meet those outcomes. Enforceability has been found to be a critical aspect of the Order. For example, the watershed requirements of Order No. R9-2002-01 were some of the Order's most flexible requirements. This lack of specificity in the watershed requirements resulted in inefficient watershed compliance efforts. This situation reflects a common outcome of flexible permit language. Such language can be unclear and unenforceable, and it can lead to implementation of inadequate programs.

To avoid these types of situations, a balance between flexibility and enforceability has been crafted into the Order. Minimum measurable outcomes are utilized to ensure the Order is enforceable, while the Copermitees are provided flexibility in deciding how they will implement their programs to meet the minimum measurable outcomes.

GENERAL CRITERIA

Non-storm water discharges may contain pollutants which result from various activities that occur within areas draining into the MS4. This includes, but is not limited to, illicit discharges and connections, exempted categories of discharge not a source of pollutants (40 CFR 122.26(d)), and discharges into the MS4 covered under a separate NPDES permit. As such, existing and proposed discharges of non-storm water from MS4s:

- a) Result from similar activities through the MS4 system;
- b) Are the same type of water;
- c) Require similar effluent limitations for the protection of the Beneficial Uses of the receiving waters;
- d) Require similar monitoring;
- e) Are under the control of the owner and operator of the MS4 system;
and
- f) Are more appropriately regulated under a general permit than individual permits.

VI. ECONOMIC ISSUES

Economic discussions of storm and non-storm water management programs tend to focus on the significant costs incurred by municipalities in developing and implementing the programs. However, when considering the cost of implementing the programs, it is also important to consider the alternative costs incurred by not fully implementing the programs, as well as the benefits which result from program implementation. For instance, unhealthful coastal water quality conditions negatively affect residents, tourists, and related portions of the Orange County economy.⁶

⁶ Orange County 2006 Community Indicators Project. 2006. Sponsored by the County of Orange, the Orange County Business Council, and the Children and Families Commission of Orange County. Available on-line at www.oc.ca.gov/ceocommunity.asp

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.⁷ Despite these problems, efforts have been made to identify management program costs, which can be helpful in understanding the costs of program implementation. The Orange County Municipalities plan to prepare a common fiscal reporting strategy to better define the expenditure and budget line items included in annual reports.⁸

Estimates of Phase I Storm Water Program Costs.

The United States Environmental Protection Agency (USEPA), the California Regional Water Quality Control Boards, and the State Board have attempted to evaluate the costs of implementing municipal storm water programs. The assessments demonstrate that true costs are difficult to ascertain and reported costs vary widely. Nonetheless, they provide a useful context for considering the costs of requirements within Tentative Order No. R9-2008-0001. In addition, reported fiscal analyses tend to neglect the costs incurred to municipalities when storm water runoff is not effectively managed. Such costs result from pollution, contamination, nuisance, and damage to ecosystems, property, and human health.

In 1999 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. USEPA also studied 35 Phase I municipalities, finding costs to be \$9.08 per household annually, similar to those anticipated for Phase II municipalities.⁹ The USEPA cost estimate for Phase I municipalities is valuable because it considers municipalities in Orange County.

A study on program cost was also conducted by the California Regional Water Quality Control Board, Los Angeles Region (LARWQCB), where program costs reported in the municipalities' annual reports were assessed. The LARWQCB estimated that average per household cost to implement the MS4 program in Los Angeles County was \$12.50.¹⁰ Since the Los Angeles County permit is very similar to Order No. R9-2002-01, this estimate is also useful in assessing general program costs in Orange County.

⁷ LARWQCB, 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003. P. 2.

⁸ Orange County Storm Water Copermittees. 2006. Report of Waste Discharge (San Diego Region)

⁹ Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791-68792.

¹⁰ LARWQCB, 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003. P. 2.

The State Board also recently 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 \$18-46, with the City of Encinitas in San Diego County representing the upper end of the range.¹¹ Although no Orange County municipalities were assessed, the cost of the City of Encinitas' program may be somewhat representative of the upper range of Orange County MS4 programs. Encinitas shares similarities with southern Orange County, including the similarity of the San Diego MS4 permit to the Orange County MS4 permit, the city's coastal location, and its reliance on tourism. However, the City's program cost can be considered as the high end of the spectrum for management program costs because the City has a consent decree with environmental groups regarding its program, and City of Encinitas has received recognition for implementing a superior program.

It is important to note that reported program costs are not all attributable to compliance 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 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 were either pre-existing or resulted from enhancement of pre-existing programs.¹² In 2000, the County of Orange found that even lesser amounts of program costs are solely attributable to MS4 permit compliance, reporting that the amount attributable to implement the Drainage Area Management Plan (DAMP), was less than 20 percent of the total budget. The remaining 80 percent was attributable to pre-existing programs.¹³

Estimating Costs of Reissued Storm Water Permits

The vast majority of costs that will be incurred as a result of implementing Order No. R9-2009-0002 are not new. Storm water management programs have been in place in Orange County for over 15 years. Any increase in cost to the Copermitttees will be incremental in nature. Moreover, since Order No. R9-2009-0002 "fine tunes" the requirements of Order No. R9-2002-01, these cost increases are expected to be modest.

¹¹ State Water Board, 2005. NPDES Stormwater Cost Survey. P. ii.

¹² Ibid. P. 58.

¹³ County of Orange, 2000. A NPDES Annual Progress Report. P. 60. More current data from the County of Orange is not used in this discussion because the County of Orange no longer reports such information.

The anticipated costs of program changes are difficult to estimate because of the flexibility inherent within the Permit and the recognition that program modifications will vary among the municipalities in response to the specific needs of the local and watershed programs. In other words, the Permit is intended to allow each Permittee to de-emphasize some program components and strengthen others based on the experience of the jurisdictional programs.

The changes in Order No. R9-2009-0002 reflect the iterative process of BMP implementation and the necessarily adaptive nature of storm water management that is expected by the USEPA. In 1996, USEPA recognized that changes to MS4 programs would occur during the reapplication period based on new information on the relative magnitude of a problem, new data on water quality impacts of the storm water discharges, and experience gained under the prior permit.¹⁴ Some program changes have been proposed by the Copermittees in the permit reapplication package, and others have been included because the Regional Board considers those measures necessary and feasible to protect water quality from the effects of MS4 discharges.

Other Economic Considerations.

Economic considerations of management programs cannot be limited only to program costs. Evaluation of programs requires information on the implementation costs and information on the benefits derived from environmental protection and improvement.¹⁵ Attention is often focused on program costs, but the programs must also be viewed in terms of their value to the public.

For example, household willingness to pay for improvements in fresh water quality for fishing and boating has been estimated by USEPA to be \$158-210.¹⁶ This estimate can be considered conservative, since it does not include important considerations such as marine waters benefits, wildlife benefits, or flood control benefits. The California State University, Sacramento study corroborates USEPA's estimates, reporting annual household willingness to pay for statewide clean water to be \$180.¹⁷ When viewed in comparison to household costs of existing management programs, household willingness to pay estimates exhibit that per household costs incurred by Copermittees to implement their management programs remain reasonable.

¹⁴ Federal Register / Vol. 61, No. 155 / Friday, August 9, 1996 / Rules and Regulations. Interpretive policy memorandum on reapplication requirements for MS4s.

¹⁵ Ribaudo M.O. and D. Heelerstein. 1992, *Estimating Water Quality Benefits: Theoretical and Methodological Issues*. U.S. Department of Agriculture. Technical Bulletin No. 1808.

¹⁶ Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68793.

¹⁷ State Board, 2005. NPDES Stormwater Cost Survey. P. iv.

The effect of storm and non-storm water discharges on receiving waters can also influence the value of real estate in southern Orange County. For instance, recent marketing of new developments in the region prominently features access or proximity to the ocean.¹⁸ This demonstrates the added value of healthy aquatic environments to property values. The real estate industry recognizes that home buyers are willing to pay for access to clean water environments. The ability to market water-based recreational activities is dependent on healthy water quality conditions.

Municipalities and business groups in Orange County recognize the value of programs to prevent and treat storm water pollution in Orange County. For instance, both coastal and inland Orange County cities positively promote their access to the Pacific Ocean as a valuable quality of life feature.¹⁹ In addition, the South Orange County Regional Chamber of Commerce's legislative policy for infrastructure includes the support of programs and solutions for non-point source storm water runoff. This demonstrates that the business community realizes the negative economic effects that result from polluted storm water.

Another important way to consider management program costs is to consider implementation in terms of costs incurred by not improving the programs. Storm and non-storm water discharges from MS4s in southern California has been found to cause illness in people bathing near storm drains.²⁰ A study of south Huntington Beach and north Newport Beach (both located in northern Orange County) found that an illness rate of about 0.8 percent among bathers at those beaches resulted in about \$3 million annually in health-related expenses.²¹ Extrapolation of such numbers to the wide range of beaches of Orange County could result in huge public expenses.

¹⁸ Examples include the "Marblehead Coastal" project in San Clemente (<http://www.marbleheadonthecoast.com>), the "Pacifica San Juan" project in San Juan Capistrano (<http://pacificasanjuan.com>), and "The Strand at Headlands" in Dana Point (<http://strandoc.com>).

¹⁹ For a coastal city, see Laguna Beach Overview at <http://www.lagunabeachcity.net/about/overview>. For an inland city, see the Lake Forest 2005 Economic Profile at <http://www.theharbor.info/pdf/2005%20Economic%20Profile.pdf>.

²⁰ Haile, R.W., et al, 1996. An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay. Santa Monica Bay Restoration Project.

²¹ Dwight, R.H., et al., 2005. Estimating the Economic Burden From Illnesses Associated With Recreational Coastal Water Pollution – A Case Study in Orange County, California. *Journal of Enviro. Management* Vol.76. No.2 p.95-103. Also reported in: Los Angeles Times, May 2, 2005. Here's What Ocean Germs Cost You: A UC Irvine Study Tallies the Cost of Treatment and Lost Wages for Beachgoers Who Get Sick.

Storm and non-storm water MS4 discharges, and their impact on receiving waters also affect tourism. In past years, Orange County was featured in the national press for its water quality problems. Such news is likely to have a negative impact on tourism, since polluted beaches are generally not attractive to tourists. According to the Orange County Community Indicators Project, the County's visitors spent an average of \$107.70 per day in 2004.²² The experience of Huntington Beach provides an example of the potential economic impact of poor water quality. Approximately eight miles of Huntington Beach were closed for two months in the middle of summer of 1999, severely impacting beach visitation. When considered with the number of visitors and their average expenditure, the negative effects to the local economy are obvious.

Coastal tourism is an important industry in Orange County and is dependent upon effective management of storm water pollution and the prevention of non-storm water pollution. The following examples reflect that relationship.

DANA POINT: In response to a Grand Jury finding (1999-2000 Rainy Season's First Flush Hits the Harbors of Orange County), the city of Dana Point notes the interrelationship between the clean coastal water and the economic health of the city. Dana Point reports receiving \$5.2 million in transit occupancy tax funds in FY 1999-2000 "due in large part because of proximity to the beach. Without clean beaches, Dana Point risks losing its major revenue source."²³ More recently, the City budget report estimates that transit occupancy taxes comprise 35 percent of general fund revenues for the 2006 fiscal year.

LAGUNA BEACH: Tourism is one of the primary components of the Laguna Beach economy, and the beach is one of the main tourist attractions in the city. In 1999, hotel/motel bed tax revenue was approximately \$3 million, representing 13 percent of the City's general fund revenue.²⁴ In 2006, the City expects transit occupancy taxes to represent about 11 percent of general fund revenue.²⁵ The proportional decrease is due to an increase in property taxes, which is also affected in part by the quality of coastal waters. The City Council recognizes the value of the beaches to tourists, and the local population and has funded several low-flow non-storm water diversion systems in an attempt to prevent beach pollution and beach closures.

²² Orange County 2006 Community Indicators Project. 2006. Sponsored by the County of Orange, the Orange County Business Council, and the Children and Families Commission of Orange County. Available on-line at www.oc.ca.gov/ceocommunity.asp

²³ Orange County Grand Jury. 1999-2000 Rainy Season's First Flush Hits the Harbors of Orange County.

²⁴ Laguna Beach at a Glance. May 2000. Prepared by Moore Iacofano Goltsman, Inc.

²⁵ City of Laguna Beach, adopted budget 2006-2007. Available on-line at: <http://www.lagunabeachcity.net/government/reference/budget07>

DOHENY STATE BEACH: In 1997, the U.S. Army Corps of Engineers (USACE) prepared an economic analysis as part of the San Juan Creek and Aliso Creek Watershed Study. Recreational value for Doheny State Beach, based on annual visitation of 670,545 people in 1995, was calculated at \$2,850,000. Furthermore, the USACE notes that lifeguards reported that beach attendance falls dramatically when there are unhealthy conditions in the ocean. In 1999, the USACE prepared an updated economic study as part of the Feasibility Phase of the San Juan Creek Watershed Management Study. The 1999 study reports that average beach attendance from 1996 to 1998 increased to 918,735. The USACE places a recreation value per visitor at \$5.76, which implies the annual recreational value of Doheny State Beach for 1996 to 1998 was \$5,291,914.

ALISO BEACH: In 1997, the USACE prepared an economic analysis as part of the San Juan Creek and Aliso Creek Watershed Study. Recreational value for Aliso Beach, based on annual visitation of 3,477,369 people in 1995, was calculated at \$14,779,000. In the 1999 Draft Feasibility Report for the Aliso Creek Watershed Management Study, the USACE noted that the average beach attendance from 1996 to 1998 decreased to 1,148,374. The recreation value per visitor was calculated at \$4.50 and the average annual impact from water quality-related beach closures at Aliso Beach Park was estimated to be \$468,392. This number is comparable to an economic analysis conducted as part of the Aliso Creek Watershed 205(j) study that estimated the annual average recreational value impact of beach closures at Aliso Beach Park to be \$468,400.

Finally, it is important to consider the benefits of management programs in conjunction with their costs. A recent 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.²⁶ Costs are anticipated to be borne over many years – probably ten years at least. As can be seen, the benefits of the 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.²⁷

Additional discussion of economic issues can be found at section 3 of the Fact Sheet/Technical Report for Regional Board Order No. R9-2002-01, available at:

http://www.waterboards.ca.gov/sandiego/programs/oc_stormwater.html.

²⁶ LARWQCB, 2004. Alternative Approaches to Stormwater Control.

²⁷ Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791.

VII. LEGAL AUTHORITY

The following statutes, regulations, and Water Quality Control Plans provide the basis for the requirements of Order No. R9-2009-0002: Clean Water Act (CWA), California Water Code (CWC), 40 CFR Parts 122, 123, 124 (National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, Final Rule), Part II of 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), Water Quality Control Plan – Ocean Waters of California (California Ocean Plan), Water Quality Control Plan for the San Diego Basin (Basin Plan), 40 CFR 131 Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California; Rule (California Toxics Rule), and the California Toxics Rule Implementation Plan.

The legal authority citations below generally apply to directives in Order No. R9-2009-0002, and provide the Regional Board with ample underlying authority to require each of the directives of Order No. R9-2009-0002. Legal authority citations are also provided with each permit section discussion in section IX of this Fact Sheet/Technical Report.

CWA 402(p)(3)(B)(ii) – The CWA requires in section 402(p)(3)(B)(ii) that permits for discharges from municipal storm sewers “shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers.”

CWA 402(p)(3)(B)(iii) – The CWA requires in section 402(p)(3)(B)(iii) that permits for discharges from municipal storm sewers “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”

40 CFR 122.26(d)(2)(i)(B,C,E, and F) – Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,E, and F) provide that each Copermittee’s permit 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: [...] (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; [...] (E) Require compliance with condition 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.”

40 CFR 122.26(d)(2)(iv) – Federal NPDES regulation 40 CFR 122.26(d)(2)(iv) provides that the Copermittee shall develop and implement a proposed management program which “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. [...] Proposed programs may impose controls on a system wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. [...] Proposed management programs shall describe priorities for implementing controls.”

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

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

Order No. R9-2009-0002 is an essential mechanism for achieving the water quality objectives that have been established for protecting the beneficial uses of the water resources in the San Diego Regional Board’s portion of Orange County. Federal NPDES regulation 40 CFR 122.44(d)(1) requires MS4 permits to include any requirements necessary to “achieve water quality standards established under CWA section 303, including State narrative criteria for water quality.” The term “water quality standards” in this context refers to a water body’s beneficial uses and the water quality objectives necessary to protect those beneficial uses as established in the Basin Plan and antidegradation policies.

VIII. FINDINGS

The findings of the Order have been modified to reduce repetition in their discussions and address new requirements. Each finding of the Order is provided and discussed below. Additional discussion relative to the findings can be found in section IX of the Fact Sheet, which provides discussions of the Order's directives.

A. Basis For the Order

Finding A.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.

Discussion of Finding A.1. In 1987, Congress established CWA Amendments to create requirements for storm water discharges under the NPDES program, which provides for permit systems to regulate the discharge of pollutants. Under the Porter-Cologne Water Quality Control Act, the State Board and the nine Regional Water Quality Control Boards have primary responsibility for the coordination and control of water quality, including the authority to implement the CWA. Porter-Cologne (section 13240) directs the Regional Water Quality Control Boards to set water quality objectives via adoption of Basin Plans that conform to all State policies for water quality control.

As a means for achieving those water quality objectives, Porter-Cologne (section 13243) further authorizes the Regional Water Quality Control Boards to establish waste discharge requirements (WDRs) to prohibit waste discharges in certain conditions or areas. Since 1990, the San Diego Regional Board has issued area-wide MS4 NPDES permits. The Order will renew Order No. R9-2002-01 to comply with the CWA and attain water quality objectives in the Basin Plan by limiting the contributions of pollutants conveyed by storm water and by including numeric action levels for dry weather non-storm water discharges designed to ensure that the Copermitees comply with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into their MS4. Further discussions of the legal authority associated with the prohibitions and directives of the Order are provided in section VII this document.

Finding A.2. This Order renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108740, which was first issued on July 16, 1990 (Order No. 90-38), and then renewed 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 Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of the MS4 Permit.

Discussion of Finding A.2. This Order renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108740, which was first issued on July 16, 1990 (Order No. 90-38), and then renewed 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 Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of the MS4 Permit. Supporting information discussing the topic of this finding can be found in section V of this document.

Finding A.3. This Order is consistent with the following precedential Orders adopted by the State Water Resources Control Board (State Board) addressing municipal storm water 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*).

Discussion of Finding A.3. In recent years the State Board has considered several appeals of MS4 permits issued by the Regional Boards. In Order 99-05, the State Board established language for Receiving Water Limitation Language for MS4 permits. In Order No. WQ-2000-11, the State Board addressed design standards for Standard Urban Storm Water Mitigation Plan (SUSMP) requirements. Order WQ 2001-15 addressed Petitions of the San Diego County MS4 Permit issued by the Regional Board in 2001 (Order No. R9-2001-01). Order WQO 2002-0014 addresses Petitions of the Orange County MS4 Permit issued by the Regional Board in 2002 (Order No. R9-2002-01).

B. Regulated Parties

Finding B.1. Each of the persons in Table 1 of the Order, hereinafter called Copermitees or dischargers, owns or operates a municipal separate storm sewer system (MS4), through which it discharges storm water and non-storm water 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.

Discussion of Finding B.1. Section 402 of the CWA prohibits the discharge of any pollutant to waters of the United States from a point source, unless that discharge is authorized by a NPDES permit. Though storm water and non-storm water may come from a diffuse source, it is discharged through MS4s, which are point sources under the CWA. Federal NPDES regulation 40 CFR 122.26(a) (iii) and (iv) provide that discharges from MS4s, which service medium or large populations greater than 100,000 or 250,000 respectively, shall be required to obtain a NPDES permit. Federal NPDES regulation 40 CFR 122.26(a)(v) also provides that a NPDES permit is required for "A [storm water] discharge which the Director, or in states with approved NPDES programs, either the Director or the USEPA 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." Such sources are then designated into the program.

Other small MS4s, such as those serving universities and military installations, also exist within the watersheds of Orange County in the San Diego Region. While these MS4s are not subject to this Order, they are subject to the Phase II NPDES storm water regulations. Over time, these MS4s will be designated for coverage under the State Board's statewide general storm water permit for small MS4s.

C. Discharge Characteristics

Finding C.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.

Discussion of Finding C.1. Section 13050(d) of the CWC defines “waste” as “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.” 40 CFR 122.2 defines “point source” as “any discernable, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.” 40 CFR 122.2 defines “discharge of a pollutant” as “Any addition of any pollutant or combination of pollutants to waters of the U.S. from any point source.” Also, the justification for control of pollution into waters of the state can be found at CWC section 13260(a)(1). State Board Order WQ 2001-15 verifies that discharges from the MS4 contain waste.²⁸

The term urban runoff has been removed throughout Tentative Order R9-2009-0002 and replaced with storm water (wet weather) or non-storm water (dry weather) runoff. This clarification is necessary to prevent the misunderstanding that regulation under this permit is subject only to urbanized areas. The term “urban runoff” is not defined in the Code of Federal Regulations or Federal Register in the regulation of phase 1 MS4 discharges.

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 Clean Water Act (CWA). The Permit defines runoff as all flows in a storm water conveyance system (MS4 defined below) and consists of the following components:

- (1) storm water (wet weather flows) and
- (2) non-storm water discharges (dry weather flows).

The Permit defines 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):

²⁸ State Board, 2001. Order WQ 2001-15. In the Matter of Petitions of Building Industry Association of San Diego County and Western States Petroleum Association: For Review of Waster Discharge Requirements Order No. 2001-01 for Urban Runoff from San Diego County [NPDES No. CAS0108758] Issued by the Regional Board.

- (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.

Permit finding D.3.c. includes natural streams that convey runoff as part of the MS4. The presence of an MS4 system is not limited to areas considered to be "urban" in nature. Though the term urban is often referred to specifically as pertaining to cities, runoff means all flows in a storm water conveyance system, regardless of the location of the conveyance system. A conveyance system owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law), may be located in a setting (e.g. unincorporated area, low density residential) that is not considered by the public to be "urban" in nature. These areas are contributing pollutants to the MS4 system that must be addressed. The term runoff applies to all flows in an MS4 system, no matter where the MS4 may be located in regards to incorporated or unincorporated property.

The Code of Federal Regulations (CFR) at 40 CFR 122.26 requires that large and medium MS4s obtain a permit for all discharges from their systems. Appendix I to 40 CFR 122 designates Orange County as having a large and medium MS4 requiring a permit. The regulations do not differentiate discharges from urban or rural MS4 systems. Rather, the regulations require the permit for all discharges from their systems. In the Final Rule establishing the Phase 1 storm water regulations, the USEPA clarified that all discharges are subject to a permit. On page 48041 of the Final Rule, the USEPA states:

"EPA recognizes that some of the counties addressed by today's rule have, in addition to areas with high unincorporated urbanized populations, areas that are essentially rural or uninhabited and may not be the subject of planned development. While permits issued for these municipal systems **will cover** (*emphasis added*) *municipal systems discharges in unincorporated portions of the county* (*emphasis added*), it is the intent of EPA that management plans

and other components of the programs focus on the urbanized and developing areas of the county.”

So, while the Permit covers all MS4 discharges regardless if that discharge is in an urban or unincorporated area; the Copermittees management program should focus on urbanized areas. Due to the Permit’s requirements, the Copermittees management programs will naturally focus on urbanized areas. Urbanized areas have more industry, construction, pollution and MS4s that require more inspection, maintenance, monitoring, enforcement and complaint follow-up.

USEPA further clarified on page 48041 that all MS4 discharges require permit coverage when addressing highway MS4 systems:

“[The regulations] will result in discharges from separate storm sewer systems serving State highways and other highways through storm sewers ... in unincorporated portions of specified unincorporated portions of specified counties being included as part of the large or medium municipal separate storm sewer systems, since all municipal separate storm sewers within the boundaries of these political entities are included.”

In their summary on page 48043, the USEPA states:

“The definition [of MS4] provides that all systems within a geographical area including highways and flood controls will be covered, thereby avoiding fragmented and ill-coordinated programs;”

Neither the State Board’s storm water permit for Caltrans (Order No. 99-06-DWQ) nor the Los Angeles Regional Board’s draft MS4 permit for Ventura County include the term “urban runoff” in a significant regulatory capacity. The Caltrans permit has one reference to “urban runoff” where the term is used interchangeably with “storm water.” The draft Ventura permit uses the term “urban runoff” when referring to titles of reference documents, previously adopted management plans and municipal ordinances that may contain the phrase.

Understandably, the Copermittees have expressed concern regarding the regulation of pollutants from natural, undeveloped areas that enter the MS4 in an unincorporated area. The MS4 collection could change a natural sheet flow discharge to a concentrated point discharge. The MS4 does not provide natural infiltration or other pollutant remediation that these flows would receive in an otherwise natural drainage system. The MS4 may concentrate these natural pollutants and flows. In some cases, the MS4 may ultimately discharge the elevated concentrations of natural pollutants and flow rates to waters of the US far from the natural pollutant and flow source, causing a condition of pollution or a violation of water quality standards.

FINDINGS C

Finding C.2. MS4 storm water and non-storm water discharges are likely to contain pollutants that cause or threaten to cause a violation of surface 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 water quality standards must be complied with at all times, irrespective of the source and manner of discharge.

Discussion of Finding C.2. This finding is a clarification regarding the potential for discharges of storm water and non-storm water to impact the Beneficial Uses as described in the Basin Plan. As such these point source discharges require Waste Discharge Requirements (WDRs) to ensure that water quality standards are met. Furthermore, since point source discharges require WDRs, the discharges are subject to the prohibitions, conditions and requirements of the Basin Plan.

In addition, municipal discharges have been split into storm water and non-storm water discharges to represent the differing regulations applicable to storm water and non-storm water, though both types of discharges are likely to contain pollutants.

Finding C.3. The most common categories of pollutants in runoff include total suspended solids, sediment (due to anthropogenic activities); pathogens (e.g., bacteria, viruses, protozoa); heavy metals (e.g., copper, lead, zinc and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers); oxygen-demanding substances (decaying vegetation, animal waste); detergents; and trash.

Discussion of Finding C.3. The National Urban Runoff Program (NURP) study showed that heavy metals, organics, coliform bacteria, nutrients, oxygen demanding substances (e.g., decaying vegetation), and total suspended solids are found at relatively high levels in storm water and non-storm water discharges.²⁹ It also found that MS4 discharges draining residential, commercial, and light industrial areas contain significant loadings of total suspended solids and other pollutants. The Basin Plan goes on to identify runoff pollutants to include lawn and garden chemicals, household and automotive care products dumped or drained on streets, and sediment that erodes from construction sites.³⁰ In addition, the State Board Urban Runoff Technical Advisory Committee (TAC) finds that urban runoff pollutants include sediments, nutrients, oxygen-demanding substances, heavy metals, petroleum hydrocarbons, pathogenic bacteria, viruses, and pesticides.³¹ Runoff that flows over streets, parking lots, construction sites, and industrial, commercial, residential, and municipal areas carries these untreated pollutants through storm drain networks directly to the receiving waters of the San Diego Region.

Finding C.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 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.

Discussion of Finding C.4. The 1992, 1994, and 1996 National Water Quality Inventory Reports to Congress prepared by USEPA showed a trend of impairment in the nation's waters from contaminated storm and non-storm water runoff.³² The 1998 National Water Quality Inventory Report showed that runoff discharges affect 11 percent of rivers, 12 percent of lakes, and 28 percent of estuaries. The report states that ocean shoreline impairment due to runoff increased from 55 percent in 1996 to 63 percent in 1998. The report notes that runoff discharges are the leading source of pollution and the main factor in the degradation of surface water quality in California's coastal waters, rivers, and streams. Furthermore, the NURP study found that pollutant levels from illicit non-storm water discharges were high enough to significantly degrade receiving water quality, and threaten aquatic life, wildlife, and human health.³³

²⁹ Ibid.

³⁰ Regional Board, 1994. Water Quality Control Plan, San Diego Basin, Region 9. San Diego.

³¹ State Board, 1994. Urban Runoff Technical Advisory Committee Report and Recommendations. Nonpoint Source Management Program.

³² USEPA, 2000. Quality of Our Nation's Waters: Summary of the National Water Quality Inventory 1998 Report to Congress – USEPA 841-S-00-001; Water Quality Conditions in the United States: Profile from the 1998 National Water Quality Inventory Report to Congress – USEPA 841-F-00-006.

³³ USEPA, 1993. Results of the Nationwide Urban Runoff Program, Volume 1 – Final Report.

In addition, the Region's CWA section 303(d) list, which identifies water bodies with impaired beneficial uses within the region, also indicates that the impacts of storm water and non-storm water runoff on receiving waters are significant. Many of the impaired water bodies on the 303(d) list are impaired by constituents that have been found at high levels within storm water and non-storm water runoff by the County of Orange storm water monitoring program.³⁴ Examples of constituents frequently responsible for beneficial use impairment include indicator fecal bacteria, heavy metals, and sediment; these constituents have been found at high levels in runoff both regionally and nationwide.^{35,36} In addition, impairments may be caused by synergistic effects of multiple contaminants or by pollutants not currently monitored by storm water programs³⁷.

Finding C.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.

³⁴ County of Orange, 2006. Orange County Municipal Copermittees 2005-2006 Annual Storm Water Program Report, Section 11.

³⁵ Ibid.

³⁶ USEPA, 1983. Results of the Nationwide Urban Runoff Program, Volume 1 – Final Report.

³⁷ County of Orange, 2006. Orange County Municipal Copermittees 2005-2006 Annual Storm Water Program Report, Section 11.

Discussion of Finding C.5. A landmark study, conducted by the Santa Monica Bay Restoration Project, found that there was an increased occurrence of illness in people that swam in proximity to a flowing storm drain.³⁸ A study of south Huntington Beach and north Newport Beach (both located in northern Orange County) found that an illness rate of about 0.8 percent among bathers at those beaches resulted in about \$3 million annually in health-related expenses.³⁹ Furthermore, runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may eventually be consumed by humans. Pollutants such as heavy metals and pesticides, which are commonly found in MS4 runoff, have been found to bioaccumulate and biomagnify in long-lived organisms at the higher trophic levels.⁴⁰ Since many aquatic species are utilized for human consumption, toxic substances accumulated in species' tissues can pose a significant threat to public health. USEPA supports this finding when it states, "As runoff flows over areas altered by development, it picks up harmful sediment and chemicals such as oil and grease, pesticides, heavy metals, and nutrients (e.g., nitrogen and phosphorus). These pollutants often become suspended in runoff and are carried to receiving waters, such as lakes, ponds, and streams. Once deposited, these pollutants can enter the food chain through small aquatic life, eventually entering the tissues of fish and humans."⁴¹

Finding C.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.

³⁸ Haile, R.W., et al., 1996. An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay. Santa Monica Bay Restoration Project.

³⁹ Dwight, R.H., et al., 2005. Estimating the Economic Burden From Illnesses Associated With Recreational Coastal Water Pollution – A Case Study in Orange County, California. *Journal of Environ. Management* Vol.76. No.2 p.95-103. Also reported in: *Los Angeles Times*, May 2, 2005. Here's What Ocean Germs Cost You: A UC Irvine Study Tallies the Cost of Treatment and Lost Wages for Beachgoers Who Get Sick.

⁴⁰ Abel, P.D, 1996. *Water Pollution Biology*.

⁴¹ USEPA, 2000. *Storm Water Phase II Compliance Assistance Guide*. Washington D.C. EPA 833-R-00-002.

Discussion of Finding C.6. The Copermittees' monitoring data exhibits frequent toxic conditions in runoff during storm events and dry weather. Toxicity is observed in both fresh and marine receiving waters, but varies significantly within and among sites and over time. However, according to the County of Orange, toxicity in both dry and wet weather appears concentrated along the coast. This supports the conclusion that toxicity is associated with anthropogenic activities and is caused by pollutants that flow downstream and become concentrated near the bottom of developed watersheds. Physical channel modification and hydromodification are also greatest near the coast and likely contribute to findings of toxicity. The cause of toxicity may vary between locations, dates, and indicator organisms. The actual cause may be influenced by various factors such as development, runoff management, habitat modification, hydromodification, and native aquatic environment. Toxicity identification evaluations (TIEs) have failed to confirm initial findings of toxicity. Follow-up studies by the County of Orange implicate both pollutants and physical stream habitat degradation (e.g. channel modification and hydromodification) as factors related to toxicity findings.⁴²

Finding C.7. The Copermittees discharge runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within one of the eleven hydrologic units (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.

Discussion of Finding C.7. This finding identifies the Copermittees responsible for MS4 discharges in each watershed management area. The list is identical to Order No. R9-2002-0001. The CWA Section 303(d) List of Impaired Waters, 2006 Update has been approved by the Regional Board, State Board, and USEPA.⁴³ This 303(d) list identifies waters that do not meet water quality standards after applying certain required technology-based effluent limits ("impaired" water bodies). As part of this listing process, states are required to prioritize waters/watersheds for future development of Total Maximum Daily Loads (TMDLs). The listed 303(d) pollutant(s) of concern do not necessarily reflect impairment of the entire corresponding WMA or all corresponding major surface water bodies. The specific impaired portions of each WMA are listed in the State Board's 2006 Section 303(d) List of Water Quality Limited Segments.

⁴² County of Orange, 2006. Orange County Municipal Copermittees 2005-2006 Annual Storm Water Program Report, Section 11.

⁴³ The approved 2006 Clean Water Act Section 303(d) List of Water Quality Limited Segments is on-line at: http://www.waterboards.ca.gov/tmdl/303d_lists2006.html

Finding C.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.

Discussion of Finding C.8. The Copermittees to date have documented high volumes of trash coming from the MS4 system and in receiving waters.⁴⁴

The Basin Plan specifies the following narrative Water Quality Objective (WQO) for Floating Material:

"Waters shall not contain floating material, including solids, liquids, foams, and scum in concentrations which cause nuisance or adversely affect beneficial uses."

The Basin Plan specifies the following narrative WQO for Suspended and Settleable Solids: Material:

"Waters shall not contain suspended and settleable solids in concentrations of solids that cause nuisance or adversely affect beneficial uses."

Additionally, high density urban areas in Southern California have been shown to be responsible for up to 60 percent of the trash that enters receiving waters from the MS4.⁴⁵ The retrofitting of existing MS4 systems, such as catch basins, in targeted high trash areas can result in significant reductions in the amount of trash entering receiving waters from the MS4.

Trash, as litter in both solid and liquid form, is consistently found on and adjacent to roadways. A California Department of Transportation Litter Management Pilot Study found that of roadway trash, plastics and Styrofoam accounted for 33 percent of trash by weight, and 43 percent by volume. Further, the study found that approximately 80 percent of the litter associated with roadways was floatable, indicating that, without capture, this litter would enter Waters of the State after a storm event, resulting in the impairment of Beneficial Uses.⁴⁶ The study, however, relied upon a mesh capture size of 0.25 inches (6.35 millimeters). This size is too large to effectively capture plastic pre-production pellets (aka "nurdles"), which are roughly 3 mm in size, and likely underestimated the total contribution of plastics. Plastics, including pre-production pellets, have been found to be the dominant pollutant on beaches in the County of Orange.⁴⁷ Furthermore, pre-production plastic pellets, which are small enough to be easily digested, have been found to carry persistent organic pollutants, including PCBs

⁴⁴ Aliso Creek Watershed 27th, 28th, 29th and 30th Quarterly Progress Reports. 2007-2008.

⁴⁵ The City of Los Angeles Meets Trash TMDLs Compliance with CB Inserts and Opening Covers. August 06, 2008.

⁴⁶ California Department of Transportation District 7 Litter Management Pilot Study. June 26, 2000.

⁴⁷ Moore, S.L., Gregorio, D., Carreon, M., Weisberg, S.B. and M. K. Leecaster. 1998. Composition and Distribution of Beach Debris in Orange County, California. *Marine Pollution Bulletin*. Vol. 42

and DDT.⁴⁸

Finding C.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.

Discussion of Finding C.9. The Copermittees have produced data that demonstrates water quality objectives are frequently not met during dry and wet weather. The 2006 Report of Waste Discharge and the 2005-06 Annual Reports document that receiving water monitoring stations often fail to meet water quality objectives established in the Basin Plan. Similar conclusions are found in monitoring reported to the Regional Board pursuant to Investigative Orders issued between 2001 and 2006 for Aliso Creek, Salt Creek⁴⁹, Prima Deshecha⁵⁰, and North Creek at Doheny Beach⁵¹. Monitoring reported to the State Board pursuant to funding grant agreements also demonstrates that discharges from MS4s routinely exceed water quality objectives.^{52,53, 54, 55, 56}

⁴⁸ Rios, L.M., Moore, C. and Patrick R. Jones. 2007. Persistent organic pollutants carried by synthetic polymers in the ocean environment. *Marine Pollution Bulletin*. Vol. 54.

⁴⁹ An Investigative Order was issued on March 6, 2003 to the City of Dana Point for water quality conditions of Salt Creek near Monarch Beach.

⁵⁰ An Investigative Order was issued on July 3, 2002 to the City of San Clemente and the County of Orange for water quality conditions of Prima Deshecha Canada (including Poche Beach).

⁵¹ Investigative Order No. R9-2006-0039 was issued on April 4, 2006 to the City of Dana Point and Quantum Ozone, Inc. for an assessment of water quality conditions at North Creek, Doheny Beach.

⁵² City of Dana Point. 2005. *Final Report for the Del Obispo Storm Drain Project*. Prepared for the State Water Resources Control Board Agreement No. 02-216-550-0.

⁵³ City of Dana Point. 2004. *Final Report For The Alipaz Storm Drain Treatment And Low Flow Diversion Project* by the City of Dana Point. Prepared for State Water Resources Control Board Agreement Number: 01-068-550-0.

⁵⁴ James Volz. 2005. *Final Report for Poche Beach Urban Runoff Ultraviolet Light Bacteria Disinfection Project*. Prepared by the County of Orange for State Water Resources Control Board Agreement No. 01-236-550-1.

⁵⁵ Max Anderson. 2005. *Final Report: Aliso Beach Clean Beach Initiatives, J01P28 Interim Water Quality Improvement Package Plant Best Management Practices*. Prepared by the County of Orange for State Water Resources Control Board Agreement No. 01-227-550-0.

⁵⁶ City of Laguna Niguel and CH2MHILL. 2004. *Final Report: Wetland Capture and Treatment (WetCAT) Network*. Prepared for State Water Resources Control Board Agreement No. 01-122-259-0.

Water quality in receiving waters downstream of MS4 discharges fail to meet Ocean Plan standards⁵⁷, California Toxics Rule standards⁵⁸, and Basin Plan objectives. Data submitted in the MS4 Annual Reports indicate that at various times chemical, bacteria, pesticide, and metal concentrations may exceed water quality objectives in marine and fresh water receiving waters in both wet and dry weather conditions. Although wet weather MS4 effluent data is not generally reported, dry-weather non-storm water MS4 effluent data demonstrates that the effluent contains concentrations of pollutants that would exceed receiving water quality objectives.

In most of these watersheds, there are no other significant NPDES permits discharging to the creeks. For instance, there are no live-stream discharges of treated waste water in south Orange County. The few NPDES permits in the watersheds are mainly for recycled water which only discharges occasionally during the rainy season. Because the water quality monitoring indicates exceedances of water quality standards and MS4 discharges are the main source of pollutants in the watersheds, it can be inferred that the MS4 discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Orange County.

Finding C.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 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.

Finding C.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 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.

⁵⁷ The Basin Plan incorporates terms and conditions of the State Board's *Water Quality Control Plan for Ocean Waters of California* (Ocean Plan) as a water quality objective for Ocean Waters in the San Diego Region.

⁵⁸ The California Toxics Rule criteria promulgated by the USEPA are directly applicable water quality standards for certain priority toxic pollutants in inland surface waters and enclosed bays and estuaries in California.

Discussion of Findings C.10 and C.11.

The Natural Resources Defense Council (NRDC) 1999 Report, "*Stormwater Strategies, Community Responses to Runoff Pollution*" identifies two main causes of the storm water pollution problem in developed areas. Both causes are directly related to development:

1. Increased volume and velocity of surface runoff. There are three types of human-made impervious covers that increase the volume and velocity of runoff: (i) rooftop, (ii) transportation imperviousness, and (iii) non-porous (impervious) surfaces. As these impervious surfaces increase, infiltration will decrease, forcing more water to run off the surface, picking up speed and pollutants.
2. The concentration of pollutants in the runoff. Certain industrial, commercial, residential and construction activities are large contributors of pollutant concentrations in storm water runoff. As human population density increases, it brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc.

As a result of these two causes, runoff leaving developed areas is significantly greater in volume, velocity, and pollutant load than pre-development runoff from the same area.

By accommodating the traditional approach to storm water management, development has also altered the flow regime (rate, magnitude, frequency, timing, and flashiness of runoff) that supports aquatic and riparian habitats. These hydrologic changes are driven by the loss of water storage capacity in the watersheds,⁵⁹ and exacerbated by physical alterations of the stream channel network.⁶⁰ This relationship between development and stream channel integrity has been documented nationally and in southern California.

⁵⁹ Konrad, Christopher P. and Derek K. Booth, 2005. *Hydrologic Changes in Urban Streams and Their Ecological Significance*. American Fisheries Society Symposium Vol.47 pp.157-177.

⁶⁰ Poff, N.L. et al. 1997. The Natural Flow Regime: A paradigm for river conservation and restoration. *Bioscience* Vol. 47, No. 11, pp.769-784.

Hydrologic changes from development also directly and indirectly adversely affect wetlands. Natural wetlands support many beneficial uses and provide important water-quality related ecological services, including pollutant removal, flood attenuation, and groundwater recharge.⁶¹ The Center for Watershed Protection recently provided USEPA with a synthesis of more than 100 scientific studies on the direct and indirect impacts of development, particularly urbanization, on wetlands and the role wetlands play in watershed quality. The report found that the three changes from land development with the most potential to impact wetlands include: Increased storm water runoff; decreased groundwater recharge; and flow constriction.⁶² Each of these changes can often be avoided or minimized by implementing LID and hydromodification BMPs.

When Order No. R9-2002-01 was adopted, studies had shown that the level of imperviousness in an area strongly correlates with the quality of nearby receiving waters.⁶³ One comprehensive study, which looked at numerous areas, variables, and methods, revealed that stream degradation occurs at levels of imperviousness as low as 10 – 20 percent.⁶⁴ Stream degradation is a decline in the biological integrity and physical habitat conditions that are necessary to support natural biological diversity. For instance, few urban streams can support diverse benthic communities with imperviousness greater than or equal to 25 percent.⁶⁵ To provide some perspective, a medium density, single-family home area can be from 25 percent to 60 percent impervious (variation due to street and parking design).⁶⁶

More recently, a report on the effects of impervious in southern California streams found that local ephemeral and intermittent streams are more sensitive to such effects than streams in other parts of the country. This study, by the Southern California Coastal Water Research Program, estimated a threshold of response at a two to three percent change in percent of impervious cover in a watershed.⁶⁷ This threshold is lower than the previously reported estimates by the USEPA that were cited in the Fact Sheet for Order No. R9-2002-01.

⁶¹ Wright, Tiffany, et al. 2006. "Direct and Indirect Impacts of Urbanization on Wetland Quality." Prepared by the Center for Watershed Protection. Available at: <http://www.cwp.org>. 81p.

⁶² Ibid p.26

⁶³ USEPA, 1999. Part II. 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. Federal Register.

⁶⁴ Ibid.

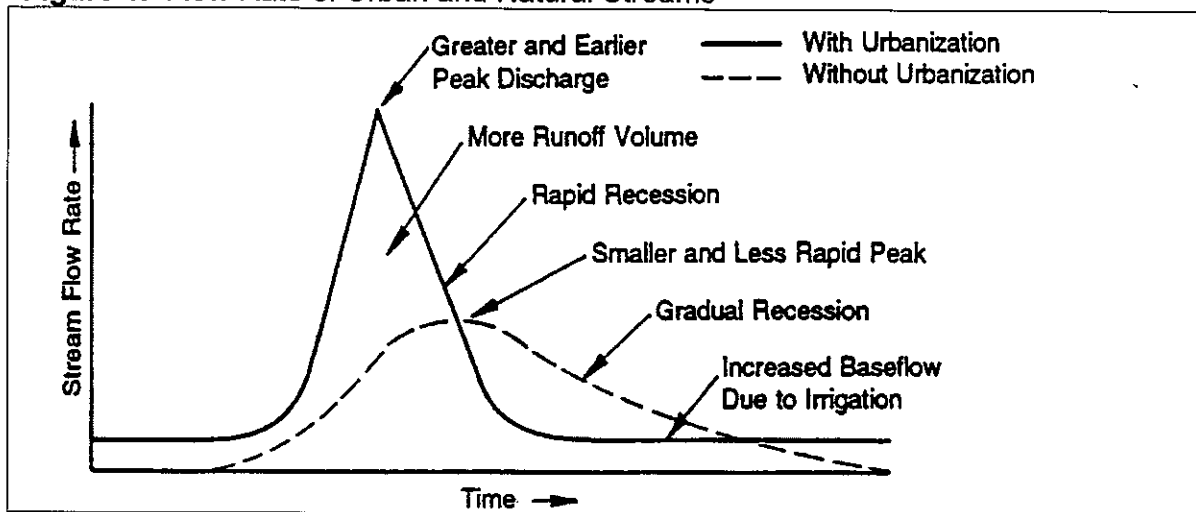
⁶⁵ Ibid.

⁶⁶ Schueler, T.R., 1994. The Importance of Imperviousness. Watershed Protection Techniques. As cited in 64 Fed. Reg. 68725.

⁶⁷ Coleman, Derrick, et al. 2005. *Effect of Increases in Peak Flows and Imperviousness on the Morphology of Southern California Streams*. Technical Report No. 450 of the Southern California Coastal Water Research Project.

To demonstrate the principle of increased volume and velocity of runoff from urbanization, Figure 1 shows the flow rate of an urban vs. a natural stream. What the figure demonstrates is that urban stream flows have greater peaks and volumes, as well as shorter retention times than natural stream flows. The greater peak flows and volumes result in stream degradation through increased erosion of stream banks and damage to aquatic habitat. The shorter retention times result in less time for sediments and other pollutants to settle before being carried out to the ocean. This sediment, and the associated pollutants it carries, can be a significant cause of water quality degradation.

Figure 1. Flow Rate of Urban and Natural Streams⁶⁸



Increased volume and velocity of runoff adversely impacts receiving waters and their beneficial uses in many ways. According to the Urban Runoff TAC report,⁶⁹ increases in population density and imperviousness result in changes to stream hydrology including:

1. Increased peak discharges compared to pre-development levels;
2. Increased volume of storm water runoff with each storm compared to pre-development levels;
3. Decreased travel time to reach receiving water; increased frequency and severity of floods;
4. Reduced stream flow during prolonged periods of dry weather due to reduced levels of infiltration;
5. Increased runoff velocity during storms due to a combination of effects of higher discharge peaks, rapid time of concentration, and smoother hydraulic surfaces from channelization; and

⁶⁸ Adapted from Schueler, T.R., 1987. Controlling Urban Runoff: A Practical Manual for Planning and Designing Urban BMPs. Metropolitan Washington Council of Governments.

⁶⁹ State Board, 1994. Urban Runoff Technical Advisory Committee Report and Recommendations. Nonpoint Source Management Program.

6. Decreased infiltration and diminished ground water recharge.

Even though the rainfall depths in arid watersheds are lower, watershed development can greatly increase peak discharge rates during rare flood events.⁷⁰ A study conducted in arid watersheds around Riverside, CA showed that, over two decades, impervious cover increased from 9 percent to 22 percent, which resulted in an increase of more than 100 percent in the peak flow rate for the two-year storm event. The study also showed that the average annual storm water runoff volume had increased by 115 percent to 130 percent over the same time span.⁷¹

Prior hydromodification studies in California have shown that the increase in impervious cover, and thus change in runoff volume, velocity, rate, and duration, results in a shift in the range of storms that produce geomorphically significant flows within receiving waters (see above discussion). Additionally, studies in California have determined that ninety percent of the geomorphic "work" done within channels receiving flows from developed areas now occurs from flows below the 10 year peak flow event.⁷²

This increased volume, velocity, rate, and duration of runoff greatly accelerates the erosion of the beds and banks within downstream receiving waters. Additionally, storm water flows which runoff directly from impervious surfaces into the MS4 and thus receiving waters prevent the associated runoff of natural sediments which would occur in pre-project conditions. This combined alteration of the physical condition of storm water runoff results in accelerated downstream erosion of receiving water bed and banks. The excessive erosion of stream beds and banks releases pollutants found in soils into receiving waters, degrades macroinvertebrate habitat (see D.2.c), eliminates spawning habitat, reduces associated wetland and riparian habitat, and threatens existing infrastructure adjacent to receiving waters. Bank sloughing within creeks and streams increases the pollutant loading to those receiving waters, particularly for turbidity and phosphorous.⁷³ In arid environments, accelerated channel erosion has been shown to have synergistic impacts within watersheds. Increased channel erosion within Las Vegas wash has resulted in the loss of over 1,000 acres of wetland and riparian habitat, released additional pollutants into downstream receiving waters, and eliminated in-stream habitat and water quality conditions required for existing threatened and endangered species.⁷⁴

⁷⁰ Schueler and Holland, 2000. Storm Water Strategies for Arid and Semi-Arid Watersheds (Article 66). The Practice of Watershed Protection. P. 695-706.

⁷¹ Ibid.

⁷² Santa Clara Valley Hydromodification Management Plan. April 21, 2005.

⁷³ Sekely, A.C., Mulla, D.J. and D.W. Bauer. 2002. Streambank slumping and its contribution to the phosphorus and suspended sediment loads of the Blue Earth River, Minnesota. *Journal of Soil and Water Conservation*. September 2002 vol. 57 no. 5 243-250.

⁷⁴ Tuttle, P.L.. and E.L.. Orsak. 2002. Las Vegas Wash Water Quality and Implications to Fish and Wildlife. U.S.

Regarding the impact of development on storm water runoff pollutant loads, the Regional Board's Basin Plan states:

Nonpoint source pollution is primarily the result of man's uses of land such as urbanization, roads and highways, vehicles, agriculture, construction, industry, mineral extraction, physical habitat alteration (dredging/filling), hydromodification (diversion, impoundment, channelization), silviculture (logging), and other activities which disturb land.⁷⁵ As a result, when rain falls on and drains through urban freeways, industries, construction sites, and neighborhoods it picks up a multitude of pollutants. The pollutants can be dissolved in the runoff and quickly transported by gravity flow through a vast network of concrete channels and underground pipes referred to as storm water conveyance systems. Such systems ultimately discharge the polluted runoff, without treatment, into the nation's creeks, rivers, estuaries, bays, and oceans.⁷⁶

According to the Center for Watershed Protection, urbanization strongly shapes the quality of both surface and ground water in arid and semi-arid regions of the southwest. Since rain events are so rare, pollutants have more time to build up on impervious surfaces compared to humid regions. Therefore, the pollutant concentrations of storm water runoff from arid watersheds tends to be higher than that of humid watersheds.⁷⁷ The effect of antecedent rainfall events is demonstrated in a recent report from the California Department of Transportation (Caltrans) that found the concept of a seasonal first flush is applicable to the southern California climate.⁷⁸

Finding C.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.

Fish and Wildlife Service.

⁷⁵ Regional Board, 1994. Water Quality Control Plan for the San Diego Basin. P. 4-66.

⁷⁶ Ibid. P. 4-69 - 4-70.

⁷⁷ Schueler and Holland, 2000. Storm Water Strategies for Arid and Semi-Arid Watersheds (Article 66). The Practice of Watershed Protection. P. 695-706.

⁷⁸ Stenstrom, Michael and Masoud Kayhanian, 2005. *First Flush Phenomenon Characterization*. Prepared for Caltrans. Report No. CTSW-RT-05-73-02.6 Study jointly performed by UCLA and UCD. Most of the data presented was collected from three highly urbanized highway sites in west Los Angeles. Much effort went into developing a quantitative way of defining the mass first flush. Other aspects include: variability of water quality during storm events, litter characteristics, correlation among constituents, first flush of organics and particle size distribution, new methods for measuring oil and grease, and grab and composite sampling strategies. The report is available on-line at: <http://www.dot.ca.gov/hq/env/stormwater/special/newsetup/>

Discussion of Finding C.12. ESAs are defined in the Order as “Areas that include but are not limited to all CWA Section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the Basin Plan ; water bodies designated with the RARE beneficial use by the Basin Plan; 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 Copermittees.”

Areas that meet this definition are inherently sensitive habitats containing unique, rare, threatened, or endangered species, or are not achieving their designated beneficial uses. As discussed above, runoff is known to contain a wide range of pollutants and has demonstrated toxicity to plants and animals. Therefore, it is necessary to apply additional storm water controls for developments within, adjacent to, or directly discharging to ESAs. This need for additional storm water controls is addressed within each component of the Order. USEPA supports the requirement for additional storm water controls, stating “For construction sites that discharge to receiving waters that do not support their designated use or other waters of special concern, additional construction site controls are probably warranted and should be strongly considered.”⁷⁹ Further support for requiring additional controls to reduce pollutants in storm water discharges to ESAs can be found in *Mitigation of Storm Water Impacts From New Developments in Environmentally Sensitive Areas*, a technical report written by the LARWQCB.⁸⁰

ESAs within the area subject to this Order are expected to be substantially similar to the previous Order. Additions may be necessary once the South County Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP) is formally adopted. Other modifications may reflect updated descriptions or findings of threatened or endangered aquatic species.

Finding C.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.

⁷⁹ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. Washington D.C. EPA/833-B-92-002.

⁸⁰ LARWQCB, 2001. *Mitigation of Storm Water Impacts From New Developments In Environmentally Sensitive Areas*.

Discussion of Finding C.13. Infiltration is an effective means for managing runoff. However, measures must be taken to protect groundwater quality when infiltration of runoff is implemented. USEPA supports runoff infiltration and provides guidance for protection of groundwater: "With a reasonable degree of site-specific design considerations to compensate for soil characteristics, infiltration may be very effective in controlling both urban runoff quality and quantity problems. This strategy encourages infiltration of urban runoff to replace the natural infiltration capacity lost through urbanization and to use the natural filtering and sorption capacity of soils to remove pollutants; however, the potential for some types of urban runoff to contaminate groundwater through infiltration requires some restrictions."⁸¹ The restrictions placed on runoff infiltration in this Order are based on recommendations provided by the USEPA Risk Reduction Engineering Laboratory. The State Board found in Order WQ 2000-11 on the appeal of the LARWQCB's Standard Urban Storm Water Mitigation Plan (SUSMP) requirements that the guidance provided in the above referenced document by the USEPA Risk Reduction Engineering Laboratory is sufficient for the protection of groundwater quality from runoff infiltration. To further protect groundwater quality, the Order also includes guidance from the LARWQCB,⁸² the State of Washington,⁸³ and the State of Maryland.⁸⁴ Subsequently, the California Storm Water Quality Association (CASQA) has produced technical guidance for post-construction treatment BMPs to protect ground water quality⁸⁵.

Finding C.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 not to be effectively prohibited under the Clean Water Act.

Discussion of Finding C.14.

Permitting Framework

The Clean Water Act (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 a NPDES permit pursuant to Section 402 of the Clean Water

⁸¹ USEPA, 1994. Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration. EPA 600 SR-94 051.

⁸² LARWQCB, 2000. Standard Urban Storm Water Mitigation Plan for Los Angeles County and Cities in Los Angeles County.

⁸³ Washington State Department of Ecology, 1999. Draft Stormwater Management in Washington State. Volume V – Runoff Treatment BMPs. Pub. No. 99-15.

⁸⁴ Maryland Department of the Environment, 1999. 2000 Maryland Stormwater Design Manual. Volume I.

⁸⁵ CASQA. The New Development and Redevelopment Handbook, 2003. Available on-line at <http://www.cabmphandbooks.org/Development.asp>

Act. The discharge of storm water and/or non-storm water from an MS4 system is considered a discharge from a point source. As discussed below, however, the Clean Water Act regulates storm water and non-storm water discharges under different standards.

In 1987 the CWA was amended to include provisions that specifically concerned NPDES permitting requirements for storm water discharges from MS4 systems. Section 402(p) of the CWA regulates the discharge of storm water from a point source, the municipal separate storm sewers. Such discharges of storm water are subject to the maximum extent practicable (MEP) storm water standard and the related iterative process. The MEP standard for storm water discharges reflects Congress' recognition that the variability of flow and intensity of storm events render difficult strict compliance with water quality standards by MS4s. However, this standard was not considered applicable to non-storm water discharges, which under 402(p) are required to be effectively prohibited from entering the MS4. Clearly, if non-storm water discharges must be effectively prohibited from entering the MS4, the very next requirement (402(p)(3)(B)(iii)) requiring discharges from the MS4 be reduced to the MEP intends that the discharge of pollutants be limited to storm water. Unless exempt or authorized under a separate NPDES permit, non-storm water discharges are not authorized to enter the MS4 in the first instance and are considered to be illicit discharges.

The Federal Register further clarifies that such discharges through an MS4 are not authorized under the CWA (55 Fed. Reg. 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 regulations (40 Code of Federal Regulations (CFR) 122.26(d)(vi)(2)(B)) require that the municipal separate storm sewer discharger prohibit "through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer." As owners and operators of the MS4, Copermittees cannot passively receive discharges from third parties (Federal Register 68766) and thus are responsible for the discharge of any non-storm water from their MS4.

The State Water Board's recent precedential order (Order WQ-2009-0008) affirming a Los Angeles County MS4 permit modification, consistent with USEPA's prior interpretations, recognizes that "[n]either the Clean Water Act nor the federal storm water regulations define 'non-storm water.' 'Illicit discharge' is defined as any discharge to an MS4 'not composed entirely of storm water.'[fn]. Thus, 'illicit

discharge' is the most nearly applicable definition of 'non-storm water' found in federal law and is often used interchangeably with that term."⁸⁶

Storm Water and Non-storm Water Definitions

By definition non-storm water is not precipitation related. 40 CFR 122.26(b)(13) states that: "Storm water means storm water runoff, snowmelt runoff, and surface runoff and drainage." While "surface runoff and drainage" is not defined in federal law, it is related to precipitation events such as rain and/or snowmelt (see 55 Fed Reg 47995-96). The Federal Register (55, page 47995) includes an entire section on the definition of storm water and non-storm water. The term "surface runoff and drainage" does not include all incidental flows in the MS4 system, but consists of flows relating to precipitation events as clarified by the Federal Register, USEPA's documents and permitting, and other Regional Board Orders.

The Federal Register (55 Fed Reg 47995-47996) provides clarification on the distinction between storm water and non-storm water discharges, including their regulation:

"In response to the comments which requested EPA to define the term storm water broadly to include a number of classes of discharges **which are not in any way related to precipitation events, EPA believes that this rulemaking is not an appropriate forum for addressing the appropriate regulation of such non-storm water discharges**, even though some classes of non-storm water discharges may typically contain only minimal amounts of pollutants. Congress did not intend that the term storm water be used to describe any discharge that has a de minimis amount of pollutants, not did it intend for section 402(p) to be used to provide a moratorium from permitting other non-storm water discharges."

As recently recognized by the State Water Board in a precedential decision upholding an MS4 permit modification adopted by the Los Angeles Regional Water Board, "U.S. EPA has previously rejected the notion that 'storm water,' as defined at 40 Code of Federal Regulations section 122.26(b)(13), includes dry weather flows. In U.S. EPA's preamble to the storm water regulations, U.S. EPA rejected an attempt to define storm water to include categories of discharges 'not in any way related to precipitation events.'[fn]."⁸⁷ Thus, USEPA has made it clear that it deems discharges unrelated to precipitation events to be non-storm water discharges. 40 CFR 122.26(d)(iv)(B) itself provides specific examples of non-storm water discharges:

"...the following category of non-storm water discharges or flows shall only be addressed where such discharges are identified by the municipality as sources of pollutants to the United States: water line flushing, landscape irrigation,

⁸⁶ State Water Board Order WQ-2009-0008 (*In the Matter of the Petition of County of Los Angeles and Los Angeles County Flood Control District*, adopted August 4, 2009), p. 4.

⁸⁷ State Water Board Order WQ-2009-0008 (*In the Matter of the Petition of County of Los Angeles and Los Angeles County Flood Control District*, adopted August 4, 2009), p. 7.

diverted stream flows, rising ground waters, uncontaminated groundwater infiltration (as defined at 40 CFR 35.2005(20) to separate storm sewers, uncontaminated pumped groundwater,..."

USEPA also removed street wash waters from the definition of storm water, as USEPA specifically identified this discharge as being non-storm water (55 Fed. Reg. page 47996). Additionally, section 1.2.2.2. of USEPA's Multi-Sector General Permit for Industrial Activities (MSGP-2000) considers fire hydrant flushings, irrigation drainage, landscape watering, and foundation or footing drains to be non-storm water discharges. USEPA's September 1999 Storm Water Management Fact Sheet for Non-Storm Water Discharges to Storm Sewers states that non-storm water discharges can include discharges of process water, air conditioning condensate, non-contact cooling water, vehicle wash water, or sanitary wastes.

While these types of non-storm water discharges (or illicit discharges) may be regulated under storm water permits because as a practical matter they can enter and be discharged from the MS4 systems, they are not regulated as storm water discharges under the Clean Water Act because they are unrelated to precipitation events. As indicated above, the State Water Resources Control Board recent discussion of this issue supports the conclusion that non-storm water discharges are unrelated to precipitation events. In its Order affirming amendments to the Los Angeles County MS4 permit to implement a TMDL to control bacteria in dry weather flows, the State Water Board rejected petitioners County of Los Angeles and the Los Angeles County Flood Control District implied assertion that the definition of "storm water" contained in the federal regulations (defined as "surface run-off and drainage") includes the run-off and drainage from non-storm events. The State Water Board notes that the challenged permit provisions do not apply to storm water flows in that they apply only during dry weather conditions as defined in the permit. In upholding the challenged order, the State Water Board notes that the Los Angeles Water Board's permit language followed USEPA's approach, referring to USEPA's rejection of attempts to define storm water to include categories of discharges "not in any way related to precipitation events."⁸⁸

Lastly, the Regional Board and State Board have issued multiple permits for non-storm water discharges, including, but not limited to, R9-2008-0002 (extracted groundwater), R9-2002-0020 (hydrostatic discharge) and 2006-008 DWQ (utility vaults), pursuant to section 402 of the CWA.

Permitting Non-storm Water Discharges

The U.S. EPA's approach (and the Regional Board's under its approved program) for non-storm water discharges from MS4s is to regulate these discharges under the existing 402 NPDES framework (Fed Reg 47995 and 48037 see below) for discharges

⁸⁸ State Water Board Order WQ-2009-0008 (*In the Matter of the Petition of County of Los Angeles and Los Angeles County Flood Control District*, adopted August 4, 2009), p. 7 (quoting 55 Fed. Reg. 47990, 47995).

to surface waters. The NPDES program (40 CFR 122.44(d)) utilizes discharge prohibitions and effluent limitations as regulatory mechanisms to regulate non-storm water discharges, including the use of technology and water quality-based effluent limitations. Non-numerical effluent limitations, such as BMPs for non-storm water discharges may only be authorized where numerical effluent limits are infeasible or where the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA (40 CFR 122.44(k) see below).

The Federal Register (55, page 48037) provides clarification that non-storm water discharges from the MS4 are to be regulated under section 402, not 402(p):

“Conveyances which continue to accept other “non-storm water” discharges (e.g. discharges without an NPDES permit) with the exceptions noted above (*exempted discharges that are not a source of pollutants*) do not meet the definition of municipal separate storm sewer and are not subject to 402(p)(3)(B) of the CWA unless such discharges are issued separate NPDES permits. Instead, conveyances which continue to accept non-storm water discharges which have not been issued separate NPDES permits are subject to sections 301 and 402 of the CWA.”

This regulatory approach is consistent with the approach recently upheld by the State Water Board in a precedential order adopted on August 4, 2009. In this Order, the State Water Board rejected a challenge to amendments to the Los Angeles County MS4 permit that require compliance with receiving water limitations and discharge prohibitions for dry weather, non-storm water discharges. Petitioners there argued that the receiving water limits and discharge prohibitions for dry weather dischargers were inappropriate and that the Los Angeles Water Board should instead have regulated the discharges with the maximum extent practicable standard, through an iterative process. The State Water Board concludes that dry weather discharges, as defined in the permit and in the underlying TMDL, “are more appropriately regarded as non-storm water discharges, which the Clean Water Act requires to be effectively prohibited.”⁸⁹

As stated above, for NPDES permits under 402 of the CWA, the Code of Federal Regulations (122.44(k)) clarify that a discharger may utilize 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 limits 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.”

⁸⁹ State Water Board Order WQ-2009-0008 (*In the Matter of the Petition of County of Los Angeles and Los Angeles County Flood Control District*, adopted August 4, 2009), p. 8

For the last 19 years, Southern Orange County NPDES permits for discharges of storm water have regulated non-storm water discharges from the MS4. These permits required Copermittees (dischargers) to prohibit non-storm water discharges into (thus through and from) their MS4 systems, implement a program to prevent illicit discharges, and monitor to identify illicit discharges and exempted discharges that are a source of pollution. These measures are considered Best Management Practices (BMPs), are required to be included in NPDES permits issued under Section 402(p) of the CWA, and are considered by USEPA to be an interim approach to permitting non-storm water discharges from the MS4 in accordance with section 402 of the CWA and CFR 122.44(k).

As explained in the discussion of Finding C.15., below, the Copermittees' reliance on BMPs for the past 19 years has not resulted in compliance with applicable water quality standards. The Regional Board has evaluated (in accordance with 40 CFR 122.44(d)(1)) past and existing controls (BMPs), non-storm water effluent monitoring results, the sensitivity of the species in receiving waters (e.g. endangered species), and the potential for effluent dilution, and has determined that existing BMPs to control pollutants in storm water discharges are not sufficient to protect water quality standards in receiving waters and the existing requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 historically results in the discharge of pollutants to the receiving waters. Thus, numeric action levels for non-storm water, dry weather, discharges from the MS4 and required actions following observed exceedances of numeric action levels have been established. For further discussion regarding the development of action levels please see Finding E.12 and discussion.

Dry weather action levels are applicable to non-storm water discharges of effluent from the MS4 system. Non-storm water effluent discharges from the MS4 are those which occur during dry weather conditions. These action levels are not applied to storm water discharges, as defined within the Order. Storm water discharges regulated by the Order are required to meet the MEP standard and related iterative process and have separate action levels.

Dry weather action levels are applicable to non-storm water discharges from the MS4 system into receiving waters. Non-storm water discharges are already required to be prohibited unless specifically exempted or covered under a separate NPDES permit. Dry weather action levels apply to non-storm water discharges of effluent from a point source into receiving waters. The MS4 is not a receiving water. Should a discharger wish to discharge a non-exempt category to the MS4 system, such discharges require a separate NPDES permit pursuant to sections 402 and 301 of the CWA. It is also infeasible to monitor and sample every discharge into the MS4, as such discharges are diffuse by nature and may vary spatially and temporally.

FINDINGS C

Finding C.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.

Discussion of Finding C.15. The Federal Register (55, page 48037) and 40 CFR 122.26(d)(iv)(B) clarify that certain components and categories of non-storm water discharges into the MS4 are not required to be prohibited. The Code of Federal Regulations requires the discharger have:

“...a program, including inspections, to implement through ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program shall address all types of illicit discharges, however, the following category of non-storm water discharges or flows shall only be addressed where such discharges are identified by the municipality as sources of pollutants to the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated groundwater infiltration (as defined at 40 CFR 35.2005(20) to separate storm sewers, uncontaminated pumped groundwater...”

As such, the identification of any of these categories as a source of pollutants requires them to be addressed as illicit discharges, which are not authorized under the CWA, and are required to be “effectively prohibited” as illicit discharges via ordinance, order or similar means. The prohibition of previously exempted discharges of non-storm water to waters of the United States from entering, and necessarily being discharged from an MS4, conforms with CWA requirements for standards and enforcement for effluent limitations to necessary to meet water quality standards (33 U.S.C. 1311(b)(1)(C)).

To date the Copermittees have identified overspray and drainage from potable and reclaimed water landscape irrigation as a substantial source and conveyance mechanism for pollutants into waters of the United States. Irrigation runoff into the MS4, as identified by the Copermittees, is a source of pollutants to waters of the United States, and is required to be *addressed* (emphasis added) as an illicit discharge per 40 CFR 122.26(d)(2)(iv)(B)(1) by prohibition through implementing and enforcing an ordinance, order or similar means. The Copermittees have identified irrigation water as a source of pollutants and conveyance of pollutants to waters of the United States, when applied improperly in excess and thereafter entering the MS4, in the following documents:

- Per requirements of 401 Water Quality Certification 02C-055, the County of Orange conducted a **Drainage Area Reconnaissance and Urban Runoff**

Characterization study. From the reconnaissance and characterization, the County of Orange determined that:

"...water quality results provided two important findings." First, "analytical data strongly indicates that irrigation overspray and drainage constitutes a very substantial source and conveyance mechanism for fecal indicator bacteria into Aliso Creek, and suggests that reduction measures for this source of urban runoff could provide meaningful reduction in bacteria loading to the stream."

- Aliso Creek, currently 303(d) listed as impaired for Indicator Bacteria, is included in the Bacteria Project I TMDL adopted by the Regional Board on December 12, 2007. Secondly, reclaimed water high in electrical conductivity and Nitrate was indicated as:

"...the source water at three of the excessive runoff locations (P1,P2,J01). These dissolved nitrogen concentration and flow rates create relatively high nitrogen loadings, which have the potential to contribute to undesirable levels of periphytic algal growth in Aliso Creek."

- On November 15, 2007 the **Unified Annual Progress Report Program Effectiveness Assessment** for the 2006-2007 reporting period was submitted by the Copermittees. Within the report, the Copermittees demonstrate that a *"wide range of constituents exceeded the tolerance interval bounds"*, including orthophosphate. Tolerance interval bounds are pollutant levels set by the Copermittees that represent when a problem may be occurring. These tolerance levels sometimes equate with Basin Plan Objectives (BPOs) and California Toxic Rules (CTR) and USEPA Criteria. The report states that *"high levels of orthophosphate concentration are most likely the result of fertilizer runoff or reclaimed water runoff"*. Aliso Creek is currently 303(d) listed as impaired for phosphorous.
- On November 15, 2007 the **Watershed Action Plan Annual Report(s)** for the 2006-2007 reporting period was 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. These locations are included in the Bacteria Project I TMDL adopted by the Regional Board on December 12, 2007. The Copermittees, within their Watershed Action Strategy Table for Fecal Indicator Bacteria
"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."

- In 2006, the State Water Quality Control Board (State Board) allocated Grant funding to the **SmartTimer/Edgescape Evaluation Program (SEEP)**. Project partners include the following Copermitees: the Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Nigel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita and San Juan Capistrano. Also included in the study were the Metropolitan Water District of Southern California, the Department of Agriculture and ten south Orange County water districts. The project targets irrigation runoff by retrofitting existing development and documenting the conservation and runoff improvements. The Grant Application states that:

"Irrigation runoff contributes flow & pollutant loads to creeks and beaches that are 303(d) listed for bacteria indicators."

Furthermore, the grant application states:

"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."

This is reinforced in the project descriptions and objectives:

"Elevated dry-weather storm drain flows, composed primarily in the South Orange County Region 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".

The basis of this grant project, conducted by the Copermitees and additional water use partners, is that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. In addition, they indicate that this alteration of natural flows is impacting the Beneficial Uses of Waters of the State and U.S.

D. Runoff Management Programs

Finding D.1.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.

Discussion of Finding D.1.a. Under CWA section 402(p), municipalities are required to reduce the discharge of storm water pollutants from their MS4s to the maximum extent practicable (MEP). MEP is the critical technology-based performance standard that municipalities must attain. The MEP standard is an ever-evolving, flexible, and advancing concept, which considers technical and economic feasibility. As knowledge about controlling storm water runoff continues to evolve, so does that which constitutes MEP. Reducing the discharge of storm water pollutants to the MEP requires Copermittees to assess each program component and revise activities, control measures, best management practices (BMPs), and measurable goals, as necessary to meet MEP.

To achieve the MEP standard, municipalities must employ whatever BMPs are technically feasible (i.e., are likely to be effective) and are not cost prohibitive. The major emphasis is on technical feasibility. Reducing storm water 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:

1. Effectiveness: Will the BMPs address a pollutant (or pollutant source) of concern?
2. Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?
3. Public Acceptance: Does the BMP have public support?
4. Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?
5. Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc?

If a municipality reviews a lengthy menu of BMPs and chooses to select only a few of the least expensive BMPs, 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 is prohibitive, 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 easily dismissed. In any case, the burden is on the municipal discharger to show compliance with its permit. After selecting BMPs, it is the responsibility of the discharger to ensure that all BMPs are implemented.⁹⁰

A definition of MEP is not provided in either the federal statute or in the federal regulations. The final determination regarding whether a municipality has reduced storm water pollutants to the MEP can only be made by the Regional Board or the State Board, and not by the municipal discharger. While the Regional Board or the State Board ultimately define MEP, it is the responsibility of the Copermittees to initially propose actions that implement BMPs to reduce storm water pollution to the MEP. In other words, the Copermittees' runoff management programs to be developed under the Order are the Copermittees' proposals of MEP. Their total collective and individual activities conducted pursuant to their runoff management programs become their proposal for MEP as it applies both to their overall effort, as well as to specific activities. The Order provides a minimum framework to guide the Copermittees in meeting the MEP standard for storm water.

It is the Regional Board's responsibility to evaluate the proposed programs and specific BMPs to determine what constitutes MEP, using the above guidance and the court's 1994 decision in *NRDC v. California Department of Transportation*, Federal District Court, Central District of California. The federal court stated that a Copermittee must evaluate and implement BMPs except where (1) other effective BMPs will achieve greater or substantially similar pollution control benefits; (2) the BMP is not technically feasible; or (3) the cost of BMP implementation greatly outweighs the pollution control benefits. In the absence of a proposal acceptable to the Regional Board, the Regional Board will define MEP by requiring implementation of additional measures by the Copermittees.

⁹⁰ State Water Resources Control Board, 1993. Memo Entitled Definition of Maximum Extent Practicable.

The Copermittees' continual evolution in meeting the MEP standard is expected to achieve compliance with water quality standards. USEPA has consistently supported this expectation. In its Interim Permitting Approach for Water Quality-Based Effluent Limitations (WQBELs) in Storm Water Permits, USEPA states "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 attainment of water quality standards."⁹¹ USEPA reiterated its position in 1999, when it stated regarding the Phase II municipal storm water regulations that "successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards" and "EPA anticipates that a permit for a regulated small MS4 operator implementing BMPs to satisfy the six minimum control measures will be sufficiently stringent to protect water quality, including water quality standards [...]."⁹²

The requirements of the Order are expected to achieve compliance with receiving water quality standards. The approach to be used is the continual assessment, revision, and improvement of Copermittee best management practice implementation. This approach is consistent with the Clean Water Act and State Board guidance. In *Defenders of Wildlife v. Browner* (1999, 197 F. 3d 1035), the United States Court of Appeals for the Ninth Circuit states: "Under 33 U.S.C. 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." In addition, the approach is consistent with State Board Order WQ 99-05, which outlines an iterative approach for achieving compliance with water quality standards.

Finding D.1.b. The Copermittees have generally been implementing the jurisdictional runoff management programs required pursuant to Order No. R9-2002-01 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.⁹³

⁹¹ Federal Register / Vol. 61, No. 166 / August 26, 1996 / P. 43761.

⁹² Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68753-68754.

⁹³ Orange County Storm Water Program, 2006. Unified Annual Progress Report, Program Effectiveness Assessment (San Diego Region).

Discussion of Finding D.1.b. In response to Order No. R9-2002-01, the Copermittees have improved their runoff management programs. For instance, comprehensive runoff management plans have been developed. In order to implement the plans, the Copermittees have, among other things, developed BMP requirements, improved inter- and intra-governmental coordination, improved training programs, improved illicit discharge detection procedures, and improved their monitoring efforts. Although the programmatic improvements have led to better implementation of BMPs, the Copermittees' monitoring data demonstrate that additional or revised BMPs are necessary to prevent discharges from MS4s from causing and contributing to violations of water quality standards. A discussion of data collected by the Copermittees is included in the discussion for Finding C.9.

Finding D.1.c. This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of storm water pollutants in 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 these high priority water quality problems. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other Regional Board compliance assessment activities.

Discussion of Finding D.1.c. The Copermittees are required to update and expand their runoff management programs on jurisdictional and watershed levels in order to improve their efforts to reduce the contribution of storm water pollutants in runoff to the MEP and meet water quality standards. Changes to Order No. R9-2002-01's requirements have been made to help ensure these two standards are achieved by the Copermittees.

The Orders' jurisdictional requirements have changed based on findings by the Regional Board during typical compliance assurance activities or receipt of complaints.⁹⁴ The Regional Board performed full jurisdictional program audits of 8 of the 13 Copermittees during the Order No. R9-2002-01 permit term. Where the audits found common implementation problems, requirements have been altered to better ensure compliance. In addition, the Regional Board conducted detailed reviews of every jurisdictional annual report submitted by the Copermittees. Updates to the Copermittees' programs are also based on recommendations found in the Copermittees' ROWD.⁹⁵ In many instances, the Copermittees and the Regional Board have identified similar issues that merit program modifications.

⁹⁴ Audit reports, report reviews, and inspection reports are available for review at the Regional Board office.

⁹⁵ All significant changes made to the Order's requirements are described and explained in detail in Fact Sheet section X.

To better focus on attainment of water quality standards, the Order's watershed requirements have been improved. The conditions of the receiving waters now drive management actions, which in turn focus diminishing resources on the highest priority water quality problems within the receiving waters in each watershed. Improvements to watershed requirements were also made to facilitate a mutually clear understanding of the requirements between the Regional Board and Copermitees.

Finding D.1.d. Updated Jurisdictional Runoff Management Plans (JRMPs) and Watershed Runoff Management Plans (WRMPs), which describe the Copermitees' runoff management programs in their entirety, are needed to guide the Copermitees' runoff management efforts and aid the Copermitees in tracking runoff management program implementation. It is practicable for the Copermitees to update the JRMPs and WRMPs within one year, since significant efforts to develop these programs have already occurred.

Discussion of Finding D.1.d. Development of runoff management plans is a crucial runoff management measure and should be considered a BMP. The plans help organize and focus the Copermitees' programs and guide their implementation. In its statewide assessment report to USEPA Region IX and the State Board, Tetra Tech, Inc. concluded that the lack of a master storm water planning document must be considered a serious program deficiency⁹⁶. When submitted to the Regional Board, the plans provide useful correspondence between the Copermitees and the Regional Board. The Plans also become available for review by the public, and thus facilitate public participation in runoff management decisions. Finally, while development and submittal of runoff management plans are not necessary to ensure compliance of the Copermitees' runoff management programs with the Order, the Regional Board is provided with a means to track Copermitee implementation.

The focus of the Order is on development and implementation of storm water programs which meet MEP, rather than creation of Copermitee plans which exhibit MEP. While the Order does not rely upon the plans to ensure MEP and other standards are achieved, the plans still serve a useful purpose. As stated above, the plans serve to organize the Copermitees' efforts to address runoff. As a practical matter, any program of the size required by the Order should be documented in writing. This serves to guide implementation of the program by the numerous individuals responsible for program implementation.

⁹⁶ Tetra Tech, Inc. 2006. *Assessment Report on Tetra Tech's Support of California's MS4 Stormwater Program*. Produced for USEPA Region IX and the California State and Regional Water Quality Control Boards.

Runoff management plans are not necessary for ensuring compliance with the Order because the Order itself contains sufficient detailed requirements to ensure that compliance with discharge prohibitions, receiving water limitations, and the narrative standard of MEP for storm water are achieved. Implementation by the Copermittees of programs in compliance with the Order's requirements, prohibitions, and receiving water limitations is the pertinent compliance standard to be used under the Order, as opposed to assessing compliance by reviewing the Copermittees' implementation of their plans alone. The Regional Board ensures compliance with the Order by reviewing annual reports, conducting inspections, performing audits, and through other general program oversight.

Runoff management plans are particularly important and useful for municipalities when program implementation is spread across several departments and/or when municipalities experience staff turnover.⁹⁷ Each Copermittee relies on multiple employees or contractors for program implementation, but the spread of responsibility varies among Copermittees.⁹⁸ Written jurisdictional plans ensure appropriate coordination within each municipality.

Copermittees' runoff management plans are simply descriptions of their runoff management programs required under the Order. These plans serve as procedural correspondence which guides program implementation and aids the Copermittees and Regional Board in tracking implementation of the programs. In this manner, the plans are not functional equivalents of the Order. For these reasons, the Copermittees' runoff management plans need not be an enforceable part of the Order.

The Copermittees' plans and programs can be updated within one year because much of their plans and programs are already in existence. In fact, many parts of their plans and programs have been in place for 15 years. Moreover, the adoption of Order No. R9-2002-01 required a larger scale reorganization of the Copermittees' programs than Tentative Order No. R9-2009-0002, but also allowed one year for program updates. The Copermittees were generally able to meet the time schedule required under Order No. R9-2002-01.

Finding D.1.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.

⁹⁷ Tetra Tech, Inc. 2005. Program Evaluation Report. Orange County Storm Water Program: Cities of Laguna Beach, Laguna Hills, Lake Forest, and Rancho Santa Margarita.

⁹⁸ Responsible departments and employees are described in the 2005-06 Annual Reports for the MS4 programs.

Discussion of Finding D.1.e. The State Board finds in its Order No. WQ 98-01 that BMPs are effective in reducing pollutants in storm water runoff, stating that “implementation of BMPs [is] generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reduction of pollutants to the maximum extent practicable.” A State Board TAC further supports this finding by recommending “that nonpoint source pollution control can be accomplished most effectively by giving priority to [BMPs] in the following order:

1. Pollution Prevention – implementation of practices that use or promote pollution free alternatives;
2. Source Control – implementation of control measures that focus on preventing or minimizing urban runoff from contacting pollution sources;
3. Treatment Control – implementation of practices that require treatment of polluted runoff either onsite or offsite.⁹⁹

Pollution prevention, the reduction or elimination of pollutant generation at its source, is an essential aspect of BMP implementation. Fewer pollutants are available to be washed from developed areas when the generation of pollutants by activities is limited. Thus, pollutant loads in storm water discharges are reduced from these areas. In addition, there is no need to control or treat pollutants that are never generated.¹⁰⁰ Furthermore, pollution prevention BMPs are generally more cost effective than removal of pollutants by treatment facilities or cleanup of contaminated media.^{101,102}

In the Pollution Prevention Act of 1990, Congress established a national policy that emphasizes pollution prevention over control and treatment. CWC section 13263.3(a) also supports pollution prevention, stating “The Legislature finds and declares that pollution prevention should be the first step in a hierarchy for reducing pollution and managing wastes, and to achieve environmental stewardship for society. The Legislature also finds and declares that pollution prevention is necessary to support the federal goal of zero discharge of pollutants into navigable waters.” Finally, the Basin Plan also supports this finding by stating “To eliminate pollutants in storm water, one can either clean it up by removing pollutants or prevent it from becoming polluted in the first place. Because of the overwhelming volume of storm water and the enormous costs associated with pollutant removal, pollution prevention is the only approach that makes sense.”¹⁰³

⁹⁹ State Board, 1994. Urban Runoff Technical Advisory Committee Report and Recommendations. Nonpoint Source Management Program.

¹⁰⁰ Orange County Storm Water Copermittees. 2006. Report of Waste Discharge (San Diego Region).

¹⁰¹ Devinny, J.S. et al. 2004. *Alternative Approaches to Stormwater Quality Control*. Prepared for the Los Angeles Regional Water Quality Control Board. Found as Appendix H to *NPDES Stormwater Cost Survey*. Prepared for the California State Water Resources Control Board by the Office of Water Programs California State University, Sacramento. Available on-line at: <http://www.owp.csus.edu/research/npdes/>

¹⁰² Schueler, T.R., 2000. Center for Watershed Protection. Assessing the Potential for Urban Watershed Restoration, Article 142.

¹⁰³ Regional Board, 1994. Water Quality Control Plan, San Diego Basin, Region 9.

USEPA also supports the utilization of a combination of BMPs to address pollutants in runoff. For example, USEPA has found there has been success in addressing illicit discharge related problems through BMP initiatives like storm drain stenciling and recycling programs, including household hazardous waste special collection days.¹⁰⁴ Structural BMP performance data has also been compiled and summarized by USEPA.¹⁰⁵

The summary provides the performance ranges of various types of structural BMPs for removing suspended solids, nutrients, pathogens, and metals from storm water flows. These pollutants are generally a concern in storm water in the San Diego Region and Orange County.¹⁰⁶ For suspended solids, the least effective structural BMP type was found to remove 30-65 percent of the pollutant load, while the most effective was found to remove 65-100 percent of the pollutant load. For nutrients, the least effective structural BMP type was found to remove 15-45 percent of the pollutant load, while the most effective was found to remove 65-100 percent of the pollutant load. For pathogens, the least effective structural BMP type was found to remove <30 percent of the pollutant load, while the most effective was found to remove 65-100 percent of the pollutant load. For metals, the least effective structural BMP type was found to remove 15-45 percent of the pollutant load, while the most effective was found to remove 65-100 percent of the pollutant load.

Several studies conducted in the last few years have measured the effectiveness of treatment BMPs in southern Orange County. Studies have been conducted on both dry weather and wet weather flows. Each demonstrates that treatment control BMPs can, to varying degrees, remove pollutants from runoff, but that pollution prevention and source control BMPs are necessary to reduce storm water pollutant discharges to the point of supporting water quality objectives in the receiving waters. A partial list of such studies includes:

1. "Assessment of Best Management Practice (BMP) Effectiveness" by the Southern California Coastal Water Research Project (SCCWRP).¹⁰⁷ This project assesses the effectiveness of BMPs in southern California for improving water quality related to toxicity.
2. "Final Report for the Del Obispo Storm Drain Project" by the City of Dana Point.¹⁰⁸ This report assesses the implementation of a solids removal unit and low-flow diversion project.

¹⁰⁴ USEPA, 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. 64 FR 68728.

¹⁰⁵ USEPA, 1999. Preliminary Data Summary of Urban Storm Water Best Management Practices. EPA 821-R-99-012.

¹⁰⁶ Orange County Stormwater Program, Appendix E1 BMP Effectiveness and Applicability for Orange County (updated June 2005).

¹⁰⁷ Jeffrey S. Brown and Steven M. Bay 2005. *Assessment of Best Management Practice (BMP) Effectiveness*. SCCWRP Technical Report 461.

¹⁰⁸ City of Dana Point. 2005. *Final Report for the Del Obispo Storm Drain Project*. Prepared for the State Water Resources Control Board Agreement No. 02-216-550-0.

3. "Final Report for the Alipaz Storm Drain Treatment and Low Flow Diversion Project" by the City of Dana Point.¹⁰⁹ This report assesses the implementation of a solids removal unit and low-flow diversion project.
4. "Final Report for Poche Beach Urban Runoff Ultraviolet Light Bacteria Disinfection Project" by the County of Orange.¹¹⁰ This report assesses the implementation of an ultraviolet system within a box culvert.
5. Final Report for J01P28 Interim Water Quality Improvement Package Plant Best Management Practices.¹¹¹ This report assesses the implementation of an ultraviolet treatment system at an inland waters storm drain outfall.
6. "Final Report for Wetland Capture and Treatment (WetCAT) Network" by the City of Laguna Niguel.¹¹² This report assesses the implementation of constructed wetlands.

Results of these recent studies demonstrate that treatment at the MS4 outfalls for pollutants that have already been discharged *into* the MS4 is generally unlikely to reduce pollutant concentrations to levels that would support water quality objectives. It also demonstrates that non-storm water discharges are occurring into the MS4 that are illicit discharges, exempted discharges that are a source of pollutants and/or discharges under a separate NPDES permit that are in violation of that permit.

It is important to note that the Clean Water Act and NPDES federal regulations clearly require control of discharges into the MS4. Section 402(p)(3)(B)(ii) of the Clean Water Act states that MS4 permits must "prohibit non-storm water discharges into the storm sewers." 40 CFR 122.26(d)(2)(iv)(B) requires Copermittees to "detect and remove [...] illicit discharges and improper disposal into the storm sewer." See Finding C.14 and Discussion.

¹⁰⁹ City of Dana Point. 2004. *Final Report For The Alipaz Storm Drain Treatment And Low Flow Diversion Project* by the City of Dana Point. Prepared for State Water Resources Control Board Agreement Number: 01-068-550-0.

¹¹⁰ Volz, James. 2005. *Final Report for Poche Beach Urban Runoff Ultraviolet Light Bacteria Disinfection Project*. Prepared by the County of Orange for State Water Resources Control Board Agreement No. 01-236-550-1.

¹¹¹ Anderson, Max. 2005. *Final Report: Aliso Beach Clean Beach Initiatives, J01P28 Interim Water Quality Improvement Package Plant Best Management Practices*. Prepared by the County of Orange for State Water Resources Control Board Agreement No. 01-227-550-0.

¹¹² City of Laguna Niguel and CH2MHILL. 2004. *Final Report: Wetland Capture and Treatment (WetCAT) Network*. Prepared for State Water Resources Control Board Agreement No. 01-122-259-0.

The Order's approach to regulating discharges into and from the MS4 is in accordance with State Board Order WQ 2001-15. In that order, the State Board reviewed the San Diego County permit (Order No. 2001-01) requirements and made one change to one prohibition.¹¹³ The Order upheld all other requirements of the current permit. Order No. R9-2009-0002 incorporates the one change made by the State Board, and continues the approach of Order No. 2001-01 (the basis for the current permit), as it was upheld by the State Board in Order WQ 2001-15. State Board Order WQ 2001-15 supports such requirements, stating: "It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control."

The Court of Appeals, Fourth Appellate District, found that the current permit's approach to regulation of discharges into the MS4 was appropriate. Since the Tentative Order utilizes the same approach, the court decision supports the Tentative Order's requirements.

Finding D.1.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 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 unnecessarily result in increased pollutant load discharges, flow rates, and flow durations which can impact receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development generates substantial pollutant loads which are discharged in runoff to receiving waters.

Discussion of Finding D.1.f. MS4 permits are issued to municipalities because of their land use authority. The ultimate responsibility for the pollutant discharges, increased runoff, and inevitable long-term water quality degradation that results from development lies with local governments. This responsibility is based on the fact that it is the local governments that have authorized the development (i.e., conversion of natural pervious ground cover to impervious surfaces) and the land uses that generate the pollutants and runoff. Furthermore, the MS4 through which the pollutants and increased flows are conveyed, and ultimately discharged into natural receiving waters, are owned and operated by the same local governments. In summary, the Copermittees under the Order are responsible for discharges into and out of their MS4s because (1) they own and operate the MS4; and (2) they have the legal authority that authorizes the very development and land uses with generate the pollutants and increased flows in the first place.

¹¹³ The State Board removed the prohibition of discharges *into* the MS4 that cause or contribute to exceedances of water quality objectives. The revision allows for treatment of storm water flows once the pollutants have entered the MS4. It does not affect the effective prohibition on certain dry-weather flows into the MS4 that is required by the Clean Water Act.

For example, since grading cannot commence prior to the issuance of a local grading permit, the Copermittees have a built-in mechanism to ensure that all grading activities are protective of receiving water quality. The Copermittee has the authority to withhold issuance of the grading permit until the project proponent has demonstrated to the satisfaction of the Copermittee that the project will not violate their ordinances or cause the Copermittee to be in violation of its MS4 permit. Since the Copermittee will ultimately be held responsible for any discharges from the grading project by the Regional Board, the Copermittee will want to use its own permitting authority to ensure that whatever measures the Copermittee deems necessary to protect discharges into its MS4 are in fact taken by the project proponent.

The Order holds the local government accountable for this direct link between its land use decisions and water quality degradation. The Order recognizes that each of the three major stages in the development process (development planning, construction, and the use or operational stage) are controlled by and must be authorized by the local government. Accordingly, this permit requires the local government to implement, or require others to implement, appropriate best management practices to reduce storm water pollutant discharges and increased flow during each of the three stages of development.

Including plans for BMP implementation during the design phase of new development and redevelopment offers the most cost effective strategy to reduce storm water runoff pollutant loads to surface waters.¹¹⁴ The Phase II regulations for small municipalities reflect the necessity of addressing runoff during the early planning phase. Due to the greater water quality concerns generally experienced by larger municipalities, Phase II requirements for small municipalities are also applicable to larger municipalities such as the Copermittees. The Phase II regulations direct municipalities to develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale. The program must ensure that controls are in place that would prevent or minimize water quality impacts. This includes developing and implementing strategies which include a combination of structural and/or non-structural BMPs appropriate to the locality. The program must also ensure the adequate long-term operation and maintenance of BMPs.¹¹⁵ USEPA expands on the Phase II regulations for urban development when it recommends that Copermittees:

¹¹⁴ USEPA, 2000. Storm Water Phase II Compliance Assistance Guide. EPA 833-R-00-002.

¹¹⁵ USEPA, 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 68845.

“Adopt a planning process that identifies the municipality’s program goals (e.g., minimize water quality impacts resulting from post-construction runoff from new development and redevelopment), implementation strategies (e.g., adopt a combination of structural and/or non-structural BMPs), operation and maintenance policies and procedures, and enforcement procedures. In developing your program, you should consider assessing existing ordinances, policies, programs and studies that address storm water runoff quality.”

Management of storm water runoff during the construction phase is also essential. USEPA explains in the preamble to the Phase II regulations that storm water discharges generated during construction activities can cause an array of physical, chemical, and biological water quality impacts. Specifically, the biological, chemical and physical integrity of the waters may become severely compromised due to runoff from construction sites. Fine sediment from construction sites can adversely affect aquatic ecosystems by reducing light penetration, impeding sight-feeding, smothering benthic organisms, abrading gills and other sensitive structures, reducing habitat by clogging interstitial spaces within the streambed, and reducing intergravel dissolved oxygen by reducing the permeability of the bed material. Water quality impairment also results, in part, because a number of pollutants are preferentially absorbed onto mineral or organic particles found in fine sediment. The interconnected process of erosion (detachment of the soil particles), sediment transport, and delivery is the primary pathway for introducing key pollutants, such as nutrients, metals, and organic compounds into aquatic systems.¹¹⁶

Finally, storm water and non-storm water runoff from existing development must be addressed. The Copermittees’ monitoring data exhibits that significant water quality problems exist in receiving waters which receive runoff from areas with extensive existing development, such as Aliso Creek. Source identification, BMP requirements, inspections, and enforcement are all important measures which can be implemented to address runoff from existing development. USEPA supports inspections and enforcement by municipalities when it states “Effective inspection and enforcement requires [...] penalties to deter infractions and intervention by the municipal authority to correct violations. Enforcement mechanisms [...] also must be described.”¹¹⁷

Finding D.1.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.

Discussion of Finding D.1.g. The annual reporting requirements are consistent with federal NPDES regulation 40 CFR 122.41, which states:

¹¹⁶ Ibid., 64 FR 68728.

¹¹⁷ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

“The operator of a large or medium municipal separate storm sewer system of a municipal separate storm sewer system that has been designated by the Director under section 122.26(a)(1)(v) of this part must submit an annual report by the anniversary of the date of the issuance of the permit for such a system. The report shall include: (1) The status of implementing the components of the storm water management program that are established as permit conditions; (2) Proposed changes to the storm water management program that are established as permit condition, Such proposed changes shall be consistent with § 122.26(d)(2)iii) of this part; (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under § 122.26(d)(2)iv) and (d)(2)v) of this part; (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; (5) Annual expenditures and budget for year following each annual report; (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; and (7) Identification of water quality improvements or degradation.”

CWC section 13267 provides that “the regional board may require that any person who has discharged [...] shall furnish, under penalty of perjury, technical or monitoring reports which the regional board requires.”

The Regional Board must assess the reports to ensure that the Copermittees’ programs are adequate to assess and address water quality. The reporting requirements can also be useful tools for the Copermittees to review, update, or revise their programs. Areas or issues which have received insufficient efforts can also be identified and improved.

Finding D.1.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. SALs express an integration of the adequacy/inadequacy of programmatic measures and BMPs required in this Order.

Discussion of Finding D.1.h. Section 402(p) of the CWA states MS4 permits for storm water 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. This includes requiring numeric effluent limitations for storm water.

SALs are not numeric effluent limitations, which is reflected in language which clarifies an excursion above a SAL does not create a presumption that MEP is not being met. Instead, a SAL exceedance is to be used by the Copermittee as an indication that the MS4 storm water discharge point is a definitive "bad actor," and the result from the monitoring needs to be considered as part of the iterative process for reducing pollutants in storm water to the MEP.

The CWA defines effluent limitations as:

"Any restriction imposed by the Director on quantities, discharge rates, and concentrations of pollutants which are "discharged" from "point sources" into "waters of the United States"..." A SAL is not a restriction on a quantity, rate or concentration, but is a level at which actions that further reduce pollutants from that discharge point need to be evaluated in order to reduce storm water pollutants to the MEP. Thus, SALs are not effluent limitations as defined by the CWC or CWA.

The approach of using "action levels" is consistent with recommendations made by USEPA in their Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, dated August 26, 1996:

"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". As such, these action levels are not considered numeric water quality-based effluent limitations.

It should be noted that a purpose of monitoring, required under this and previous Orders, is to aid in the evaluation of implemented programs and BMPs in reducing pollutants in storm water discharges to the MEP. The tentative Monitoring and Reporting Program states:

This Receiving Waters and Runoff Monitoring and Reporting Program is intended to meet the following goals:

2. Measure and improve the effectiveness of the Permittees' runoff management programs;
 3. Assess the chemical, physical, and biological impacts to receiving waters resulting from runoff discharges;
 4. Characterize runoff discharges;
 5. Identify sources of specific pollutants;
 6. Prioritize drainage and sub-drainage areas that need management actions;
- and

9. Provide information to implement required BMP improvements.

For the past 4 permit cycles (19 years), Copermittees have utilized non-numerical limitations (BMPs) to control and abate the discharge of any pollutants in storm water discharges to the MEP. Copermittees have been accorded 19 years to research, develop, and deploy BMPs that are capable of reducing storm water discharges from the MS4 to levels represented in SALs. Storm Water Action Levels are set at such a level that any exceedance of a SAL will clearly indicate BMPs being implemented are insufficient to protect the Beneficial Uses of waters of the State. Copermittee shall utilize the exceedance information as a high priority consideration when adjusting and executing annual work plans, as required by this Permit. Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not complied to the MEP.

SALs have been developed utilizing Phase I storm water effluent data (updated February 2008, <http://rpitt.eng.ua.edu/Research/ms4/mainms4.shtml>) from the arid west region (USEPA Rain Zone 6). USEPA Rainfall Zone 6, which includes MS4 effluent data from Orange, San Diego, Los Angeles and Ventura County. While the County of Orange has a large monitoring data set, Regional Board staff have concluded that there is a lack of effluent monitoring from major outfalls that are representative of conditions throughout the Region. The approach taken to derive SALs is a straightforward percentile approach, with the SAL being set as the 90th percentile of the dataset for each constituent. This approach is consistent with the 2006 State Board Panel Report:

"The statistically based population approach would once again rely on the average distribution of measured water quality values developed from many water quality samples taken for many events at many locations. In this case, however, the Action Level would be defined by the central tendency and variance estimates from the population data. For example, the Action Level could be set as two standard deviations above the mean, i.e. if measured concentrations are consistently higher than two standard deviations above the mean, an Action Level would be triggered. Other population based measures of central tendency could be used (i.e. geomean, median, etc.) or estimates of variance (i.e. prediction intervals, etc.). Regardless of which population based estimators are used (or percentile from above), the idea would be to identify the [statistically derived] point at which managers feel concentrations are significantly beyond the norm."

SALs are a measurable criteria which quantifies the performance of BMPs for a particular watershed or subwatershed that discharges storm water MS4 effluent from that particular discharge point. Thus, Copermittees can utilize SAL results to determine the effectiveness BMPs on the effluent from a particular area of the MS4.

SALs represent the lowest 10 percent of pollutant reduction for USEPA Rain Zone 6 MS4 Phase I programs discharging to waters of the United States. For the past 4

permit cycles (19 years), Copermittees have utilized non-numerical limitations (BMPs) to control and abate the discharge of any pollutants in storm water discharges to the MEP. Copermittees have been accorded 19 years to research, develop, and deploy BMPs that are capable of reducing storm water discharges from the MS4 to levels represented in SALs. Storm Water Action Levels are set at such a level that any exceedance of a SAL will indicate to the Copermittee(s) that the discharge is within the lowest 10% of monitored outfalls. Therefore, an exceedance of a SAL warrants priority consideration within the Copermittee iterative process.

Finding D.2.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.

Discussion of Finding D.2.a. The post-construction requirements and design standards contained in the SSMP section of Order No. R9-2009-0002 constitute MEP consistent with State Board guidance, court decisions, and Regional Board requirements. The State Board and Regional Boards have made several recent decisions in regards to inclusion of SSMP requirements in MS4 permits. In a precedential decision, State Board WQ Order No. 2000-11, the State Board found that the SSMP provisions constitute MEP for addressing storm water pollutant discharges resulting from Priority Development Projects. The provisions of the SSMP section of the Order are also consistent with those previously issued by the Regional Board for Orange County (Order No. R9-2002-0001) and San Diego County (Order Nos. R9-2001-01 and R9-2007-0001), as well as requirements in the Los Angeles County MS4 permit (Order No. R4-2001-182). In State Board Order WQ 2001-15, the State Board reaffirmed that SSMP requirements constitute MEP. Moreover, the SSMP requirements of the San Diego County MS4 permit (Order No. R9-2001-01) were upheld when the California State Supreme Court declined to hear the matter on appeal.

Finding D.2.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.

Discussion of Finding D.2.b. Many end-of-pipe BMPs are designed for low flow conditions because their end-of-pipe location prevents them from being designed for large storm events. This results in the end-of-pipe BMPs being overwhelmed, bypassed, or ineffective during larger storm events more frequently than onsite BMPs designed for larger storms. BMPs are also frequently most effective for a particular type of pollutant (such as sediment). Such BMPs may be appropriate for small sites with a limited suite of pollutants generated; however, end-of-pipe BMPs must typically be able to address a wide range of pollutants generated by a sub-watershed, limiting their effectiveness and/or increasing costs. Moreover, the location of some end-of-pipe BMPs allow for untreated pollutants to be discharged to and degrade receiving waters prior to their reaching the BMPs. This fails to protect receiving waters, which is the purpose of BMP implementation. In addition, opportunities to educate the public regarding runoff pollution can be lost when end-of-pipe BMPs are located away from pollutant sources and out of sight. Onsite BMPs can lead to a better public understanding of runoff issues since their presence can provide a visible and/or tangible lesson in pollution prevention.

Finding D.2.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.

Discussion of Finding D.2.c. The Clean Water Act (CWA) is the cornerstone of surface water quality protection in the United States. (The Act does not deal directly with ground water nor with water quantity issues.) The statute employs a variety of regulatory and nonregulatory tools to sharply reduce direct pollutant discharges into

waterways, and manage polluted runoff. These tools are employed to achieve the broader goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters so that they can support the protection and propagation of fish, shellfish, wildlife and recreation in and on the water.

Increasing the volume, velocity, frequency and discharge duration of storm water runoff from developed areas will eventually greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads and volume while simultaneously increasing impervious area. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by naturally vegetated soil. Furthermore, impervious surfaces tend to concentrate pollutants on the top of the surface that are then washed off into the MS4 and waters of the State in a concentrated manner. The use of Low-Impact Development (LID) site design BMPs can be an effective means of minimizing the impact of runoff discharges on receiving waters. By reducing water pollution, reducing runoff and increasing groundwater recharge, LID helps to improve the quality of receiving surface waters, stabilize the flow rates of receiving waters (preventing downstream hydromodification), reduce downstream flooding and protect and enhance water supply sources. Current runoff management, knowledge, practice and technology has resulted in the use of LID BMPs as an acceptable means of meeting the MEP standard for storm water treatment.

Current municipal codes may oppose or hinder the design, use and implementation of specific elements of LID. These codes include, but are not limited to, emergency services access requirements, building landscape ordinances, building height limits and parking space requirements. It is essential for Copermittees to work with other responsible agencies and/or update codes that have the potential to impact the use of LID.

The Local Government Commission, a non-profit organization working to build livable communities, developed a set of principles known as the *Ahwahnee Water Principles for Resource-Efficient Land Use*¹¹⁸ that provide the opportunity to reduce costs and improve the reliability and quality of our water resources. Implementation of LID incorporates several of the Ahwahnee principles such as:

1. "Community Design should be compact, mixed use, walkable and transit-oriented so that urban runoff pollutants are minimized and the open lands that absorb water are preserved to the maximum extent possible."
3. "Water holding areas such as creek beds, recessed athletic fields, ponds, cisterns, and other features that serve to recharge groundwater, reduce runoff, improve water quality and decrease flooding should be incorporated into the urban landscape."

¹¹⁸ Local Government Commission, "The Ahwahnee Water Principles – A Blueprint for Regional Sustainability", http://water.lgc.org/Members/tony/docs/lgc_water_guide.pdf

4. "All aspects of landscaping from the selection of plants to soil preparation and the installation of irrigation systems should be designed to reduce water demand, retain runoff, decrease flooding, and recharge groundwater."
5. "Permeable surfaces should be used for hardscape. Impervious surfaces such as driveways, streets, and parking lots should be minimized so that land is available to absorb storm water, reduce polluted urban runoff, recharge groundwater and reduce flooding."

The use of LID site design BMPs helps reduce the amount of impervious area associated with development and allows storm water to infiltrate into the soil. Natural vegetation and soil filters storm water runoff and reduces the volume and pollutant loads of storm water. Studies have revealed that the level of imperviousness resulting from development and urbanization is strongly correlated with the water quality impairment of nearby receiving waters.¹¹⁹ In many cases, the impacts on receiving waters due to changes in hydrology can be more significant than those attributable to the contaminants found in storm water discharges.¹²⁰ These impacts include stream bank erosion (increased sediment load and subsequent deposition), benthic habitat degradation, and decreased diversity of macroinvertebrates. Although conventional BMPs do reduce storm water pollutant loads, they may not effectively control adverse effects from changes in the discharge hydrologic conditions.¹²¹

The Order includes requirements for developments to include site design BMPs that mimic or replicate the natural hydrologic cycle. Open space designs which maximize pervious surfaces and retention of "natural" drainages have been found to reduce both the costs of development and pollutant export.¹²² Moreover, USEPA finds including plans for a "natural" site design and BMP implementation during the design phase of new development and redevelopment offers the most cost effective strategy to reduce storm water pollutant loads to surface waters.¹²³ In addition, a recent U.S. Department of Housing and Urban Development guidance document on low-impact development notes that the use of LID-based storm water management design allows land to be developed, but in a cost-effective manner that helps mitigate potential environmental impacts.¹²⁴

¹¹⁹ USEPA, 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.
¹²⁰ Ibid.

¹²¹ USEPA, 2000. Low-Impact Development: A literature review. EPA-841-B-00-005. 35p.

¹²² Center for Watershed Protection, 2000. "The Benefits of Better Site Design in Residential Subdivisions." Watershed Protection Techniques. Vol. 3. No. 2.

¹²³ USEPA, 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.

¹²⁴ U.S. Department of Housing and Urban Development, Office of Policy Development and Research, 2003. "The Practice of Low Impact Development." Prepared by: NAHB Research Center, Inc. Upper Marlboro, Maryland. Contract No. H-21314CA. 131p.

Finding D.2.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.

Discussion of Finding D.2.d. RGOs are included in the Order as a Priority Development Project category because RGOs produce significantly greater loadings of hydrocarbons and trace metals (including copper and zinc) than other developed areas. To meet the storm water MEP standard, source control and structural treatment BMPs are needed at RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) an ADT of 100 or more vehicles per day. These are appropriate thresholds since vehicular development size and volume of traffic are good indicators of potential impacts of storm water runoff from RGOs on receiving waters.

This finding has been added to satisfy State Board WQ Order No. 2000-11's requirements for including RGOs as a Priority Development Category. Order No. 2000-11 acknowledged that a threshold (size, average daily traffic, etc.) appropriate to trigger SSMP requirements should be developed for RGOs and that specific findings regarding RGOs should be included in MS4 permits to justify the requirement.¹²⁵ Additional detail to support the inclusion of RGOs can be found in the Fact Sheet discussion of Section D.1.d.2.j.

Finding D.2.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.

¹²⁵ State Board, 2000. Order WQ 2000-11. In the Matter of the Petitions of The Cities Of Bellflower, Et Al., The City Of Arcadia, And Western States Petroleum Association Review of January 26, 2000 Action of the Regional Board And Actions and Failures to Act by both the California Regional Water Quality Control Board, Los Angeles Region and Its Executive Officer Pursuant to Order No. 96-054, Permit for Municipal Storm Water and Urban Run-Off Discharges Within Los Angeles County [NPDES NO. CAS614001] SWRCB/OCC FILES A-1280, A-1280(a) and A-1280(b)

Discussion of Finding D.2.e. Industrial sites can be a significant source of pollutants in storm water runoff. In an extensive review of storm water literature, the LARWQCB found widespread support for the finding that "industrial and commercial activities can also be considered hot spots as sources of pollutants." It also found that "industrial and commercial areas were likely to be the most significant pollutant source areas" of heavy metals.¹²⁶ Likewise, storm water runoff from heavy industry in the Santa Clara Valley has been found to be extremely toxic.¹²⁷ These findings are corroborated by USEPA, which states in the preamble to the 1990 Phase I NPDES storm water regulations that "Because storm water from industrial facilities may be a major contributor of pollutants to municipal separate storm sewer systems, municipalities are obligated to develop controls for storm water discharges associated with industrial activity through their system in their storm water management program." Since heavy industrial sites can be a significant source of pollutants in runoff in a manner similar to other SSMP project categories such as commercial development or automotive repair shops, it is appropriate to include heavy industrial sites as a SSMP category in the Order.

The Phase I NPDES storm water regulations require the Copermittees to "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" (40 CFR 122.26(d)(2)(i)). In addition, it has been established that the MEP standard for the control of storm water runoff from new development projects includes incorporation of the SSMP requirements. Since the Copermittees must both control storm water pollutants from industrial sites and meet the storm water MEP standard for new development, it is appropriate to apply the SSMP requirements to heavy industrial sites.

The State Board's Order WQ 2000-11 indicates that it is appropriate to apply SSMP requirements to categories of development where evidence shows the category of development can be a significant source of pollutants. As evidenced above, heavy industrial sites can be a significant source of pollutants. Therefore, the Order includes heavy industrial sites as a SSMP Priority Development Project category.

¹²⁶ Los Angeles Regional Water Quality Control Board. 2001.

¹²⁷ Schueler and Holland, 2000. Storm Water Strategies for Arid and Semi-Arid Watersheds (Article 66). The Practice of Watershed Protection.

Finding D.2.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). However, proper BMP design and maintenance to avoid standing water 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.

Discussion of Finding D.2.f. The implementation of certain structural BMPs or other runoff treatment systems can result in significant vector problems in the form of increased breeding or harborage habitat for mosquitoes, rodents or other potentially disease transmitting organisms. The implementation of BMPs that retain water may provide breeding habitat for a variety of mosquito species, some of which have the potential to transmit diseases such as Western Equine Encephalitis, St. Louis Encephalomyelitis, and malaria. Recent BMP implementation studies by Caltrans¹²⁸ in District 7 and District 11 have demonstrated mosquito breeding associated with some types of BMPs. The Caltrans BMP Retrofit Pilot study cited lack of maintenance and improper design as factors contributing to mosquito production. However, a Watershed Protection Techniques article describes management techniques for selecting, designing, and maintaining structural treatment BMPs to minimize mosquito production.¹²⁹ State and local runoff management programs that include structural BMPs with the potential to retain water have been implemented in Florida and the Chesapeake Bay region without resulting in significant public health threats from mosquitoes or other vectors.¹³⁰

Finding D.2.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 allow 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.

¹²⁸ Caltrans, 2000. BMP Retrofit Pilot Studies: A Preliminary Assessment of Vector Production.

¹²⁹ Watershed Protection Techniques, 1995. Mosquitoes in Constructed Wetlands: A Management Bugaboo? 1(4):203-207.

¹³⁰ Shaver, E. and R. Baldwin, 1995. Sand Filter Design for Water Quality Treatment in Herricks, E., Ed. Stormwater Runoff and Receiving Systems: Impact, Monitoring, and Assessment, CRC Lewis Publishers, New York, NY.

Discussion of Finding D.2.g. Increasing the volume, velocity, frequency and discharge duration of storm water runoff from developed areas will eventually greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads and volume while simultaneously increasing impervious area. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by naturally vegetated soil.

Historic hydromodification impacts, such as concrete lining and channelization, have impacted the natural physical habitat of urban streams resulting in low Index of Biotic Integrity (IBI) scores. The Copermittee's 2006-2007 monitoring indicated decreased IBI scores in the developed watersheds. In the absence of water chemistry and toxicity impacts, these low scores were attributed to be a result of poor physical habitat conditions.¹³¹

Hydromodification impacts result in poor physical habitat conditions through streambed scour, erosion, vegetation displacement, sediment deposition, channelization and channel modifications. Increased sediment loads from hydromodification causes other impacts to physical habitats including increased turbidity which then may cause increased temperatures. In addition, an increased sediment load may have an increased biological content thereby increasing the sediment oxygen demand and lowering the dissolved oxygen available for aquatic life.¹³²

The objective of the CWA is "to restore and maintain the chemical, *physical*, and biological integrity of the Nation's waters (emphasis added)." Stream restoration by removing concrete and other unnatural materials is a major step toward achieving that objective. The success of future stream restoration and stabilization is, however, dependent on preventing and reducing physical impacts from activities upstream. Therefore, hydromodification management measures are necessary upstream of modified (e.g. concrete, rip rap, etc.) channels in addition to non-modified channels.

Please see discussion of Findings C.10 and C.11.

¹³¹ Orange County Copermittees, November 15, 2007. 2006-2007 Unified Annual Progress Report Program Effectiveness Assessment (San Diego Region).

¹³² USEPA, National Management Measures to Control Nonpoint Source Pollution from Hydromodification, EPA 841-B-07-002, July 2007.

Finding D.3.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). 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.

Discussion of Finding D.3.a. USEPA finds the control of pollutant discharges from industry and construction so important to receiving water quality that it has established a double system of regulation over industrial and construction sites. This double system of regulation consists of two parallel regulatory systems with the same common objective: to keep pollutants from industrial and construction sites out of the MS4. In this double system of regulation for runoff from industrial and construction sites, local governments must enforce their legal authorities (i.e., local ordinances and permits) while the Regional Board must enforce its legal authority (i.e., statewide general industrial and construction storm water permits). These two regulatory systems are designed to complement and support each other. Municipalities are not required to enforce Regional Board and State Board permits; however, they are required to enforce their ordinances and permits. The Federal regulations are clear that municipalities have responsibility to prevent non-storm water and address storm water runoff from industrial and construction sites which enters their MS4s.

Municipalities have this responsibility because they have the authority to issue land use and development permits. Since municipalities are the lead permitting authority for industrial land use and construction activities, they are also the lead for enforcement regarding runoff discharges from these sites. For sites where the municipality is the lead permitting authority, the Regional Board will work with the municipality and provide support where needed. The Regional Board will assist municipalities in enforcement against non-compliant sites after the municipality has exhibited a good faith effort to bring the site into compliance.

According to USEPA, the storm water regulations envision that NPDES permitting authorities and municipal operators will cooperate to develop programs to monitor and control pollutants in storm water discharges from industrial facilities.¹³³ USEPA discusses the “dual regulation” of construction sites in its Storm Water Phase II Compliance Assistance Guide, which states “Even though all construction sites that disturb more than one acre are covered nationally by an NPDES storm water permit, the construction site runoff control minimum measure [...] is needed to induce more localized site regulation and enforcement efforts, and to enable operators [...] to more effectively control construction site discharges into their MS4s.”¹³⁴ While the Storm Water Phase II Compliance Assistance Guide applies to small municipalities, it is applicable to the Copermittees, because they are similar in size and have the potential to discharge similar pollutant types as Phase II municipalities.

Finding D.3.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.

Discussion of Finding D.3.b. Source identification is necessary to characterize the nature and extent of pollutants in discharges and to develop appropriate BMPs. It is the first step in a targeted approach to runoff management. Source identification helps identify the location of potential sources of pollutants in runoff. Pollutants found to be present in receiving waters can then be traced to the sites which frequently generate such pollutants. In this manner source inventories can help to target inspections, monitoring, and potential enforcement. This allows for limited inspection, monitoring, and enforcement time to be most effective. USEPA supports source identification as a concept when it recommends construction, municipal, and industrial source identification in guidance and the federal regulations.^{135,136}

¹³³ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

¹³⁴ USEPA, 2000. Storm Water Phase II Compliance Assistance Guide. EPA 833-R-00-002.

¹³⁵ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

¹³⁶ 40 CFR 122.26(d)(2)(ii)

The development of BMPs for identified sources will help ensure that appropriate, consistent controls are implemented at all types of development and areas. Copermittees must reduce the discharge of pollutants in storm water runoff to the maximum extent practicable. To achieve this level of pollutant reduction, BMPs must be implemented. Designation of minimum BMPs helps ensure that appropriate BMPs are implemented for various sources. These minimum BMPs also serve as guidance as to the level of water quality protection required. USEPA requires development and implementation of BMPs for construction, municipal, commercial, industrial, and residential sources at 40 CFR 122.26(d)(2)(iv)(A-D).

Updating ordinances and approval processes is necessary in order for the Copermittees to control discharges to their MS4s. USEPA supports updating ordinances and approval processes when it states "A crucial requirement of the NPDES storm water regulation is that a municipality must demonstrate that it has adequate legal authority to control the contribution of pollutants in storm water discharged to its MS4. [...] In order to have an effective municipal storm water management program, a municipality must have adequate legal authority to control the contribution of pollutants to the MS4. [...] 'Control,' in this context, means not only to require disclosure of information, but also to limit, discourage, or terminate a storm water discharge to the MS4."¹³⁷

Inspections provide a necessary means for the Copermittees to evaluate compliance of pollutant sources with their municipal ordinances and minimum BMP requirements. USEPA supports inspections when it recommends inspections of construction, municipal, and industrial sources.¹³⁸ Inspection of high risk sources are especially important because of the ability of frequent inspections to help ensure compliance, thereby reducing the risk associated with such sources. USEPA suggests that inspections can improve compliance when it states "Effective inspection and enforcement requires [...] penalties to deter infractions and intervention by the municipal authority to correct violations."¹³⁹

Finding D.3.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.

¹³⁷ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

¹³⁸ Ibid.

¹³⁹ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

Discussion of Finding D.3.c. An MS4 is defined in the federal regulations as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains), owned or operated by a Copermittee, and designed or used for collecting or conveying runoff.¹⁴⁰ Natural drainage patterns and urban streams are frequently used by municipalities to collect and convey runoff away from development within their jurisdiction. Therefore, the Regional Board considers natural drainages that are used for conveyances of runoff, regardless of whether or not they've been altered by the municipality, as both part of the MS4s and as receiving waters. To clarify, an unaltered natural drainage, which receives runoff from a point source (channeled by a Copermittee to drain an area within their jurisdiction), which then conveys the runoff to an altered natural drainage or a man-made MS4, is both an MS4 and a receiving water.¹⁴¹

Finding D.3.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.

¹⁴⁰ USEPA, 2000. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System. Code of Federal Regulations, Vol. 40, Part 122.

¹⁴¹ Regional Board, 2001. Response in Opposition to Petitions for Review of California Regional Water Quality Control Board San Diego Region Order No. 2001-01 – NPDES Permit No. CAS0108758 (San Diego Municipal Storm Water Permit).

Discussion of Finding D.3.d. CWA section 402(p) requires operators of MS4s to prohibit non-storm water discharges into their MS4s. This is necessary because pollutants which enter the MS4 generally are conveyed through the MS4 to be eventually discharged into receiving waters. If a municipality does not prohibit non-storm water discharges, it is providing the pathway (its MS4) which enables pollutants to reach receiving waters. Since the municipality's storm water management service can result in pollutant discharges to receiving waters, the municipality must accept responsibility for the water quality consequences resulting from this service. Furthermore, third party discharges can cause a municipality to be out of compliance with its permit. Since pollutants from third parties which enter the MS4 will eventually be discharged from the MS4 to receiving waters, the third party discharges can result in a situation of municipality non-compliance if the discharges lead to an exceedance of water quality standards. For these reasons, each Copermittee must prohibit and/or control discharges from third parties to its MS4. USEPA supports this concept when it states "the operators of regulated small MS4s cannot passively receive and discharge pollutants from third parties" and "the operator of a small MS4 that does not prohibit and/or control discharges into its system essentially accepts 'title' for those discharges. At a minimum, by providing free and open access to the MS4s that convey discharges to the waters of the United States, the municipal storm sewer system enables water quality impairment by third parties."¹⁴²

Finding D.3.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.

Discussion of Finding D.3.e. When rain falls and drains freeways, industries, construction sites, and neighborhoods, it picks up a multitude of pollutants. Gravity flow transports the pollutants to the MS4. Illicit discharges and connections also can contribute a significant amount of pollutants to MS4s. MS4s are commonly designed to convey their contents as quickly as possible. Due to the resulting typically high flow rates within the concrete conveyance systems of MS4s, pollutants which enter or are deposited in the MS4 and not removed are generally flushed unimpeded through the MS4 to waters of the United States. Since treatment generally does not occur within the MS4, in such cases reduction of storm water pollutants to the MEP must occur prior to discharges entering the MS4.

¹⁴² Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68765-68766.

The importance of this concept is supported by the tons of wastes/pollutants that have been removed from the Copermittees' MS4s as reported in their ROWD.¹⁴³ Moreover, these pollutants will be discharged into receiving waters unless an effective MS4 and structural treatment BMP maintenance program is implemented by the Copermittees. The requirement for Copermittees to conduct a MS4 maintenance program is specifically directed in both the Phase I and Phase II storm water regulations. Regarding MS4 cleaning, USEPA states "The removal of sediment, decaying debris, and highly polluted water from catch basins has aesthetic and water quality benefits, including reducing foul odors, reducing suspended solids, and reducing the load of oxygen-demanding substances that reach receiving waters."¹⁴⁴ It goes on to say, "Catch basin cleaning is an efficient and cost-effective method for preventing the transport of sediment and pollutants to receiving water bodies." USEPA also finds that "Lack of maintenance often limits the effectiveness of storm water structural controls such as detention/retention basins and infiltration devices. [...] The proposed program should provide for maintenance logs and identify specific maintenance activities for each class of control, such as removing sediment from retention ponds every five years, cleaning catch basins annually, and removing litter from channels twice a year."¹⁴⁵

Finding D.3.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.

¹⁴³ Orange County Storm Water Copermittees. 2006. Report of Waste Discharge (San Diego Region).

¹⁴⁴ USEPA, 1999. Storm Water O&M Fact Sheet, Catch Basin Cleaning. EPA 832-F-99-011.

¹⁴⁵ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

Discussion of Finding D.3.f. The Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A – D) are clear in placing responsibility on municipalities for control of runoff from third party activities and land uses to their MS4.¹⁴⁶ In order for municipalities to assume this responsibility, they must implement ordinances, permits, and plans addressing runoff from third parties. Assessments for compliance with their ordinances, permits, and plans are essential for a municipality to ensure that third parties are not causing the municipality to be in violation of its municipal storm water permit. When conditions of non-compliance are determined, enforcement is necessary to ensure that violations of municipality ordinances and permits are corrected. When the Copermittees determine a violation of its storm water ordinance, it must pursue correction of the violation. Without enforcement, third parties do not have incentive to correct violations. USEPA supports enforcement by municipalities when it states “Effective inspection and enforcement requires [...] penalties to deter infractions and intervention by the municipal authority to correct violations. Enforcement mechanisms [...] also must be described.”¹⁴⁷

Education is a critical BMP and an important aspect of runoff management programs. USEPA finds that “An informed and knowledgeable community is critical to the success of a storm water management program since it helps ensure the following: Greater support for the program as the public gains a greater understanding of the reasons why it is necessary and important, [and] greater compliance with the program as the public becomes aware of the personal responsibilities expected of them and others in the community, including the individual actions they can take to protect or improve the quality of area waters.”¹⁴⁸

Regarding target audiences, USEPA also states “The public education program should use a mix of appropriate local strategies to address the viewpoints and concerns of a variety of audiences and communities, including minority and disadvantaged communities, as well as children.”

Finding D.3.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.

Discussion of Finding D.3.g.

This finding is supported by the Phase II Storm Water Regulations, which state “early and frequent public involvement can shorten implementation schedules and broaden public support for a program.” USEPA goes on to explain, “Public participation is likely to ensure a more successful storm water program by providing valuable expertise and a conduit to other programs and governments.”¹⁴⁹

¹⁴⁶ USEPA, 2000. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System. Code of Federal Regulations, Vol. 40, Part 122.

¹⁴⁷ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA/833-B-92-002.

¹⁴⁸ USEPA, 2000. Storm Water Phase II Compliance Assistance Guide. EPA 833-R-00-002.

¹⁴⁹ Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68755.

Finding D.3.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.

Discussion of Finding D.3.h. Existing BMPs are not sufficient to protect the Beneficial Uses of receiving waters from storm water MS4 discharges, as evidenced by 303(d) listings and exceedances of Water Quality Objectives from the Copermittees monitoring reports. Implementing more advanced BMPs, including the retrofitting of existing development with LID, is part of the iterative process. Based on the current rate of redevelopment compared to existing BMPs, the use of LID only on new and redevelopment will not adequately address current water quality problems, including downstream hydromodification. Retrofitting existing development is practicable for a municipality through a systematic evaluation, prioritization and implementation plan focused on impaired water bodies, pollutants of concern, areas of downstream hydromodification, feasibility and effective communication and cooperation with private property owners.

Finding D.4.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.

Discussion of Finding D.4.a. In recent years, addressing water quality issues from a watershed perspective has increasingly gained attention. Regarding watershed-based permitting, the USEPA *Watershed-Based NPDES Permitting Policy Statement* issued on Jan. 7, 2004 states the following:

USEPA continues to support a holistic watershed approach to water quality management. The process for developing and issuing NPDES permits on a watershed basis is an important tool in water quality management. USEPA believes that developing and issuing NPDES permits on a watershed basis can benefit all watershed stakeholders, from the NPDES permitting authority to local community members. A watershed-based approach to point source permitting under the NPDES program may serve as one innovative tool for achieving new efficiencies and environmental results. USEPA believes that watershed-based permitting can:

- Lead to more environmentally effective results;
- Emphasize measuring the effectiveness of targeted actions on improvements in water quality;
- Provide greater opportunities for trading and other market based approaches;
- Reduce the cost of improving the quality of the nation's waters;
- Foster more effective implementation of watershed plans, including total maximum daily loads (TMDLs); and
- Realize other ancillary benefits beyond those that have been achieved under the CWA (e.g., facilitate program integration including integration of clean water act and safe drinking water act programs).

Watershed-based permitting is a process that ultimately produces NPDES permits that are issued to point sources on a geographic or watershed basis. In establishing point source controls in a watershed-based permit, the permitting authority may focus on watershed goals, and consider multiple pollutant sources and stressors, including the level of nonpoint source control that is practicable. In general, there are numerous permitting mechanisms that may be used to develop and issue permits within a watershed approach.

This USEPA guidance is in line with State Board and Regional Board watershed management goals. For example, the State Board's TAC recommends watershed-based water quality protection, stating "Municipal permits should have watershed specific components." The TAC further recommends that "All NPDES permits and Waste Discharge Requirements should be considered for reissuance on a watershed basis."

In addition, the Basin Plan states that "public agencies and private organizations concerned with water resources have come to recognize that a comprehensive evaluation of pollutant contributions on a watershed scale is the only way to realistically assess cumulative impacts and formulate workable strategies to truly protect our water resources. Both water pollution and habitat degradation problems can best be solved by following a basin-wide approach."

In light of USEPA's policy statement and the State Board's and Regional Board's watershed management goals, the Regional Board seeks to expand watershed management in the regulation of runoff from the MS4. Watershed-based MS4 permits can provide for more effective receiving water quality protection by focusing on specific water quality problems. The entire watershed for the receiving water can be assessed, allowing for critical areas and practices to be targeted for corrective actions. Known sources of pollutants of concern can be investigated for potential water quality impacts. Problem areas can then be addressed, leading to eventual improvements in receiving water quality. Management of runoff on a watershed basis allows for specific water quality problems to be targeted so that efforts result in maximized water quality improvements.¹⁵⁰

Finding D.4.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.

Discussion of Finding D.4.b. Copermittees in Orange County participate in several runoff-related activities whose scope extends beyond the area subject to this Order. These include countywide activities (e.g., portions of Orange County fall under the jurisdiction of the Santa Ana Regional Board), southern California, and statewide activities. Copermittees' participation in these regional activities is generally directed at improving management capability, preventing redundancy and taking advantage of economies of scale. For instance, Copermittees seek to develop consistency between watershed and/or jurisdictional programs (e.g., through standards development), and to collaborate on certain program activities such as education, training, and monitoring. The Copermittees report agreeing that jurisdictional, watershed, and regional programs cannot be effectively developed and implemented in isolation. In addition, the Copermittees, through WRMP implementation efforts, have learned that many watershed activities can be more effectively implemented (e.g., achieve more water quality benefits) at the regional level due to economies of scale and agree watershed protection should be increasingly emphasized as a focal point of Copermittee efforts under the re-issued Permit.¹⁵¹

Finding D.4.c. It is important for the Copermittees to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittee coordination with other watershed stakeholders, especially Caltrans, the Department of Defense, and water and sewer districts, is also important.

¹⁵⁰ Regional Board, 2004. San Diego County Municipal Storm Water Permit Reissuance Analysis Summary. P. 1.

¹⁵¹ Orange County Storm Water Copermittees. 2006. Report of Waste Discharge (San Diego Region).

Discussion of Finding D.4.c. Conventional planning and zoning can be limited in their ability to protect the environmental quality of creeks, rivers, and other waterbodies. Watershed-based planning is often ignored, despite the fact that receiving waters unite land by collecting runoff from throughout the watershed. Since watersheds unite land, they can be used as an effective basis for planning. Watershed-based planning enables local and regional areas to realize economic, social, and other benefits associated with growth, while conserving the resources needed to sustain such growth, including water quality.

This type of planning can involve four steps: (1) Identify the watersheds shared by the participating jurisdictions; (2) Identify, assess, and prioritize the natural, social, and other resources in the watersheds; (3) Prioritize areas for growth, protection, and conservation, based on prioritized resources; and (4) Develop plans and regulations to guide growth and protect resources. Local governments have started with simple, yet effective, steps toward watershed planning, such as adopting a watershed-based planning approach, articulating the basic strategy in their General Plans, and beginning to pursue the basic strategy in collaboration with neighboring local governments who share the watersheds. Examples of new mechanisms created to facilitate watershed-based planning and zoning include the San Francisquito Creek Watershed Coordinated Resource Management Process and the Santa Clara Basin Watershed Management Initiative.¹⁵²

¹⁵² Bay Area Stormwater Management Agencies Association., 1999. Start at the Source. Forbes Custom Publishing. Available on-line at: http://www.scvurppp-w2k.com/basmaa_satsm.htm

E. Statute and Regulatory Considerations

Finding E.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 limitations 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.

Discussion of Finding E.1. The RWLs in the Order require storm water compliance with water quality standards through an iterative approach for implementing improved and better-tailored BMPs over time. The iterative BMP process requires the implementation of increasingly stringent BMPs until receiving water standards are achieved. This is necessary because implementation of BMPs alone cannot ensure attainment of receiving water quality standards. For example, a BMP that is effective in one situation may not be applicable in another. An iterative process of BMP development, implementation, and assessment is needed to promote consistent compliance with receiving water quality objectives. If assessment of a given BMP confirms that the BMP is ineffective, the iterative process should be restarted, with redevelopment of a new BMP that is anticipated to result in compliance with receiving water quality objectives.

The issue of whether storm water discharges from MS4s must meet water quality standards has been intensely debated in past years. The argument arises because CWA section 402(p) fails to clearly state that municipal dischargers of storm water must meet water quality standards. On the issue of industrial discharges of storm water, the statute clearly indicates that industrial dischargers must meet both (1) the technology-based standard of "best available technology economically achievable (BAT)" and (2) applicable water quality standards. On the issue of municipal discharges however, the statute states that municipal dischargers must meet (1) the technology-based standard of "MEP" and (2) "such other provisions that the Administrator or the State determines appropriate for the control of such pollutants." The statute fails, however, to specifically state that municipal dischargers must meet water quality standards.

As a result, the municipal storm water dischargers have argued that they do not have to meet water quality standards; and that they only are required to meet MEP for storm water. Environmental interest groups maintain that not only do MS4 discharges have to meet water quality standards, but that MS4 permits must also comply with numeric effluent limitations for the purpose of meeting water quality standards. On the issue of water quality standards, USEPA, the State Board, and the Regional Board have consistently maintained that MS4s must indeed comply with water quality standards. On the issue of whether water quality standards must be met by numeric effluent limitations, USEPA, the State Board (in Orders WQ 91-03 and WQ 91-04), and the Regional Board have maintained that MS4 permits can contain narrative requirements for the implementation of BMPs in place of numeric effluent limitations for storm water discharges.¹⁵³

In addition to relying on USEPA's legal opinion concluding that MS4s must meet MEP for storm water and water quality standards, the State Board also relied on the CWA's explicit authority for States to require "such other provisions that the Administrator or the State determines appropriate for the control of such pollutants" in addition to the technology-based standard of MEP for storm water discharges. To further support its conclusions that MS4 permit dischargers must meet water quality standards, the State Board relied on provisions of the CWC that specify that all waste discharge requirements must implement applicable Basin Plans and take into consideration the appropriate water quality objectives for the protection of beneficial uses.

The State Board first formally concluded that permits for MS4s must contain effluent limitations based on water quality standards in its Order WQ 91-03. In that Order, the State Board also concluded that it was appropriate for Regional Boards to achieve this result by requiring best management practices, rather than by inserting numeric effluent limitations into MS4 permits. Later, in Order WQ 98-01, the State Board prescribed specific precedent setting Receiving Water Limitations language to be included in all future MS4 permits. This language specifically requires that MS4 dischargers meet water quality standards and allows for the use of narrative BMPs (increasing in stringency and implemented in an iterative process) as the mechanism by which water quality standards can be met for storm water discharges.

In Order WQ 99-05, the State Board modified its receiving water limitations language in Order WQ 98-01 to meet specific objections by USEPA (the modifications resulted in stricter compliance with water quality standards). State Board Order WQ 99-05 states:

¹⁵³ For the most recent assessment, see Storm Water Panel Recommendations to the California State Water Resources Control Board, 2006. *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial, and Construction Activities.*

“In Order WQ 98-01, the State Board ordered that certain receiving water limitation language be included in future municipal storm water permits. Following inclusion of that language in permits issued by the San Francisco Bay and San Diego Regional Boards for Vallejo and Riverside respectively, the USEPA objected to the permits. The USEPA objection was based on the receiving water limitation language. The USEPA has now issued those permits itself and has included receiving water limitation language it deems appropriate.

In light of USEPA’s objection to the receiving water limitation language in Order WQ 98-01 and its adoption of alternative language, the State Board is revising its instructions regarding receiving water limitation language for municipal storm water permits. It is hereby ordered that Order WQ 98-01 will be amended to remove the receiving water limitation language contained therein and to substitute the USEPA language. Based on the reasons stated here, and as a precedent decision, the following receiving water limitation language shall be included in future municipal storm water permits.”

In the 1999 case involving MS4 permits issued by USEPA to several Arizona cities (*Defenders of Wildlife v. Browner*, 1999, 197 F. 3d 1035), the United States Court of Appeals for the Ninth Circuit upheld USEPA’s requirement for MS4 dischargers to meet water quality standards, but it did so on the basis of USEPA’s discretion rather than on the basis of strict compliance with the Clean Water Act. In other words, while holding that the Clean Water Act does not require all MS4 discharges to comply strictly with state water quality standards, the Court also held that USEPA has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants. On the question of whether MS4 permits must contain numeric effluent limitations, the court upheld USEPA’s use of iterative BMPs in place of numeric effluent limitations for storm water discharges.

On October 14, 1999, the State Board issued a legal opinion on the federal appellate decision and provided advice to the Regional Boards on how to proceed in the future. In the memorandum, the State Board concludes that the recent Ninth Circuit opinion upholds the discretion of USEPA and the State to (continue to) issue storm water permits to MS4s that require compliance with water quality standards through iterative BMPs. Moreover, the memorandum states that “[...] because most MS4 discharges enter impaired water bodies, there is a real need for permits to include stringent requirements to protect those water bodies. As TMDLs are developed, it is likely that MS4s will have to participate in pollutant load reductions, and the MS4 permits are the most effective vehicles for those reductions.” In summary, the State Board found that the Regional Boards should continue to include the RWL established in State Board Order WQ 99-05 in all future permits.

FINDINGS E

The issue of the RWLs language was also central to BIA's (and others') appeal of Order No. 2001-01 (San Diego MS4 permit), which was used as a template for Order No. R9-2002-01. BIA contended that the storm water MEP standard was a ceiling on what could be required of the Copermitees in implementing their runoff management programs, and that Order No. 2001-01's receiving water limitations requirements exceeded that ceiling. In other words, BIA argued that the Copermitees could not be required to comply with receiving water limitations if they necessitated efforts which went beyond the MEP standard. Again, the courts upheld the Regional Board's discretion to require compliance with water quality standards in municipal storm water permits, without limitation. The Court of Appeal, Fourth Appellate District found that the Regional Board has "the authority to include a permit provision requiring compliance with water quality standards."¹⁵⁴ On further appeal by BIA, the California State Supreme Court declined to hear the matter.

While implementation of the iterative BMP process is a means to achieve compliance with water quality objectives for storm water MS4 discharges, it does not shield the discharger from enforcement actions for continued non-compliance with water quality standards. Consistent with USEPA guidance,¹⁵⁵ regardless of whether or not an iterative process is being implemented, discharges that cause or contribute to a violation of water quality standards are in violation of Order No. R9-2008-0001.

Finding E.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)¹⁵⁶, 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).

¹⁵⁴ Building Industry Association et al., v. State Water Resources Control Board, et al. 2004.

¹⁵⁵ USEPA, 1998. Jan. 21, 1998 correspondence, "State Board/OCC File A-1041 for Orange County," from Alexis Strauss to Walt Petit, and March 17, 1998 correspondence from Alexis Strauss to Walt Petit.

¹⁵⁶ Subject to exceptions under the "Sources of Drinking Waters" Policy (Resolution No. 89-33)

Discussion of Finding E.2. The southern portion of Orange County is within the San Diego Region. The Orange County portion of the San Diego Region falls within and comprises the majority of the San Juan Hydrologic Unit. Major streams within the Orange County watersheds include San Juan Creek, Trabuco Creek, and San Mateo Creek. Other surface water bodies include Aliso Creek, Prima Deshecha Canada, Segunda Deshecha Canada, Oso Creek, Salt Creek, Laguna Canyon Channel, Canada Gobernadora, and Bell Canyon. Several small canyon streams drain directly to the Ocean. Major inland waterbodies include Oso Reservoir, El Toro Reservoir, and Sulphur Creek Reservoir.

The Orange County watersheds include unincorporated portions of Orange County, the Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano. The uppermost portions of the San Mateo, San Juan, Trabuco, and Aliso Creek watersheds are within the Cleveland National Forests.

Approximately 500,000 people reside within the permitted area. This estimate is based on the 2000 census, which does not represent exact numbers because three municipalities (County of Orange and the Cities of Laguna Hills and Lake Forest) lie within both the San Diego Region and the Santa Ana Region. In addition, new developments have increased the housing stock of the area since the 2000 census. This includes the master planned developments of Ladera Ranch in the San Juan Creek watershed and Talega in the San Clemente Coastal and San Mateo Creek watersheds.

Finding E.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.

Discussion of Finding E.3. Runoff management programs are required to be designed to reduce pollutants in storm water MS4 discharges to the maximum extent practicable and achieve compliance with water quality standards. Therefore, implementation of runoff management programs, which satisfy the requirements of Order No. R9-2009-0002, will prevent violations of receiving water quality standards. The Basin Plan states that "Water quality objectives must [...] conform to US EPA regulations covering antidegradation (40 CFR 131.12) and State Board Resolution 68-16, *Statement of Policy with Respect to Maintaining High Quality of Waters in California*." As a result, when water quality standards are met, USEPA and State Board antidegradation policy requirements are also met.

Finding E.4. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The adoption and implementation of this NPDES permit relieves the Permittee from developing a non-point source plan, for the urban category, under CZARA. The Regional Board addresses septic systems through the administration of other programs.

Discussion of Finding E.4. Coastal states are required to develop programs to protect coastal waters from nonpoint source pollution, as mandated by the federal CZARA. CZARA Section 6217 identifies polluted runoff as a significant factor in coastal water degradation, and requires implementation of management measures and enforceable policies to restore and protect coastal waters. In lieu of developing a separate NPS program for the coastal zone, California's NPS Pollution Control Program was updated in 2000 to address the requirements of both the CWA section 319 and the CZARA section 6217 on a statewide basis. The California Coastal Commission (CCC), the State Board, and the nine Regional Water Quality Control Boards are the lead State agencies for upgrading the program, although 20 other State agencies also participate. Pursuant to the CZARA (6217(g) Guidance Document the development of runoff management programs pursuant to this NPDES permit fulfills the need for coastal cities to develop an runoff non-point source plan identified in the State's Non-point Source Program Strategy and Implementation Plan.¹⁵⁷

Finding E.5. Section 303(d)(1)(A) of the CWA requires that "Each state shall identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard (WQS) applicable to such waters." The CWA also requires states to establish a priority ranking of impaired waterbodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired waterbodies is called the Section 303(d) List. The current Section 303(d) List was approved by the State Board on February 4, 2003 and on July 25, 2003 by USEPA. The List was recently updated 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).

¹⁵⁷ State Board/CCC, 2000. Nonpoint Source Program Strategy and Implementation Plan, 1998-2013 (PROSIP).

Discussion of Finding E.5. Section 303(d) of the federal CWA (CWA, 33 USC 1250, et seq., at 1313(d)), requires States to identify waters that do not meet water quality standards after applying certain required technology-based effluent limits ("impaired" water bodies). States are required to compile this information in a list and submit the list to USEPA for review and approval. This list is known as the Section 303(d) list of impaired waters. As part of this listing process, States are required to prioritize waters/watersheds for future development of TMDLs. The State Board and Regional Boards have ongoing efforts to monitor and assess water quality, to prepare the Section 303(d) list, to prioritize waters/watersheds for TMDL development and to subsequently develop TMDLs. TMDLs developed and adopted by the Regional Board are incorporated into the Basin Plan via a Basin Plan Amendment as authorized under section 13240 of the California Water Code. The 2006 California 303(d) List identifies impaired receiving water bodies and their watersheds within the State of California. Storm water and non-storm water runoff that is discharged from the Copermittees' MS4s is a leading cause of receiving water quality impairment in the San Diego Region.¹⁵⁸ TMDLs Project I and II for bacteria are considered priority development TMDLs due to impacts to REC 1 benefits due to impairment of waters for human contact recreation.

Finding E.6. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under federal Clean Water Act section 402. (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).)

¹⁵⁸ The approved 2006 Clean Water Act Section 303(d) List of Water Quality Limited Segments is on-line at: http://www.waterboards.ca.gov/tmdl/303d_lists2006.html.

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

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

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

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

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

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

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

Finding E. 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.

Discussion of Finding E.7. Runoff treatment and/or mitigation in accordance with any of the requirements in the Order must occur prior to the discharge of storm water into receiving waters. Allowing storm water polluted runoff to enter receiving waters prior to treatment to the MEP will result in degradation of the water body and potential exceedances of water quality standards, from the discharge point to the point of dissipation, infiltration, or treatment. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. This requirement is supported by federal regulation 40 CFR 131.10(a) and USEPA guidance. According to USEPA,¹⁵⁹ "To the extent possible, municipalities should avoid locating structural controls in natural wetlands. Before considering siting of controls in a natural wetland, the municipality should demonstrate that it is not possible or practicable to construct them in sites that do not contain natural wetlands... Practices should be used that settle solids, regulate flow, and remove contaminants prior to discharging storm water into a wetland."

Additional Federal guidance discusses the implementation of wetlands to treat municipal storm water discharges (USEPA, 2000. *Guiding Principles for Constructed Treatment Wetlands: Providing for Water Quality and Wildlife Habitat*). It states:

¹⁵⁹ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

"..treatment wetlands should not be constructed in a waters of the U.S. unless you can sufficiently pretreat the stormwater flows to protect the values and functions of the waters of the U.S. Because storm water is an unpredictable effluent source and can contain high levels of toxic substances, nutrients, and pathogens, we strongly encourage that you construct the treatment wetland in uplands and use best management practices in these projects."¹⁶⁰

Consistent with USEPA guidance, the conversion or use of waters of the U.S./State into runoff treatment facilities or conveyance facilities for untreated storm water discharges must be appropriately reviewed by both Federal and State resource agencies. Such projects may be subject to federal permitting pursuant to Clean Water Act Section 404 if discharges of dredged or fill material is involved.

The placement of hydromodification controls within waters of the U.S./State may also be subject to federal and/or state permitting, but would not necessarily be considered a pollutant treatment BMP. Provided the grade control structures are designed to re-establish a natural channel gradient and correct excessive changes to the sediment transport regime caused by urbanization, rather than to create a series of artificial hydrological impoundments for the purpose of treating pollution, this type of project is not considered an in-stream treatment BMP.

Finding E. 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.

Discussion of Finding E. 8. CWC Section 13389 exempts the adoption of waste discharge requirements (such as NPDES permits) from CEQA requirements: "Neither the State Board nor the regional boards shall be required to comply with the provisions of Chapter 3 (commencing with section 21100) of Division 13 of the Public Resources Code prior to the adoption of any waste discharge requirement, except requirements for new sources as defined in the Federal Water Pollution Control Act or acts amendatory thereof or supplementary thereto."

¹⁶⁰ USEPA, 2000. Guiding Principles for Constructed Treatment Wetlands: Providing for Water Quality and Wildlife Habitat, (EPA 843-B-00-003).

This CEQA exemption was challenged during BIA's (and others') appeal of Order No. 2001-01. BIA contended that the CEQA exemption did not apply to permit requirements where the Regional Board utilized its discretion to craft permit requirements which were more prescriptive than required by federal law. The Court of Appeal, Fourth Appellate District disagreed with this argument, stating "we also reject Building Industry's argument to the extent it contends the statutory CEQA exemption in Water Code section 13389 is inapplicable to a particular NPDES permit provision that is discretionary, rather than mandatory, under the CWA."¹⁶¹ On further appeal by BIA, the California State Supreme Court declined to hear the matter.

In a recent decision, the Court of Appeal of the State of California, Second Appellate District, upheld the CEQA exemption for municipal storm water NPDES permits (County of Los Angeles, et al. v. California State Water Resources Control Board, et al.).¹⁶²

Finding E.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, Tideland 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.

Finding E.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 Copermitttees are warranted and required

¹⁶¹ Building Industry Association et al., v. State Water Resources Control Board, et al. 2004.

¹⁶² Los Angeles County Super. Ct. No. BS080792. Partial publication dated November 6, 2006.

pursuant to this Order.

Finding E.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 Waters¹⁶³. 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 WLA¹⁶⁴. Federal guidance¹⁶⁵ 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 limitations¹⁶⁶ 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

¹⁶³ State Water Resources Control Board, Resolution No. 68-16

¹⁶⁴ 40 CFR 122.44(d)(1)(vii)(B)

¹⁶⁵ USEPA, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 FR 43761, August 26, 1996

¹⁶⁶ 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.

the receiving waters.

Discussion of Finding E.9, E.10, E.11. Section 303(d)(1)(A) of the Clean Water Act (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 waterbodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired waterbodies is called the Section 303(d) List. The current Section 303(d) List was approved by the State Water Resources Control Board (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). Every two years the State of California is required by CWA section 303(d) and 40 CFR(130.7) to develop and submit to the USEPA for approval an updated 303(d) list of impaired waterbodies. The Regional Board is currently undergoing the required 2 year (2008) update for submittal to the State Board.

Multiple water bodies in Orange County have been identified as impaired and placed on the Section 303(d) list. The Regional Board has 78 current 303(d) listings for which TMDLs must be prioritized and subsequently developed. The 303(d) listing of a waterbody and subsequent TMDL development is required when regulations under current permits, such as Technology Based Effluent Limitations (TBELS), are not stringent enough to meet Water Quality Standards and protect the Beneficial Uses of Waters of the State. In 2004, the *Bacteria Impaired Waters TMDL Project II* addressed six bacteria impaired shorelines including Baby Beach in Dana Point Harbor. On June 11, 2008 the Regional Board adopted a Basin Plan amendment to incorporate *TMDLs for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay*. On June 16, 2009, the State Board approved the Basin Plan amendment. The *TMDLs for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay* are pending approval by the State Office of Administrative Law (OAL) and USEPA.

Storm water discharges from developed and developing areas in Orange County are a significant source of certain pollutants that cause, may be causing, threatening to cause or contributing to water quality impairment in the waters of Orange County. Furthermore, the CWA section 303(d) list indicates that there is a reasonable potential that municipal storm water and dry weather 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 TMDLs for these pollutants in these waters to eliminate impairment and attain water quality standards. Per 40 CFR(130.7), WLAs are required for all point sources, including storm water and

non-storm water discharges from MS4s. Therefore, focused pollutant control actions and further pollutant impact assessments by the Copermittees are warranted and required pursuant to this Order.

MS4 Permits address only those TMDL WLAs that have been adopted by the Regional Board and have been approved by the State Board, OAL and USEPA. WLAs are portions of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. The TMDL WLAs in MS4 Permits can be addressed using water quality-based numeric effluent limitations (WQBELs) calculated at end-of-pipe. WQBELs must be consistent with the assumptions and requirements of the WLAs.¹⁶⁷

Assessment of compliance with WLAs is to be assessed at the point of discharge to the receiving water and within the receiving water. TMDL WLAs evaluated end-of-pipe will be assessed using WQBELs. Determination of compliance may also be assessed within the receiving waters to evaluate WLA reductions, program effectiveness and to assess overall water quality. As Numeric Targets serve to establish WLAs, they are part of the underlying assumptions of the WLA and can serve as points of compliance.

Finding E.12. This Order requires each Copermittee to effectively prohibit all types of unauthorized discharges of non-storm water into its MS4. However, historically pollutants have been identified as present in dry weather non-storm water discharges from the MS4s through 303(d) listings, monitoring conducted by the Copermittees under Order No. R9-2002-0001, 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 outlined in the Basin Plan, Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). An exceedance of an action level requires specified responsive action by the Copermittees. This Order describes what actions the Copermittees must take when an exceedance of an action level is observed. Exceedances of non-storm water action levels do not alone constitute a violation of this Order but could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions established in this Order. Failure to undertake required source investigation and elimination action following an exceedance of a non-storm water action level (NAL or action level) is a violation of this Order. The 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

¹⁶⁷ Per 40 CFR 122.44(d)(1)(vii)(B)

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.

Discussion of Finding E.12. This Order includes the existing requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges in the MS4s. It also includes the following prohibition set forth in the Basin Plan: "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." (Prohibition A.1.) As discussed in the Order's Findings on discharge characteristics, e.g., C.2., C.4., C.6., C.7., C.9., C.14., and C.15., the Copermittees' reliance on BMPs for the past 19 years has not resulted in compliance with applicable water quality standards or compliance with the requirement to effectively prohibit all types of unauthorized discharges of non-storm water in the MS4. The Regional Board has evaluated (in accordance with 40 CFR 122.44(d)(1)) past and existing control (BMPs), non-storm water effluent monitoring results, the sensitivity of the species in receiving waters (e.g. endangered species), and the potential for effluent dilution and has determined that existing BMPs to control pollutants in storm water discharges are not sufficient to protect water quality standards in receiving waters and the existing requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 historically results in the discharge of pollutants to the receiving waters.

Therefore it is appropriate to establish dry weather non-storm water action levels based upon established water quality standards to measure pollutants levels in the discharge of dry weather non-storm water that could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4 and/or that these discharges are causing, or threatening to cause, a condition of pollution, contamination or nuisance in the receiving waters. NALs are not numeric effluent limitations. While not alone a violation of this Order, an exceedance of an NAL requires the Copermittees to initiate a series of source investigation and elimination actions to address the exceedance. Results from the NAL monitoring are to be used in developing the Copermittees annual work plans. Failure to undertake required source investigation and elimination action following an exceedance of an NAL is a violation of this Order. Please see further discussion in the directives section C of the fact sheet.

A purpose of monitoring, required under this and previous Orders, as stated in the Monitoring and Reporting Program is to "detect and eliminate illicit discharges and illicit connections to the MS4" and to answer the following core management questions:

1. Are conditions in receiving waters protective, or likely to be protective, of beneficial uses?

2. What is the extent and magnitude of the current or potential receiving water problems?
3. What is the relative MS4 discharge contribution to the receiving water problem(s)?
4. What are the sources of MS4 discharge that contribute to receiving water problem(s)?
5. Are conditions in receiving waters getting better or worse?

For the past 4 permit cycles (19 years), Copermittees have utilized their IC/ID program to identify and eliminate non-storm water discharges that are sources of pollutants to the MS4. The Copermittees are also subject to the requirement to effectively prohibit all types of unauthorized discharges of non-storm water into the MS4s. Historically, discharges of unauthorized non-storm water do occur, resulting in the discharge of pollutants to the receiving water. NALs have been included in this Order to ensure that the Copermittees comply with the requirement to effectively prohibit all types of unauthorized non-storm water discharges that are a source of pollutants in the receiving waters.

F. Public Process

Finding F.1. The Regional Board has notified the Copermitees, 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.

Discussion of Finding F.1. Public notification of development of a draft permit is required under Federal regulation 40 CFR 124.10(a)(1)(ii). This regulation states "(a) Scope. (1) The Director shall give public notice that the following actions have occurred: (ii) A draft permit has been prepared under Sec. 124.6(d)." Public notifications "shall allow at least 30 days for public comment," as required under Federal regulation 40 CFR 124.10(b)(1).

Finding F.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.

Discussion of Finding F.2. Public hearings are required under CWC Section 13378, which states "Waste discharge requirements and dredged or fill material permits shall be adopted only after notice and any necessary hearing." Federal regulation 40 CFR 124.12(a)(1) also requires public hearings for draft permits, stating "The Director shall hold a public hearing whenever he or she finds, on the basis or requests, a significant degree of public interest in a draft permit(s)." Regarding public notice of a public hearing, Federal regulation 40 CFR 124.10(b)(2) states that "Public notice of a public hearing shall be given at least 30 days before the hearing."

IX. DIRECTIVES

This section discusses significant changes which have been made to the requirements of the Order from the requirements which were previously included in Order No. R9-2002-0001. For each section of the Order that has been changed there is a discussion which describes the change that was made and provides the rationale for the change. In addition, comments on the Copermittees' ROWD recommendations, as they pertain to each changed requirement of the Order, are provided.

Requirements of the Order that are not discussed in this section have not been significantly changed from those requirements previously included in Order No. 2002-0001. For such requirements, discussions and rationale for the requirements can be found in section VII of the Fact Sheet/Technical Report for Regional Board Order No. R9-2002-0001, dated February 13, 2002. Section VII also provides additional background information for those requirements that have undergone significant change which are described in detail in this report. The Fact Sheet/Technical Report is available for download at:

http://www.waterboards.ca.gov/sandiego/programs/oc_stormwater.html

Legal authority citations are provided for each major section of the Tentative Order. These citations apply to all applicable requirements within the section for which they are provided.

A. Prohibitions and Receiving Water Limitations

The following legal authority applies to section A:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: The Regional Board Water Quality Control Plan for the San Diego Basin (Basin Plan) contains the following waste discharge prohibition: "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."

California Water Code section 13050(l) states "(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."

California Water Code section 13050(k) states "'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."

California Water Code section 13050(m) states "'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."

California Water Code section 13241 requires each regional board to "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 [...]."

California Water Code Section 13243 provides that "A regional board, in a water quality control plan or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted."

California Water Code Section 13263(a) provides that waste discharge requirements prescribed by the Regional Board implement the Basin Plan.

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A - D) require municipalities to implement controls to reduce pollutants in storm water runoff from commercial, residential, industrial, and construction land uses or activities.

Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(A - D) require municipalities to have legal authority to control various discharges to their MS4.

Federal NPDES regulation 40 CFR 122.44(d)(1) requires municipal storm water permits to include any requirements necessary to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."

Federal NPDES regulation 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to "control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

Section A of the Order combines two previously distinct requirement sections – Prohibitions and RWLs. These sections have been combined into one section for organization purposes and to reduce redundancy, since both sections address the same issue. These changes have no net effect on the implementation and enforcement of the Order.

Section A.3 describes the “iterative process.” The Copermitees must reduce the discharge of storm water pollutants to the MEP and ensure that their MS4 discharges do not cause or contribute to violations of water quality standards. If the Copermitees have reduced storm water pollutant discharges to the MEP, but their discharges are still causing or contributing to violations of water quality standards, the Order provides a clear and detailed process for the Copermitees to follow. This process is often referred to as the “iterative process” and can be found at section A.3. The language of section A.3 is prescribed by the State Board and is included in MS4 permits statewide. Section A.3 essentially requires additional BMPs to be implemented until MS4 storm water discharges no longer cause or contribute to a violation of water quality standards.

The State Policy with respect to maintaining high quality waters has been added to clarify that discharges from the MS4 that cause or contribute to a violation of the Policy for high quality waters is prohibited.

B. Non-Storm Water Discharges

The following legal authority applies to section B:

Broad Legal Authority: CWA sections 402, 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F), 40 CFR 122.26(d)(2)(iv) and 40 CFR 122.44.

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B) requires MS4 operators “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.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(1) provides that the Copermitees shall prevent all types of illicit discharges into the MS4 except for certain non-storm water discharges.

Section B of the Order has been reworded to simplify and clarify the requirements for addressing non-storm water discharges that are not prohibited. This rewording has no net effect on the implementation and enforcement of the Order.

Section B.2 has been modified by the removal of landscape irrigation, irrigation water and lawn watering from the list of non-storm water discharges that are not prohibited, i.e. landscape irrigation, irrigation water and lawn watering discharges into and from the MS4 are now prohibited. Saline swimming pool discharges have been added as a footnote to the list provided the discharge is directly to a saline water body (see Finding C.14 and Discussion). Language has been added to the section to clarify differences in the federal regulations under 40 CFR 122.26(d)(iv)(B) and for the authority of the Director (Regional Board) in regards to exempted discharges.

The following exemptions have been removed from Section B, per identification as a source and conveyance of pollutants to waters of the United States when discharged from the MS4: landscape irrigation, irrigation water and lawn watering. Therefore, these illicit discharges must be addressed per 40 CFR 122.26(B). These previously exempted discharges have been identified by Permittees as a source of pollutants and conveyance of pollutants to waters of the United States in the following:

The County of Orange conducted, per requirements of 401 Water Quality Certification 02C-055, a Drainage Area Reconnaissance and Urban Runoff Characterization study. From the reconnaissance and characterization, the County of Orange determined that "water quality results provided two important findings". First, "analytical data strongly indicates that irrigation overspray and drainage constitutes a very substantial source and conveyance mechanism for fecal indicator bacteria into Aliso Creek, and suggests that reduction measures for this source of urban runoff could provide meaningful reduction in bacteria loading to the stream". Aliso Creek, currently 303(d) listed as impaired for Indicator Bacteria, is included in the Bacteria Project I TMDL adopted by the San Diego Regional Board on December 12, 2007. Secondly, reclaimed water high in electrical conductivity and Nitrate was indicated as "the source water at three of the excessive runoff locations (P1,P2,J01P02). These dissolved nitrogen concentration and flow rates create relatively high nitrogen loadings, which have the potential to contribute to undesirable levels of periphytic algal growth in Aliso Creek".

The County of Orange, Cities of Orange County and Orange County Flood Control District on November 15, 2007 submitted their Unified Annual Progress Report for the 2006-2007 reporting period. Within the report, the Copermittees demonstrate that a "wide range of constituents exceeded the tolerance interval bounds", including orthophosphate. "These high levels of orthophosphate concentration are most likely the result of fertilizer runoff or reclaimed water runoff". Aliso Creek is currently 303(d) listed as impaired for phosphorous.

The County of Orange, Orange County Flood Control District and Permittees within the San Juan Creek, Laguna Coastal Streams, Aliso Creek, and Dana Point Coastal Streams Watersheds on November 15, 2007 submitted their Watershed Action Plan Annual Reports for the 2006-2007 reporting period. 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 the watershed and/or Pacific Ocean at the discharge point of the watershed. These locations are included in the Bacteria Project I TMDL adopted by the San Diego Regional Board on December 12, 2007. The Copermittees, within their Watershed Action Strategy Table for Fecal Indicator Bacteria "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".

In 2006, the State Water Quality Control Board allocated Grant funding to the Smarttimer/Edgescape Evaluation Program (SEEP). Project partners include the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita and San Juan Capistrano as well as the Metropolitan Water District of Southern California, the Department of Agriculture and ten south Orange County water districts. The project targets irrigation runoff by retrofitting existing development and documenting the conservation and runoff improvements. The Grant Application states that "Irrigation runoff contributes flow & pollutant loads to creeks and beaches that are 303(d) listed for bacteria indicators". Furthermore, the grant application states that "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". This is reinforced in the project descriptions and objectives: "Elevated dry-weather storm drain flows, composed primarily in the South Orange County Region 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". The basis of this grant project, conducted by the Permittees and additional water use partners, is that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. In addition, they indicate that the alteration of natural flows is impacting the Beneficial Uses of waters of the State.

Section B.3 has been clarified by the recognition of building fire suppression system maintenance (e.g. fire sprinklers) as an illicit discharge. The Regional Board has found that such discharges contain waste, and as such the Regional Board is requiring these discharges be addressed as illicit discharges by the Copermitees. This is consistent with the Federal Regulations (55 Fed Reg 48037). Thus, the discharges are to be prohibited via ordinance, order or similar means and incorporated as part of the Copermitees IC/ID program.

C. Non Storm Water Dry Weather Action Levels

The following legal authority applies to Section C:

Broad Legal Authority: CWA section 402, 402(p)(3)(B)(ii), CWC §13377. 40 CFR 122.26(d)(2)(i)(B, C, E, and F), and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority:

The Clean Water Act section 402(p)(3)(B)(ii) provides that MS4 permits “shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers.”

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B) provides that the proposed management program “shall be based on a description of a program including a schedule, to detect and remove (or require the discharger to the municipal storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(1) provides that the Copermittee include in its proposed management program “a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal storm sewer system; this program description shall address all types of illicit discharges, however the [listed exempt] 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.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(2) provides that the Copermittee include in its proposed management program “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.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(3) provides that the Copermittee include in its proposed management program “procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field scree, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water.”

Section C establishes non-storm water dry weather action levels (see also Finding C.14, Finding E.12, and the Discussion for those sections).

Non-exempted, non-storm water discharges are to be effectively prohibited from entering the MS4 or become subject to another NPDES permit (see Federal Register, Vol. 55, No. 222, pg. 47995). Conveyances which continue to accept non-exempt, non-storm water discharges do not meet the definition of MS4 and are not subject to

section 402(p)(3)(B) of the CWA unless the discharges are issued separate NPDES permits. Instead, conveyances that continue to accept non-exempt, non-storm water discharges that do not have a separate NPDES permit are subject to sections 301 and 402 of the CWA (see Federal Register, Vol. 55, No. 222, pg. 48037).

The Order requires the sampling of a representative percentage of major outfalls and other identified stations within each hydrologic subarea. While it is important to assess all major outfall discharges from the MS4 into receiving waters, to date the Copermittees have implemented a dry-weather monitoring program that has identified major outfalls that are representative of each hydrologic subarea and have randomly sampled other major outfalls. Thus, it is expected that the Copermittees will utilize past dry weather monitoring in the selection and annual sampling of a representative percentage of major outfalls in accordance with the requirements under Section C.4.

Background and Rationale for Requirements

The Regional Board developed the requirements for dry weather, non-storm water action levels based upon an evaluation of existing controls, monitoring and reporting programs (effluent and receiving water), special studies, and based upon Findings C.1 C.3, C.4, C.6, C.7 and C.14.

Water Quality Control Plan

Section 303(C) of the Clean Water Act requires the state to establish Water Quality Standards (WQS). WQS define the water quality goals of a waterbody, or part thereof, by designating their use or uses to be made of the water and by setting criteria necessary to protect those uses.

The Regional Board's Water Quality Control Plan for the San Diego Basin (Basin Plan) designates beneficial uses, establishes water quality objectives, and contains implementation programs and policies to achieve those objectives for all waters addressed through the Basin Plan. The Basin Plan was adopted by the Regional Board on September 8, 1994, and was subsequently approved by the State Board on December 13, 1994. Subsequent revisions to the Basin Plan have also been adopted by the Regional Board and State Board.

State Board Resolution No. 88-63 establishes state policy that all waters, with certain exceptions, should be considered suitable or potentially suitable for municipal and domestic supplies. Requirements of this Order do not include effluent limitations reflecting municipal and domestic supply use as all waters within the County of Orange under this Order are specifically exempted from municipal and domestic supply as a Beneficial Use.

The State Board adopted the Water Quality Control Plan for Ocean Waters of California (Ocean Plan) in 2005, it was approved by USEPA, and became effective on February 14, 2006. The Ocean Plan establishes Water Quality Objectives, general requirements for management of waste discharged to the ocean, effluent quality

requirements, discharge provisions, and general provisions. Limitations derived from the Ocean Plan have been included in this Order as action levels to protect the Beneficial Uses of enclosed bays and estuaries because their Beneficial Uses are similar

National Toxics Rule (NTR) and California Toxics Rule (CTR)

The USEPA adopted the NTR on December 22, 1992, which was amended on May 4, 1995, and November 9, 1999. The CTR was adopted by USEPA on May 18, 2000, and amended on February 13, 2001. These rules include water quality criteria for priority pollutants and are applicable to non-storm water discharges from the MS4. Criteria for 126 priority pollutants are established by the CTR. USEPA promulgated this rule to fill a gap in California water quality standards that was created in 1994 when a California court overturned the State's water quality control plans containing criteria for priority toxic pollutants. The federal criteria are legally applicable in the State of California for inland surface waters, enclosed bays and estuaries for all purposes and programs under the CWA.

Antidegradation Policy

Section 131.12 of 40 CFR requires that the State water quality standards include an antidegradation policy consistent with the federal policy. The State Board established California's antidegradation policy in State Board Resolution No. 68-16. Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. Resolution No. 68-16 requires that existing quality of waters be maintained unless degradation is justified based on specific findings. The Regional Boards' Basin Plans implement, and incorporate by reference, both the State and federal antidegradation policies. Permitted non-storm water discharges from the MS4 are consistent with the antidegradation provision of 40 CFR section 131.12 and State Board Resolution No. 68-16.

Monitoring and Reporting

40 CFR Section 122.48 requires that all NPDES permits specify requirements for recording and reporting monitoring results. Sections 13267 and 13383 of CWC authorize the Regional Boards to require technical and monitoring reports. The Monitoring and Reporting Program establishes monitoring and reporting requirements to implement state and federal regulations. The Monitoring and Reporting Program can be found as Attachment E of the Order.

Dilution or Mixing Zones

In order to protect the Beneficial Uses of receiving waters from pollutants as a result of non-storm water MS4 discharges, this Order does not provide for a mixing zone or a zone of initial dilution except when the discharge is to the surf zone.

The San Diego Region has predominately intermittent and ephemeral rivers and streams (Inland Surface Waters) which vary in flow volume and duration at spatial and temporal scales. Therefore, it is assumed that any non-storm water discharge from

the MS4 into the receiving water is likely to be of a quantity and duration that does not allow for dilution or mixing. For ephemeral systems, non-storm water discharges from the MS4 are likely to be the only surface flows present within the receiving water during the dry season.

MS4 discharge points to bays, estuaries and lagoons are not designed to achieve maximum initial dilution and dispersion of non-storm water discharges. Thus, initial dilution factors for non-storm water discharges from the MS4 into bays, estuaries, and lagoons are conservatively assumed to equal zero.

It is appropriate to base numeric action levels for dry weather non-storm water discharges on these considerations.

California Ocean Plan

A discharge to a surf zone occurs when the non-storm water discharge point from the MS4 discharges:

- a) Directly into the ocean in a wave induced area subject to long-shore conditions;
or
- b) Across a primarily sandy substrate beach and subsequently directly into a wave induced area subject to long-shore conditions;

Establishment of Action Levels

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). 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.

In June of 2006, the California 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.' The report only examined numerical limits as applied to storm water and not non-storm water. In the recommendations, the Blue Ribbon panel proposed storm water action levels which are computed using statistical based population approaches. For example, Section D of the Permit uses a recommended statistical approach to develop storm water action levels. The Blue Ribbon panel did not examine the efficacy of action levels or recommendations for development of action levels for non-storm water discharges.

For discharges to inland surface waters, action levels are based on the EPA water quality criteria for the protection of aquatic species, the EPA water quality criteria for the protection of human health, water quality criteria and objectives in the applicable

State plans, effluent concentration available using best available technology, and 40 CFR 131.38. Since the assumed initial dilution factor for the discharge is zero and a mixing zone is not allowed, a non-storm water discharge from the MS4 could not cause an excursion from numeric receiving water quality objectives if the discharge is in compliance with the action levels contained in the Order. Likewise, discharges in compliance with action levels to the surf zone cannot cause excursions from water quality objectives.

Dry weather monitoring of non-storm water MS4 effluent conducted under the previous Order (R9-2002-001), which relies on BMPs as controls to protect water quality standards, has identified pollutants that are found in non-storm water discharges. Monitoring of pH, Dissolved Oxygen, Phosphorus, Nitrate, Turbidity and Methylene Blue Active Substances (MBAS) in non-storm water MS4 discharges has shown that the effluent exceeds state water quality criteria. It is appropriate to establish numeric action levels for these pollutants to ensure that the Copermittees are complying with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s.

Water Quality Limited Segments on the current 303(d) list (2006) within the jurisdiction of this Order have been identified due to exceedances of Sulfate, Chloride and Total Dissolved Solids criteria from a source which is currently unknown (see Table 2a). These pollutants are not monitored for under the current non-storm water MS4 effluent monitoring program. While this Order does not establish a numeric action level for these constituents at this time, this Order now requires non-storm water MS4 discharge monitoring to include monitoring for Sulfates, Chlorides and Total Dissolved Solids.

Priority pollutants analyzed included Cadmium, Copper, Chromium, Lead, Nickel, Silver and Zinc. These priority pollutants are likely to be present in non-storm water MS4 discharges (see Finding C.3) and dissolved metal effluent monitoring is available from the previous Order. The most stringent applicable water quality criteria have been identified for these seven metals and, excluding Chromium (VI), and all are dependent on receiving water hardness. The conversion factors for Cadmium and Lead are also water hardness dependent (40 CFR 131.38(b)(2)). These levels are established as the action levels for these constituents.

While effluent monitoring is available from the previous Order, the monitoring was done for dissolved concentrations and lacked a measurement of receiving water hardness. Due to the multiple point source discharges of non-storm water from the MS4, a discharge may enter a receiving water whose hardness will vary temporally. In addition, hardness may vary spatially within and among receiving waters.

However, other information is available to determine the appropriateness of an action level. Existing effluent monitoring concentrations absent of receiving water data, no dilution credit or mixing zone allowance, current 303(d) listings of receiving waters for

DIRECTIVES C

other pollutants, receiving water monitoring data, and the classification of waters as critical habitat for endangered and species of concern, provide evidence that NALs are appropriate for these priority pollutants at this time in order to ensure that the Copermittees comply with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s.

Existing effluent data (see attachment F), absent receiving water hardness, provides evidence that it is appropriate to include NALs based on a conservative hardness level. Absent receiving water hardness, all analyzed metals, are discharged at concentrations which may be in exceedance of CTR criteria depending on receiving water hardness. Chromium effluent data that is available is in the form of total Chromium. However, per the SIP, Chromium criteria are for Chromium III and Chromium VI. Therefore, the total Chromium measurement is inadequate, but can be used as an estimate of Chromium III and VI concentrations.

As discussed, inland surface waters, enclosed bays, and estuaries have conservatively been allotted a mixing zone and dilution credit of zero. As such, any discharge of these priority pollutants is likely to impact the receiving water, regardless of the quantity or rate of discharge.

As discussed in Finding C.7 and discussion, multiple receiving waters within the County of Orange are 303(d) listed for a number of pollutants, including toxicity. The 303(d) listing of a waterbody as impaired provides evidence that the receiving water(s) are already experiencing negative impacts. These water quality limited segments are more susceptible to degradation from the synergistic addition of more pollutants, even from upstream discharges. It is therefore appropriate to include numeric action levels designed to ensure that the Copermittees are complying with the requirement to effectively prohibit all types of unauthorized discharges of non-storm water into the MS4s.

Copermittees have monitored the receiving waters for MS4 discharges pursuant to requirements under Order R9-2002-0002. Dry weather receiving water data indicates poor conditions within waters receiving non-storm water MS4 discharges. Urban stream bioassessment conducted under the Order (2002-2008) has documented all non-reference sites as consistently having poor or very poor Index of Biotic Integrity (IBI) scores, in part due to receiving water toxicity¹⁶⁸.

Receiving waters within the jurisdiction of this Order are classified as critical habitat, including being designated with the RARE beneficial use, for endangered, threatened and species of concern including, but not limited to, *O. mykiss irideus*, *E. newberryil*, *A. marmorata pallida* and *G. orcutti*.

¹⁶⁸ 2006-07 and 2007-08 Unified Annual Progress Reports.

The Regional Board evaluated discharges to the surf zone, per the California Ocean Plan, Appendix VI and in accordance with 40 CFR 122.44(d). Indicator bacteria, pH, turbidity (NTU), and metals were analyzed for the purpose of determining the levels of these constituents in non-storm water discharges from the MS4.

The Regional Board has determined that there is not sufficient information at this time to develop action levels for pH, turbidity and metals. While non-storm water MS4 effluent data is available, the data collected is for discharges to inland surface waters, enclosed bays and estuaries. Preliminary receiving water data and limited non-storm water MS4 discharge data collected under the Ambient Coastal Receiving Water Monitoring indicates some exceedances of criteria for metals in the discharge, and toxicity in receiving waters¹⁶⁹. However, the Regional Board believes the level of data available is insufficient, and is requiring additional monitoring of pH, turbidity and metals in non-storm water MS4 discharges to ocean waters (discharges to the surf zone).

Water Quality Limited Segments on the current 303(d) list (2006) for the Pacific Ocean shoreline within the jurisdiction of this Order have been identified due to exceedances of Indicator Bacteria criteria whose known source includes non-storm water discharges from the MS4. These 303(d) listed segments support extensive REC-1 beneficial uses and are located within State Marine Reserves and Conservation Areas. The listing of receiving waters as 303(d) listed for bacteria supports the inclusion of action levels to ensure that the Copermitttees are complying with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4. In addition, no dilution credit or mixing zone allowance is included in developing numeric action levels for the discharge of a pollutant to waters which are 303(d) listed as impaired for that pollutant.

Dry Weather Non-Storm Water Action Levels Calculations for Discharges to Inland Surface Waters, Enclosed Bays, and Estuaries

On the basis of the foregoing discussion, the NALs were calculated with the following considerations and assumptions:

No dilution credit is considered for the discharge. Therefore, the discharge must comply with the Water Quality Objective at the point of discharge.

For NALs based on CTR, implementation was done using the procedure list as outlined in the SIP (see below example).

NAL CTR/SIP Calculation – Zinc Example:

Criteria for Priority Toxic Pollutants in the State of California is described in the CTR

¹⁶⁹ 2007-08 Unified Annual Progress Report.

table listed in 40 CFR 131.38.

A		B Freshwater		C Saltwater		D Human Health (10 ⁻⁶ risk for carcinogens) For consumption of:	
# Compound	CAS Number	Criterion Maximum Conc. ^d B1	Criterion Continuous Conc. ^d B2	Criterion Maximum Conc. ^d C1	Criterion Continuous Conc. ^d C2	Water & Organisms (µg/L) D1	Organisms Only (µg/L) D2
1. Antimony	7440360					14 a,s	4300 a,t
2. Arsenic ^b	7440382	340 i,m,w	150 i,m,w	69 i,m	36 i,m		
3. Beryllium	7440417					n	n
4. Cadmium ^b	7440439	4.3 e,i,m,w,x	2.2 e,i,m,w	42 i,m	9.3 i,m	n	n
5a. Chromium (III)	16065831	550 e,i,m,o	180 e,i,m,o			n	n
5b. Chromium (VI) ^b	18540299	16 i,m,w	11 i,m,w	1100 i,m	50 i,m	n	n
6. Copper ^b	7440508	13 e,i,m,w,x	9.0 e,i,m,w	4.8 i,m	3.1 i,m	1300	
7. Lead ^b	7439921	65 e,i,m	2.5 e,i,m	210 i,m	8.1 i,m	n	n
8. Mercury ^b	7439976	[Reserved]	[Reserved]	[Reserved]	[Reserved]	0.050 a	0.051 a
9. Nickel ^b	7440020	470 e,i,m,w	52 e,i,m,w	74 i,m	8.2 i,m	610 a	4600 a
10. Selenium ^p	7782492	[Reserved] p	5.0 q	290 i,m	71 i,m	n	n
11. Silver ^b	7440224	3.4 e,i,m		1.9 i,m			
12. Thallium	7440280					1.7 a,s	6.3 a,t
13. Zinc ^b	7440666	120 e,i,m,w,x	120 e,i,m,w	90 i,m	81 i,m		

Saltwater criterion maximum concentration (CMC) = 90 ug/L

Saltwater criterion continuous concentration (CCC) = 81 ug/L

These criteria are expressed in terms of the dissolved fraction of the metal in the water column. [See footnote "m" to Table in paragraph (b)(1) of 40 CFR 131.38].

40 CFR 122.45(c) requires that this Order include effluent limitations as total recoverable concentration; therefore it is appropriate to include action levels also as total recoverable concentration.

The SIP requires that if it is necessary to express a dissolved metal value as a total recoverable and a site-specific translator has not yet been developed, the Regional Board shall use the applicable conversion factor from 40 CFR 131.38.

The term "Conversion Factor" (CF) represents the recommended conversion factor for converting a metal criterion expressed as the total recoverable fraction in the water column to a criterion expressed as the dissolved fraction in the water column.

Total recoverable concentration * CF = Dissolved concentration criterion

or

DIRECTIVES C

Total recoverable concentration = Dissolved concentration criterion/ CF

§ 131.38

40 CFR Ch. I (7-1-08 Edition)

Metal	Conversion factor (CF) for freshwater acute criteria	CF for fresh-water chronic criteria	CF for saltwater acute criteria	CF ^a for salt-water chronic criteria
Silver	0.85	(^d)	0.85	(^d)
Tinallium	(^d)	(^d)	(^d)	(^d)
Zinc	0.978	0.986	0.946	0.946

CF for Zinc = .946, so the total recoverable concentrations for zinc:

90 ug/L dissolved (CMC)/ 0.946 (CF) = 95 ug/L total recoverable CMC

81 ug/L dissolved (CCC) / 0.946 (CF) = 86 ug/L total recoverable CCC

Effluent Variability multiplier and Coefficient of Variation (CV)

For each concentration based on an aquatic life criterion, the long-term average (LTA) is calculated by multiplying the concentration with a factor that adjusts for effluent variability. The multiplier can be found in Table 1 of the SIP. Since this Order does not have existing data to properly conduct a variability analysis in accordance with the SIP, the CV has been set equal to 0.6 per SIP requirements. The current effluent data is limited due to the small number of representative outfalls sampled, the lack of outfalls discharging to representative waterbodies within the Region, and the targeted nature of the sampling design.

Based upon a CV of 0.6, Table 1 of the SIP requires an effluent variability as follows:

Acute Multiplier = 0.321

Chronic Multiplier = 0.527

The long-term average (LTA) is calculated by multiplying the total recoverable concentrations for zinc with the acute and chronic multipliers:

LTA Acute = 95 ug/L * 0.321 = 30.5

LTA Chronic = 86 ug/L * 0.527 = 45.3

The MDAL and AMAL will be based on the most limiting of the acute and chronic LTA, in the case for copper the most limiting LTA is the acute of 30.5 ug/L

NALs are calculated by multiplying the most limiting LTA with a multiplier that adjusts for the averaging periods and exceedance frequencies of the criteria and the effluent limitations. The multiplier can be found in Table 2 of the SIP. Since this Order has insufficient data, the CV has been set to 0.6 and since sampling frequency is four times a month or less, n has been set equal to 4 per the SIP.

Table 2. Long-Term Average (LTA) Multipliers for Calculating Effluent Limitations

Coefficient of Variation	MDEL Multiplier	AMEL Multiplier			MDEL/AMEL Multiplier		
	99 th Percentile Occurrence Probability	95 th Percentile Occurrence Probability			MDEL = 99 th Percentile AMEL = 95 th Percentile Occurrence Probability		
(CV)		n = 4	n = 8	n = 30	n = 4	n = 8	n = 30
0.1	1.25	1.08	1.06	1.03	1.16	1.18	1.22
0.2	1.55	1.17	1.12	1.06	1.33	1.39	1.46
0.3	1.90	1.26	1.18	1.09	1.50	1.60	1.74
0.4	2.27	1.36	1.25	1.12	1.67	1.82	2.02
0.5	2.68	1.45	1.31	1.16	1.84	2.04	2.32
0.6	3.11	1.55	1.38	1.19	2.01	2.25	2.62

Therefore, from Table 2 of the SIP, the LTA multipliers will be as follows:

MDAL Multiplier = 3.11

AMAL Multiplier = 1.55

The MDAL and AMAL limits are calculated by multiplying the LTA with an LTA multiplier for each limit:

MDAL = 30.5 ug/L * 3.11 = 95 ug/L

AMAL = 30.5 ug/L * 1.55 = 47 ug/L

Dry Weather Non-Storm Water Action Levels Calculations for Discharges to the Surf Zone

Based on the foregoing discussion, the Average Monthly and Maximum Daily NALs were calculated with the following considerations and assumptions:

No dilution credit is considered for the discharge. Therefore, the discharge must comply with the Water Quality Objective at the point of discharge.

Whole Effluent Toxicity (WET) Testing Requirements

A WET limit is required if a discharge causes, has a reasonable potential to cause, or contributes to an exceedance of applicable water quality standards, including numeric and narrative. Since these types of discharges are prohibited under this Order, WET limits are not applicable.

Discussion of AMALs, MDALs and Instantaneous Maximums

Where practical, action levels in this Order have been expressed as both AMALs and MDALs. Certain action levels may not practicably be expressed as AMALs and MDALs due to specific BPO language, sampling requirements and/or a lack of Criteria. Based upon the likely sampling frequency of the Copermittees, the frequency of sampling will occur such that grab samples are taken once per sampling day. This single sample would then be subject to MDALs and Instantaneous Maximum levels. In this case, the more conservative action level would apply. In addition, it is expected that some effluent monitoring will occur less than or equal to once per month. In this scenario, the MDAL, AMAL and Instantaneous Maximum levels would need to be met based upon one sample, unless sampling did not occur. For some BPOs, AMALs have been excluded and only MDALs/Instantaneous Maximums set to prevent redundancy in action levels.

Compliance with Action levels (Priority Pollutants)

Compliance with action levels shall be determined as follows:

Dischargers shall be deemed out of compliance with this Order if the Copermittee failed to take the prescribed action in response to a concentration of the priority pollutant in the monitoring sample that is greater than the action level and greater than or equal to the reported Minimum Level (exceedance of an action level). Regardless of the Copermittee's actions in response to an exceedance, they are still subject to the prohibitions found in Section A and B of the Order.

When determining to take an action in response to the AMALs and more than one sample result is available in a month, the discharger shall compute the arithmetic mean unless the data set contains one or more reported determinations of DNQ or ND. In those cases, the discharger shall compute the median in place of the arithmetic mean in accordance with the following procedure:

- (1) The data set shall be ranked from low to high, reported ND determinations lowest, DNQ determinations next, followed by quantified values (if any). The order of the individual ND or DNQ determinations is unimportant.
- (2) The median value of the data set shall be determined. If the data set has an odd number of data points then the median is the middle value. If the data set has an even number of data points, then the median is the average of the two values around the middle unless one or both of those points are ND or DNQ, in which case the median value shall be the lower of the two data points where DNQ is lower than a value and ND is lower than DNQ.

D. Storm Water Action Levels

Section D has been added to establish storm water action levels (see also Finding D.1.h and Discussion).

Introduction

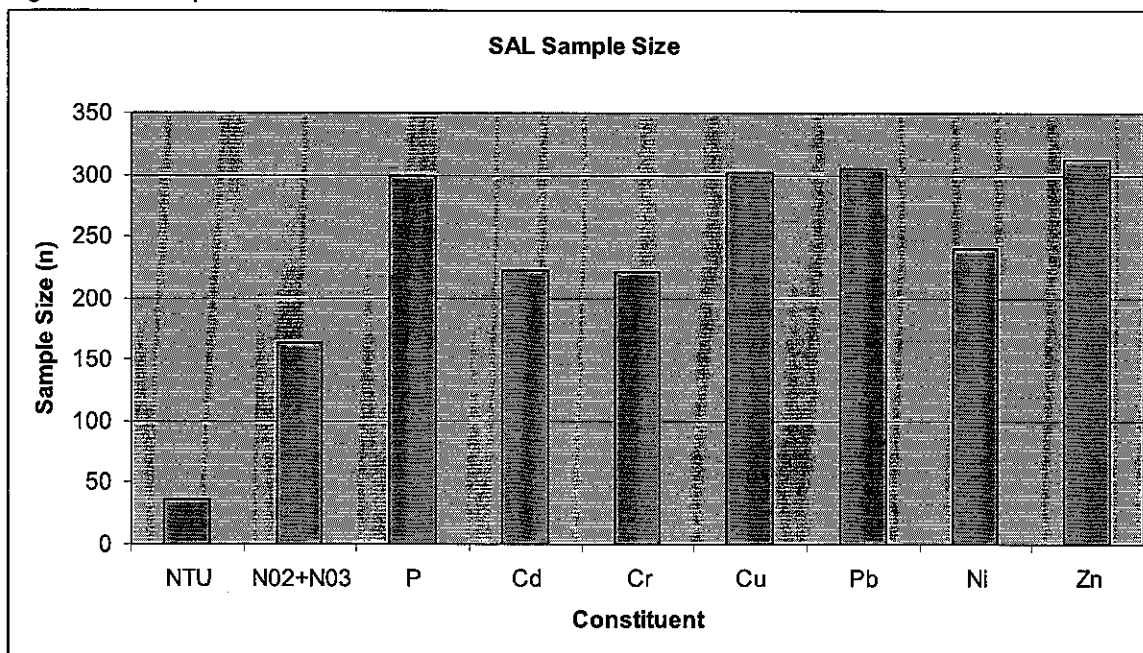
In response to comments at the initial public workshop, meetings with the principle Permittees, and comments from the July 01, 2009 Regional Board meeting, SAL concentrations, standards and constituents have been updated, Order language has been clarified and additions to the monitoring requirements have been made.

SAL Concentration/Standards Updates

SAL pollutant levels have been updated and now come from a regional subset of nationwide Phase I MS4 data. Regional Board staff have chosen to update SALs by using USEPA Climate Zone 6 (arid west) data when computing SALs. Utilizing data from USEPA Climate Zone 6 is expected to produce SALs which closely reflect the environmental conditions experienced in Orange County. 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.

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 Climate Zone 6 samples to more than 400, and included additional monitoring events within Southern California (see Figure 2).

Figure 2. Sample Sizes Used to Calculate Storm Water Action Levels



Additional changes have been made by staff to update SALs to reflect the water quality standards in the San Diego Regional Water Quality Control Board Basin Plan, the California Toxic Rule and USEPA Water Quality Criteria. Since it is the goal of the SALs, through the iterative and MEP process, to have outfall storm water discharges meet all applicable water quality objectives, the list of constituents to be tested and protocol for testing has been updated to provide a reference point to evaluate the iterative MEP process. As such, Kjeldahl Nitrogen (TKN) and Total Suspended Solids (TSS) have been removed from the SAL table. There currently are no appropriate criteria for TKN or TSS, and alternate constituents are available which do have BPOs for comparative purposes. Instead, Nitrate/Nitrite and Turbidity, which have BPOs of 1.0 mg/L and 20 NTUs respectively, are included with associated SALs.

Metals included in SALs include Cadmium, Chromium, Nickel, Zinc, Lead and Copper. In receiving water quality monitoring collected by the Copermittees to date, these metals have been detected and shown to contribute to toxicity at mass loading stations within Southern Orange County.

Monitoring Updates

SAL language has been updated to require the measurement of hardness and to provide more specificity in the assessment of samples with SALs for total metal concentrations. While USEPA Climate Region 6 data includes 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 and MEP process, 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 an exceedance of a SAL concentration is detected for a metal the Copermitttee must determine if that exceedance is above the existing applicable water quality limitation based upon the hardness of the receiving water. The water quality limitations Permittees 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.

E. Legal Authority

The following legal authority applies to section E:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(i)(A) provides that the Copermittees shall develop and implement legal authority to "Control through ordinance, 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."

Federal NPDES regulation 40 CFR 122.26(d)(2)(i)(D) provides that the Copermittees shall develop and implement legal authority to "Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system."

Illicit discharge is defined under Federal NPDES regulation 40 CFR 122.26(b)(2) as "any discharge to a municipal separate storm sewer system 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."

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A - D) require municipalities to implement controls to reduce pollutants in storm water runoff from commercial, residential, industrial, and construction land uses or activities.

Federal NPDES regulation 40 CFR 122.26(d)(1)(ii) requires from the Copermittee "A description of existing legal authority to control discharges to the municipal separate storm sewer system."

Section E.1.b Prohibit all identified illicit discharges not otherwise allowed pursuant to section B.2 including but not limited to:

- (1) Sewage;
- (2) Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;
- (3) Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility including motor vehicles, cement-related equipment, and port-a-potty servicing, etc.;
- (4) Discharges of wash water from mobile operations such as mobile automobile washing, steam cleaning, power washing, and carpet cleaning, etc.;

- (5) Discharges of wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc.;
- (6) Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;
- (7) Discharges of pool or fountain water containing chlorine, biocides, toxic amounts of salt, or other chemicals; discharges of pool or fountain filter backwash water;
- (8) Discharges of sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and

Duplicative language has been removed from this section.

Section E.1.j has been added to the Order to ensure that BMPs implemented by third parties are effective. Since the Copermittees cannot passively receive and discharge pollutants from third parties, the Copermittees must ensure discharges of storm water pollutants to the MS4 are reduced to the MEP. In order to achieve this, the Copermittees must be able to ensure that effective BMPs are being implemented by requiring the third parties to document BMP effectiveness. Regarding the Copermittees' ability to require documentation and reporting from third parties, USEPA states "municipalities should provide documentation of their authority to enter, sample, inspect, review, and copy records, etc., as well as demonstrate their authority to require regular reports."¹⁷⁰

¹⁷⁰ USEPA, 1992. Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

F. Jurisdictional Runoff Management Program

F.1. Development Planning

The following legal authority applies to section F.1:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWA section 402(a), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F), 40 CFR 131.12, and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(2) provides that Copermitttees develop and implement a management program which is to include "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 plans shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed."

Federal NPDES regulation 40 CFR 122.44(d)(1) requires municipal storm water permits to include any requirements necessary to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."

Sections F.1.a and F.1.b (General Plan and Environmental Review Process) require the Copermitttees to update and revise their General Plan (or equivalent plan) and environmental review processes to ensure water quality and watershed protection principles are included. The Copermitttees are required to detail any changes to the General Plan or environmental review process in their Jurisdictional Runoff Management Program Annual Reports.

The change made to these sections requires updating the General Plan and Environmental Review Process on an as-needed basis, is supported by information provided in the Copermitttees' Report of Waste Discharge (ROWD) and Annual Reports. Each Copermitttee has either updated, is in the process of updating, or has assessed its General Plan to ensure the General Plans include the required principles and are in compliance with Order No. R9-2002-0001. The ROWD also states that although all the Copermitttees have reviewed their environmental review processes, a number of Copermitttees want the overall planning approval process to more effectively ensure that water quality protection is considered in the earliest phases of project consideration.

Section F.1.a has been modified to include redevelopment projects in the General Plan. This change requires Copermittees to update their General Plan to include water quality and watershed protection for all new development and redevelopment projects.

Section F.1.c (Approval Process Criteria and Requirements) requires that all development projects (regardless of size) implement BMPs to reduce storm water pollutant discharges to the MEP. Source control and site design BMP requirements were not clearly described in this section of Order No. R9-2002-0001. Additional detail has been added to this section to better describe the source control and site design BMPs needed for implementation. This additional detail is consistent with the requirements of the SSMP, known in Orange County as the Water Quality Management Plan (WQMP). However, only source control and site design BMPs that apply to all types of development projects are required (i.e., properly designed trash storage areas).

The requirements are consistent with Order No. R9-2002-0001, section F.1.b.1. However, some elements are not contained in the current or proposed DAMP¹⁷¹ (e.g., buffer zones). One exception is that Order No. R9-2002-0001's requirement that applicants must provide evidence of coverage under the General Industrial Permit has been removed, since industrial tenants for a development project are usually not known during the planning stage.

The section has been modified to reflect the prohibition of over-irrigation runoff to the MS4, as well as LID requirements. Additionally, this section requires the use of native and/or low water use plants for landscaping, where feasible.

Sections F.1.d and F.1.d.(1) (Standard Storm Water Mitigation Plans) require the Copermittees to review and update their local SSMPs (also known in Orange County as Water Quality Management Plans – WQMPs) for compliance with the Order. The sections also require all Priority Development Projects falling under certain categories to meet SSMP requirements. The update is necessary to ensure that the Copermittees' local SSMPs are consistent with the changes that have been made to the Order's SSMP requirements. The requirement for the development/adoption of a Model SSMP has been removed since a model was completed and adopted in 2003.

The SSMP section of the Order has been reformatted for clarity. There are also some significant changes. Changes have been made in response to experience gained by the Orange County Storm Water program, USEPA program evaluations, recent BMP development and effectiveness studies, recent reports on the magnitude of problems caused by hydromodification, and reviews of annual reports and the ROWD submitted by the Copermittees.

¹⁷¹ Orange County Storm Water Copermittees. *Drainage Area Management Plan (DAMP) 2007*. July 21, 2006. The 2007 DAMP was submitted to the Regional Board with the Report of Waste Discharge as part of the application for NPDES Permit reissuance.

In addition, the Order requires that a one-acre threshold be phased in over three years for the priority development category. This threshold was selected to be consistent with the Phase II NPDES regulations for small municipalities. The one-acre determination applies to the amount of ground area disturbed, not the total size of the parcel or project. Each Copermittee may also lower this threshold if desired.

Section F.1.d.(2) (Priority Development Project Categories) includes several changes to improve, simplify, and clarify the Priority Development Project categories.

The most significant change is that 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. This criterion was not included in Order No. R9-2002-0001. It is included, however, in the Model San Diego SSMP that was approved by the Regional Board in 2002. It is included in this Order because existing development inspections by Orange County municipalities show that facilities included in the Priority Development Project Categories routinely pose threats to water quality. This permit requirement will improve water quality and program efficiency by preventing future problems associated with partly treated storm water runoff from redevelopment sites. This approach to improving storm water runoff from existing developments is practicable because municipalities have a better ability to regulate new developments than existing developments.

Industrial sites and retail gasoline outlets have been added to the priority development categories. This heavy industrial category was not included in Order No. R9-2002-0001 because industrial NPDES requirements already establish storm water criteria. This category is included in the Order to be consistent with Phase II rules and to close loopholes. A discussion of retail gasoline outlets is below.

The criterion for commercial developments has been lowered to one acre from 100,000 square feet (2.3 acres). It is modified in order to be consistent with USEPA Phase II guidance, and to reflect the findings from Permittees that smaller commercial developments pose high threats to storm water discharges.

Housing and restaurant criteria have been clarified. The two housing development categories are now combined into one category that includes 10 or more housing units. In addition, requirements which specifically apply to restaurants have been combined in this section. The section has been modified to clarify that restaurants with less than 5,000 square feet of development are subject to SSMP requirements, except for the treatment control BMP and hydromodification control requirements. This is consistent with Order No. R9-2002-0001's approach for applying SSMP requirements to restaurants.

Section F.1.d.(2)(j) includes Retail Gasoline Outlets (RGOs) as a Priority Development Project category because RGOs are points of confluence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up. RGOs consequently produce significantly greater pollutant loadings of hydrocarbons and trace metals (including copper and zinc) than other developed areas. To meet the storm water MEP standard, source control and structural treatment BMPs are needed at RGOs that meet the following criteria: (a) 5,000 square feet or more of developed area, or (b) a projected average daily traffic of 100 or more vehicles per day. These are appropriate thresholds since development size and volume of traffic are good indicators of potential impacts of runoff from RGOs on receiving waters. RGOs were proposed, but not included in Order No. R9-2002-0001 pending guidance from the State Board in its review of the San Diego MS4 Permit, Order No. 2001-0001.

In State Board WQ Order No. 2000-11, the State Board removed RGOs as a SSMP category because the State Board found that RGOs were already heavily regulated and limited in their ability to construct infiltration devices or perform treatment. Order No. 2000-11 also acknowledged that a threshold (size, average daily traffic, etc.) appropriate to trigger SSMP requirements should be developed, and that specific findings regarding RGOs should be included in MS4 permits to justify the requirement.¹⁷² The State Board also removed the RGO category from the San Diego County MS4 permit (Order No. 2001-01) because the Regional Board did not specifically address the issues raised in WQ Order No. 2000-11.

As discussed further below, the LARWQCB and the Regional Board have adequately addressed these issues. RGOs have been included as a SSMP category in the Los Angeles County MS4 permit (Order No. R4-01-182), the statewide general Phase II MS4 permit (WQ Order No. 2003-0005-DWQ), and the Regional Board Southern Riverside County MS4 permit (Order No. R9-2004-001). The State Board also addressed the inclusion of RGOs through the appeals of MS4 permits issued by the Los Angeles and San Francisco Bay Area Regional Boards. The State Board held a workshop addressing RGOs and identified RGOs as significant sources of pollutants. The State Board then dismissed the petitions for removal of RGOs from the SSMP requirements in the Los Angeles and San Francisco Bay Area MS4 permits.

Inexpensive and effective structural treatment BMPs which reduce storm water pollutants and control peak flow rates and velocities are available for use at RGOs. Studies have shown that some catch basin inserts can remove hydrocarbons and heavy metals, which are typical pollutants of concern at RGOs. Sand or media filters have also been found to be effective and available for use at RGOs. Site design measures to control flow include cisterns, small weirs, baffles, and redirecting roof runoff to pervious areas.

¹⁷² State Board, 2000. Order WQ 2000-11.

No evidence has been provided to indicate that use of these structural BMPs at RGOs will pose a safety risk. In fact, filter BMPs have been installed at RGOs in some municipalities without apparent adverse safety effects. In addition, similar BMPs such as oil/water separators have been used for years by RGOs without safety problems.

Threshold - Studies indicate that runoff from RGOs contains similar pollutants to runoff from commercial parking lots. In precedential WQ Order 2000-11, the State Board determined that parking lots with a size threshold of 5,000 square feet or more is an appropriate SUSMP category. Based in part on the similarity of pollutants, the 5,000 square feet size threshold was also included for RGOs in the Order. In addition, other municipalities currently use similar size thresholds for RGOs when requiring design standards to mitigate storm water runoff. To provide additional flexibility for the Copermittees, another threshold of 100 or more motor vehicles ADT has been added to the Order. This threshold is based on requirements used in Washington and Oregon for what are considered "high use" sites. This is an appropriate threshold since vehicular traffic is a good indicator of the amount of pollutants generated at a site.

The Regional Board followed the State Board's direction regarding RGOs by including the above discussion in this Fact Sheet, as well as a specific finding that justifies the regulation of runoff from RGOs that meet certain criteria. Considering all of the supporting documentation discussed above, it is appropriate to include RGOs as a Priority Development Project category.

Additional detailed supporting information can be found in the 2001 technical report titled *Retail Gasoline Outlets: New Development Design Standards for Mitigation of Storm Water Impacts* by the LARWQCB and the Regional Board.

Section F.1.d.(3) (Pollutants of Concern) requires Copermittees to update their procedures for identifying pollutants of concern for each Priority Development Project. This is important to do periodically because of changing water quality conditions and designations of impairments or areas of concern. Furthermore Copermittees continually learn more about pollutant-generating activities as they conduct inspections and investigations, and that information must be incorporated into the SSMP process.

Section F.1.d.(4) This Section has been modified to clarify some elements of low impact development. This section requires Copermittees to require or implement site design BMPs at Priority Development Projects in order to reduce the amount of polluted storm water runoff from those sites. The primary approach in site design BMPs is to limit the permanent loss of existing infiltration capacity because loss of infiltration is a major contributor to wet weather pollution discharges. General means to accomplish that goal include retaining natural infiltration areas of a site and limiting the amount of impervious surfaces. The Order does not require a specific or relative amount of pervious surfaces be added to a project. The Order seeks to retain on-site capture of the 85th percentile storm.

The site design BMP options listed in these sections are consistent with the site design BMPs currently required by the Copermittees in the Model WQMP. In the ROWD, the Copermittees propose to improve the process of selecting site design BMPs. Specifically, they propose to develop recommendations for incorporating low-impact design (LID) techniques and site design BMPs. However, the Model WQMP employs an open-ended approach to requirements for site design BMPs, requiring implementation of site design BMPs “where applicable and feasible” and “where appropriate.” Unfortunately, this approach has proven to be ineffective in integrating site design BMPs in project designs. Audits conducted in 2005 of four Copermittees found that municipalities need to work with project applicants to improve the quality of site design BMPs.¹⁷³ As a result, the Order establishes two sets of site design BMP criteria.

First, section F.1.d.(4)(b) of the Order directs the Copermittees to require, rather than consider, new development projects to employ certain classes of site design BMPs. The required site design BMPs take advantage of features that are incorporated into the Priority Development Project, such as landscaping or walkways. It also requires that projects seek to maintain natural water drainage features rather than instinctively convey water in buried pipes and engineered ditches that eliminate natural water quality treatment functions. These types of site design BMPs are both effective and achievable. These requirements are consistent with the guidelines of Order No. R9-2002-0001 and both the 2003 and 2007 DAMPs.¹⁷⁴

Next, section F.1.d.(4)(d) of the Order requires that LID BMPs be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event. This is consistent with other municipal stormwater NPDES permits recently adopted by the Los Angeles and Santa Ana Regional Boards. In those permits, the stakeholders were involved in drafting the numerical performance criteria. The requirement for a numerical BMP design standard is well established for treatment control BMPs and is required in permits throughout the nation such as in Pennsylvania, West Virginia, Georgia, and Washington D.C. Since the 85th percentile storm event has previously been used as the numeric design standard for treatment control BMPs; the same size storm event can be applied as the numeric design standard for LID BMPs. According to information provided by the County of Orange, the 24 hour, 85th percentile rainfall is between 0.7 to 0.8 inches of rain for the majority of the area covered by this permit.

¹⁷³ Tetra Tech, Inc. 2005. Program Evaluation Report. Orange County Storm Water Program: Cities of Laguna Beach, Laguna Hills, Lake Forest, and Rancho Santa Margarita.

¹⁷⁴ The 2003 and 2007 DAMPs include preserving natural drainage features as a recommended site design BMP requirement that was to be reviewed and used where applicable and feasible. The DAMPs note this as a way to mimic a site's natural hydrologic regime.

The retention of natural drainage features, such as ephemeral streams, wetlands, and depressions, can be particularly important because small tributaries are essential to the maintenance of the chemical, biological, and physical integrity of larger waterbodies.¹⁷⁵ The loss and modification of such natural water resources to accommodate post-development storm water management leads to direct and indirect adverse effects on water quality that are felt both on the project site and off the site within the watershed.^{176,177,178} Effects to aquatic beneficial uses from altered drainage features can occur downstream and upstream. The length of upstream or downstream effect of channel modifications is dependant on the specific structure type and channel slope.¹⁷⁹ For instance, road culverts can act as partial barriers to upstream distribution of native aquatic macroinvertebrates in urban streams, while bridges can provide adequate passage.¹⁸⁰ As a result of the adverse effects to water quality and beneficial uses, the State of California nonpoint source pollution program management measures for urban areas includes limiting the destruction of natural drainage features and natural conveyance areas.¹⁸¹

Through its process of conditioning development projects under the CWA section 401 Water Quality Certification program, the Regional Board finds that the level of site design BMP implementation in the Order is feasible for all projects. This site design BMP requirement will help ensure that site design BMPs are implemented for new development projects. Site design BMPs are a critical component of storm water runoff management at new development projects, since the BMPs provide multiple benefits including preservation of hydrologic conditions, reduction of pollutant discharges, cost effectiveness, and green space.

¹⁷⁵ Aquatic scientists comment letter (April 10, 2003) on the Advanced Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act Regulatory Definition of "Waters of the United States." (Docket ID No. OW-2002-0050). This letter is a synthesis of scientific information regarding ephemeral, intermittent, and headwater streams. It was written to USEPA by 85 leading aquatic scientists.

¹⁷⁶ Wright, Tiffany, et al. 2006. *Direct and Indirect Impacts of Urbanization on Wetland Quality*. Prepared by the Center for Watershed Protection for the USEPA Office of Wetlands, Oceans, and Watersheds. 81p. Available online at <http://www.cwp.org>

¹⁷⁷ Konrad, Christopher P. and Derek K. Booth, 2005. *Hydrologic Changes in Urban Streams and Their Ecological Significance*. American Fisheries Society Symposium. Vol. 45 pp.157-177.

¹⁷⁸ Coleman, Derrick, et al. 2005. *Effect of Increases in Peak Flows and Imperviousness on the Morphology of Southern California Streams*. Technical Report No. 450 of the Southern California Coastal Water Research Project.

¹⁷⁹ Fischenich, J.C. 2001. "Impacts of stabilization measures." EMRRP Technical Notes Collection (ERDC TNEMRRP- SR-32), U.S. Army Engineer Research and Development Center, Vicksburg, MS.
<http://www.wes.army.mil/el/emrrp>

¹⁸⁰ Blakely, Tanya J., et al. 2006. *Barriers To The Recovery Of Aquatic Insect Communities In Urban Streams* Freshwater Biology Vol. 51(9), 1634–1645.

¹⁸¹ California Nonpoint Source Encyclopedia, Management Measure 3.1.b. Runoff from Developing Areas, Site Development and Management Measure 3.3.a. Runoff from Existing Development, Existing Development.

The site design BMP options listed do not need to be costly.¹⁸² Some design options, such as concave vegetated surfaces or routing rooftop or walkway runoff to landscaped areas, are cost neutral.¹⁸³ Other site design BMPs, such as minimizing parking stall widths or use of efficient irrigation devices, are oftentimes already required. In addition, use of site design BMPs reduces storm water runoff quantity, allowing for treatment control BMPs and other storm water infrastructure on site to be smaller, therefore savings costs for both developers and municipalities.^{184,185}

Because of the potential economic and environmental benefits of using low-impact development site design, the U.S. Department of Housing and Urban Development, Office of Policy Development and Research, developed "*The Practice of Low Impact Development (LID)*" to assist the housing industry during the land development process.¹⁸⁶ This document focuses specifically on technologies that affect both the cost impacts and environmental issues associated with land development. Much of the report focuses on storm water management because low-impact development storm water management systems can save capital costs for developers and maintenance costs for municipalities.¹⁸⁷ The executive summary of the HUD report notes:

This approach to land development, called Low Impact Development (LID), uses various land planning and design practices and technologies to simultaneously conserve and protect natural resource systems and reduce infrastructure costs. LID still allows land to be developed, but in a cost-effective manner that helps mitigate potential environmental impacts. LID is best suited for new, suburban development.

Developers can use site and structure designs that reduce building footprints, decrease the amount of paved infrastructure, and provide for dispersed drainage and infiltration of runoff from impervious surfaces to reduce the effective impervious surface.¹⁸⁸ The concept of effective impervious surface is important, because when runoff from these surfaces is directed to pervious areas rather than an impervious drainage system (i.e., curbs, gutters, street surfaces, storm drain pipes), it can infiltrate, evaporate, or be taken up by vegetation, thereby reducing the total volume of storm water runoff leaving a site.

¹⁸² USEPA, 2000. Low-Impact Development: A literature review. EPA-841-B-00-005. 35p.

¹⁸³ Bay Area Stormwater Management Agencies Association., 1999. Start at the Source. Forbes Custom Publishing. Available on-line at: http://www.scvurppp-w2k.com/basmaa_satsm.htm. pp. 149.

¹⁸⁴ National Association of Home Builders Research Center. *Builders Guide to Low Impact Development*. Available on-line at <http://www.toolbase.org>

¹⁸⁵ National Association of Home Builders Research Center. *Municipal Guide to Low Impact Development*. Available on-line at <http://www.toolbase.org>

¹⁸⁶ U.S. Department of Housing and Urban Development, Office of Policy Development and Research, 2003. *The Practice of Low Impact Development*. Prepared by: NAHB Research Center, Inc. Upper Marlboro, Maryland. Contract No. H-21314CA.

¹⁸⁷ Ibid. Executive Summary, p.x.

¹⁸⁸ Bay Area Stormwater Management Agencies Association. 2003. *Using Site Design Techniques to Meet Development Standards for Stormwater Quality*. Available on-line at: <http://www.basmaa.org/>

The Order continues to provide the Copermitees with flexibility in implementing site design BMP requirements by providing a LID BMP waiver program.

Section F.1.d.(5) (Source Control BMP Requirements) requires that Priority Development Projects implement minimum source control BMPs. This section has been added to provide more detail and clarify the Order's requirements for source control BMPs. The minimum source control BMPs listed in the section are consistent with the Model WQMP.

Section F.1.d.(6) (Treatment Control BMP Requirements) is consistent with Order No. R9-2002-0001, with two exceptions. First, the Order limits the selections of methods used to determine the appropriate volume of storm water runoff to be treated. The modification ensures that priority development project proponents utilize the most accurate information to determine the volume or flow of runoff which must be treated. Using detailed local rainfall data, the County of Orange has developed the 85th Percentile Precipitation Isopleth Map, which exhibits the size of the 85th percentile storm event throughout Orange County.¹⁸⁹ Since this map uses detailed local rainfall data, it is more accurate for calculating the 85th percentile storm event than other methods which were included in Order No. R9-2002-0001. The other methods found in Order No. R9-2002-0001 were included as options to be used in the event that detailed accurate rainfall data did not exist for various locations within Orange County. The development of the 85th Percentile Precipitation Isopleth Map makes these other less accurate methods superfluous. Therefore, these other methods for calculating the 85th percentile storm event have been removed from the current Order.

Second, the Order requires that treatment control BMPs selected for implementation at Priority Development Projects have a removal efficiency rating that is higher than the "low removal efficiency," as presented in the Model SSMP/WQMP. The requirement allows exceptions for those projects that, with a feasibility analysis, can justify the use of a treatment control BMP with a low removal efficiency for a Priority Development Project. This requirement is needed because to date, the Copermitees have generally approved low removal efficiency treatment control BMPs without justification or evidence that use of higher efficiency treatment BMPs was considered and found to be infeasible. Specifically, it has been found during audits of the Copermitees' SSMP programs that many SSMP reports do not adequately describe the selection of treatment control BMPs.¹⁹⁰ Moreover, USEPA's contractor Tetra Tech, Inc. recommends that "project proponents should begin with the treatment control that is most effective at removing the pollutants of concern [...] and provide justification if that treatment control BMP is not selected."¹⁹¹

¹⁸⁹ The isopleth map can be found as Exhibit 7.II in the Model WQMP.

¹⁹⁰ Tetra Tech, Inc. 2005. Program Evaluation Report. Orange County Storm Water Program: Cities of Laguna Beach, Laguna Hills, Lake Forest, and Rancho Santa Margarita.

¹⁹¹ Tetra Tech, Inc., 2005. Program Evaluation Report –San Diego Standard Urban Storm Water Mitigation Plan (SUSMP) Evaluation. P. 5.

In the ROWD, the Copermittees acknowledge the need for further attention to the selection and implementation of effective treatment BMPs. They propose to revise the model WQMP table of BMP effectiveness. The requirement is needed to provide clarification that selection of low efficiency treatment control BMPs over high efficiency BMPs without justification does not meet permit requirements and is not in compliance with the storm water MEP standard.

In addition, treatment control BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies. Related guidelines are identified in guidance from CASQA.¹⁹² Additional considerations are outlined in publications from the California Department of Health Services and University of California Division of Agriculture and Natural Resources.¹⁹³

Section F.1.d.(7). (Low-Impact Design BMP Waiver Program) allows Copermittees to develop a LID BMP waiver program, under which projects where it is technically infeasible to implement the required LID BMPs could substitute with treatment control BMPs and a mitigation project, payment into an in-lieu funding program, and/or watershed equivalent BMPs. Some sites may be technically infeasible to implement the required LID BMPs due to the site constraints. For this reason, the Regional Board has added to the Order a requirement for the Copermittees to develop such a program. The program would provide the opportunity for development projects to avoid partial or full LID BMP implementation in exchange for implementation of treatment control BMPs and mitigation. The program would maintain equal water quality benefits as properly implemented LID BMPs when partial LID BMPs are coupled with a mitigation project or in-lieu funding.

The Order includes specific minimum requirements so that the program will achieve similar water quality benefits. Any program which allows development projects to forgo LID BMP implementation must include provisions which will achieve similar water quality benefits. To ensure that this is the case for the LID BMP waiver program, minimum provisions for the program have been added to the Order

¹⁹² For example, see the California Stormwater BMP Handbook guidelines for Extended Detention Basins (TC-22) at <http://www.cabmphandbooks.org>.

¹⁹³ Marco Metzger. "Managing Mosquitoes in Stormwater Treatment Devices." University of California Division of Agriculture and Natural Resources Publication No. 8125. Available at <http://anrcatalog.ucdavis.edu>.

Section F.1.d.(8). (BMP Design Standards) addresses a need for the Copermitees to develop and apply consistent criteria for the design and maintenance of structural treatment BMPs. Correct BMP design is critical to ensure that BMPs are effective and perform as intended. Without design criteria, there is no assurance that this will occur, since there is no standard for design or review. As an example, Ventura County has developed a BMP manual that includes standard design procedure forms for BMPs. Ventura County's *Technical Guidance Manual for Storm Water Quality Control Measures* is available at <http://www.vcstormwater.org/publications.htm>.¹⁹⁴ California Stormwater Quality Association (CASQA) also confirms the necessity of design criteria when it includes such criteria in its *New Development and Redevelopment BMP Handbook*.¹⁹⁵ This issue is noted in the ROWD, and the Copermitees propose to develop standard design checklist/plans/details for selected source control and treatment BMPs.

Section F.1.d.(9). (Implementation process) requires the Copermitee to implement a process to verify compliance with SSMP requirements. As part of the SSMP, requires identification at what point in the planning process that projects must meet SUSMP requirements and what are roles/responsibilities of municipal departments. The intent of this requirement is to provide consistency in the application of the SSMPs between the Copermitees. This requirement was included in previous Order No. R9-2002-0001.

Section F.1.d.(10) (Annual Review of Treatment BMPs) requires Copermitees to keep their SSMPs up to date with BMP effectiveness studies for low-impact design and treatment control BMPs. The ROWD includes commitments to develop a library of BMP performance reports and to revise the model WQMP table for the latest information on BMPs. This requirement will ensure that two important types of information be included in those efforts: Site design BMPs and treatment BMPs that are assessed as part of contracts with the State Board and Regional Board. The later types of projects include those funded with Clean Beach Initiative grants and other grants. Projects funded with such state grants must include effectiveness assessments using a quality assurance plan. As a result, such studies generally provide reliable sources of local data and should be included in local SSMPs.

¹⁹⁴ Ibid.

¹⁹⁵ California Stormwater Quality Association, 2003. *Stormwater Best Management Practice Handbook – New Development and Redevelopment*.

Sections F.1.e and F.1.f. (BMP Verification and Treatment BMP Maintenance Tracking) are included in the Order to improve the effectiveness of the BMP requirements. They are included in response to findings from the Audits¹⁹⁶ and recommendations from USEPA.¹⁹⁷ The Copermitees recognize a need to improve the verification of post-construction BMPs. The 2007 DAMP proposes to verify 90 percent of WQMPs (including structural and non-structural BMPs) by inspection, self-certifications, surveys or other means. The Regional Board finds that 90 percent is a reasonable annual target, but considers inspections to be essential to achieve optimal results. Therefore, the Order requires high priority sites to be inspected annually, and allows other measures to be used for lower priority treatment control BMPs.

Section F.1.h. (Hydromodification) expands and clarifies current requirements for control of MS4 discharges to limit hydromodification effects caused by changes in runoff resulting from development and urbanization. The requirements are based on findings and recommendations of the Orange County Storm Water Program, the Stormwater Monitoring Coalition (SMC),^{198,199} and the Storm Water Panel on Numeric Effluent Limits (Numeric Effluent Panel).²⁰⁰ Added specificity is needed due to the current lack of a clear standard for controlling hydromodification resulting from development. More specific requirements are also warranted because hydromodification is increasingly recognized as a major factor affecting water quality and beneficial uses, and the Copermitees have proposed only vague and voluntary modifications to the Model WQMP. The Order is intended to ensure the intent of the proposed modifications is incorporated into each Copermitees' SSMP.

¹⁹⁶ The 2005 audits performed by Tetra Tech, Inc. found that cities are not tracking post-construction BMPs. The final audit report recommended (Section 2.1.2) that each city should develop a system to verify implementation and track post-construction BMPs to ensure that they are adequately maintained.

¹⁹⁷ Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68845. USEPA recommends such practices in the Phase II storm water regulations, promoting "inspections during construction to verify BMPs are built as designed."

¹⁹⁸ Coleman, Derrick, et al. 2005. *Effect of Increases in Peak Flows and Imperviousness on the Morphology of Southern California Streams*. Technical Report No. 450 of the Southern California Coastal Water Research Project.

¹⁹⁹ Stein, Eric and Susan Zaleski. 2005. *Managing Runoff to Protect Natural Streams: The Latest Developments on Investigation and Management of Hydromodification in California*. Proceedings of a special technical workshop co-sponsored by California Stormwater Quality Association (CASQA), Stormwater Monitoring Coalition (SMC), and University of Southern California Sea Grant (USC Sea Grant). Technical Report No. 475 of the Southern California Coastal Water Research Project.

²⁰⁰ Storm Water Panel Recommendations to the California State Water Resources Control Board. 2006. *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial, and Construction Activities*.

Hydromodification is the change in a watershed's runoff characteristics resulting from development, together with associated morphological changes to channels receiving the runoff. As the total area of impervious surfaces increases, infiltration of rainfall decreases, causing more water to run off the surface and at a higher velocity. Runoff from developed areas can produce erosive flows in channels under rainfall conditions which were not previously problematic. Moreover, runoff from developed areas increases the duration of time that channels are exposed to erosive flows. The increase in the volume of runoff and the length of time that erosive flows occur ultimately intensify sediment transport, causing changes in sediment transport characteristics and the hydraulic geometry (width, depth, and slope) of channels.²⁰¹

These types of changes have been documented in southern California. It has been reported that 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.²⁰² Such changes in runoff have significant impacts on channel morphology. It has recently been found that ephemeral/intermittent channels in southern California appear to be more sensitive to changes in imperviousness than channels in other areas. Morphology of small channels in southern California was found to change with only 2-3 percent watershed imperviousness, as opposed to 7-10 percent watershed imperviousness in other parts of the nation.²⁰³

Effects of hydromodification are evident in southern Orange County and recognized by the Copermittees. Analyses of bioassessment data, for example, indicate that physical changes to stream channels caused by hydromodification are likely responsible, in part, for the low bioassessment scores in urbanized settings.²⁰⁴ It is important to recognize that the physical changes are a direct result of MS4 discharges, but that two separate mechanisms are involved. First, is a change in the flow regime caused by the increase in impervious surfaces and loss of natural conveyance systems. Discharges to receiving waters from the MS4 outfalls do not mimic the natural discharges from former tributaries to that receiving water, and the change results in erosion. Second, the physical stream habitat in many places has been severely modified in order to efficiently convey those increased storm water discharges to the ocean. Where streams are hardened and/or buried to convey storm water, they cannot provide adequate water quality and other necessary conditions to support beneficial uses. Both of these issues are addressed in the Order.

²⁰¹ Santa Clara Valley Urban Runoff Pollution Prevention Program, 2005. Hydromodification Management Plan. P. 1-1.

²⁰² Schueler and Holland, 2000. Storm Water Strategies for Arid and Semi-Arid Watersheds (Article 66). The Practice of Watershed Protection.

²⁰³ Coleman, et. al., 2005. Effect of Increases in Peak Flows and Imperviousness on the Morphology of Southern California Streams. P. iv.

²⁰⁴ See Chapter 11 of the ROWD and the 2005-06 Unified Annual Report for the analyses.

The Copermitees' recognize the need to improve management of hydromodification. The ROWD proposes to revise the Model WQMP to incorporate additional information from ongoing hydromodification studies conducted by the SMC. The Order allows the Copermitees to adopt criteria consistent with future SMC findings in the development of their Hydromodification Management Plan (see below).

Section F.1.h. requires the Copermitees to submit a Hydromodification Management Plan (HMP) within two years of permit adoption. This is consistent with other Southern California MS4 permits and in direct response to comments from the USEPA on Tentative Order R9-2008-001.

Section F.1.h (1) describes several elements that must be included in the HMP. For example, the HMP must identify a method for assessing susceptibility of channel segments which receive runoff discharges from Priority Development Projects, and include a channel standard to ensure that the stability of the channel is not compromised as a result of discharges from the Priority Development Projects. The HMP must also identify a range of flows where Priority Development Projects could cause hydromodification effects and subsequent stream instability.

Additionally, the HMP must require Priority Development Projects to implement hydrologic control measures (such as LID or detention basins) to prevent hydromodification and resultant degradation of stream conditions downstream of project sites. To compare post-project flow rates and durations to pre-project flow rates and durations, the HMP must specify that the pre-developed (naturally occurring) flow rates and durations shall be used when assessing pre-project conditions, so that the naturally occurring hydrology is eventually restored.

In cases where a stream has been armored with concrete, rip rap, or other man-made materials, the HMP shall require the assessment of a comparable soft-bottom channel as the channel standard, as opposed to using the characteristics of the hardened channel as the channel standard. This is to ensure that hydromodification management measures are already in place should any portion of the hardened channel be returned to its natural state, thereby restoring the physical integrity of the creek and its Beneficial Uses. For this reason, the waiver provision for hydromodification management measures for projects discharging into hardened channels was deleted from the Tentative Order. The remaining exception is for projects that discharge storm water runoff into underground storm drains discharging directly into bays or the ocean and for projects discharging to waters where the entire channel bed and banks have been concrete lined all the way to ocean receiving waters.

The HMP must also include metrics for assessing impacts to downstream watercourses from Priority Development Projects, as well as assessing improvements to these watercourses. One metric that must be included is the Index of Biotic Integrity (IBI) score for benthic macroinvertebrates. This is because historic hydromodification

impacts, such as concrete lining and channelization, have impacted the natural physical habitat of urban streams resulting in low IBI scores. The Copermittee's 2006-2007 monitoring indicated decreased IBI scores in the urbanized watersheds. In the absence of water chemistry and toxicity impacts, these low scores were attributed to be a result of poor physical habitat conditions.²⁰⁵ Therefore, the IBI score will be a useful metric in terms of assessing both impacts to streams from Priority Development Projects and improvements due to implementation of management measures.

In addition to the hydrologic control measures that must be included in the HMP to prevent or minimize hydromodification effects from Priority Development Projects, the HMP must also include additional measures to be used on Priority Development Projects based on a prioritized consideration of the following elements in this order: 1) site-design hydrologic control measures, 2) on-site management measures, 3) the use of regional controls upstream of receiving waters, and lastly, 4) in-stream controls (not to include reinforcement with non-naturally occurring materials). The suite of management measures must also include stream restoration as a viable option to achieve the channel standard and subsequently restore Beneficial Uses.

Section F.1.h (5) describes interim hydromodification criteria that must be implemented by the Copermittees within one year of adoption of the Tentative Order and concurrent to development of the local HMP. The values chosen for the interim criteria are those currently being implemented by Copermittees in the San Diego area.

Finally, the requirements included in section F.1.h do not supersede the requirements for LID presented in section F.1.d. (4). In certain situations, the requirements to incorporate LID will satisfy the requirements for hydromodification management. For example, detention basins are a common BMP used to manage high flow rates but behave hydrologically different than distributed systems used in LID. Using LID is a viable option for both accomplishing hydromodification management and pollutant load reductions.

F.2. Construction

The following legal authority applies to section F.2:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

²⁰⁵ Orange County Copermittees, November 15, 2007. 2006-2007 Unified Annual Progress Report Program Effectiveness Assessment (San Diego Region).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D) provides that the proposed management program include “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.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(1) provides that the proposed management program include “A description of procedures for site planning which incorporate consideration of potential water quality impacts.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(2) provides that the proposed management program include “A description of requirements for nonstructural and structural best management practices.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(3) provides that the proposed management program include “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.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(4) provides that the proposed management program include “A description of appropriate educational and training measures for construction site operators.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(i)(A) provides that each Copermitttee must demonstrate that it can 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 site of industrial activity.”

Federal NPDES regulation 40 CFR 122.26(b)(14) provides that “The following categories of facilities are considered to be engaging in ‘industrial activity’ for the purposes of this subsection: [...] (x) Construction activity including cleaning, grading and excavation activities [...].”

Federal NPDES regulation 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to “control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.”

Section F.2 has additions to ensure the protection of threatened and endangered species and requires the consideration of potential impacts from the use of Active Treatment Systems. These requirements were added to ensure additional protection of the Beneficial Uses of waters of the State.

Section F.2.a. (Ordinance Update) requires each Copermittee to review and update its grading and storm water ordinances as necessary to comply with the MS4 permit. By updating the grading and storm water ordinances, the Copermittees will have the necessary legal authority to require construction sites to implement effective BMPs that will reduce pollutant discharges to the maximum extent practicable. The Order allows the Copermittees 365 days to review and update their ordinances. The 365 days should be adequate to allow for the relatively minor changes that might be needed since their ordinances were last updated under Order No. R9-2002-0001.

Section F.2.b. (Source Identification) requires the Copermittees to develop and update a watershed based inventory of all construction sites regardless of size or ownership. This section has been modified to require the inventory be updated regularly, rather than annually. More frequent updates will ensure the Copermittees have a more accurate inventory of construction sites within their jurisdiction. A regularly updated inventory of active construction sites will assist the Copermittees in ensuring that all sites are inspected per Order requirements. The Order does not specify the frequency of updates, and instead relies on each Copermittee to develop updates appropriate to local construction activity. The 2007 DAMP proposes that the inventory be updated "at a minimum" prior to the start of the rainy season. Such a minimum standard may not be appropriate for each Copermittee. Failure to maintain a useful inventory would be a violation of the Order.

Section F.2.c. (Site Planning and Project Approval Process) requires Copermittees to incorporate consideration of potential water quality impacts prior to approval and issuance of construction and grading permits. The Copermittees²⁰⁶ and our program evaluations in 2005²⁰⁷ recommend that storm water requirements need to be better incorporated into the pre-construction process.

²⁰⁶ Orange County Storm Water Copermittees. 2006. Report of Waste Discharge (San Diego Region), Section 7, New Development.

²⁰⁷ Tetra Tech, Inc. 2005. Program Evaluation Report. Orange County Storm Water Program: Cities of Laguna Beach, Laguna Hills, Lake Forest, and Rancho Santa Margarita.

This section now requires the Copermittees to review project proponents' runoff management plans for compliance with local regulations, policies, and procedures. USEPA recommends that it is often easier and more effective to incorporate storm water quality controls during the site plan review process or earlier.²⁰⁸ In the Phase I storm water regulations, USEPA states that a primary control technique is good site planning.²⁰⁹ USEPA goes on to say that the most efficient controls result when a comprehensive storm water management system is in place.²¹⁰ To determine if a construction site is in compliance with construction and grading ordinances and permits, USEPA states that the "MS4 operator should review the site plans submitted by the construction site operator before ground is broken."²¹¹ Site plan review aids in compliance and enforcement efforts since it alerts the "MS4 operator early in the process to the planned use or non-use of proper BMPs and provides a way to track new construction activities."²¹² During audits of Orange County Copermittee storm water programs, it was found that site plan and SWPPP review were inadequate and inconsistent.²¹³

Section F.2.d. (BMP Implementation) includes modifications to the requirements for each Copermittee to designate and ensure implementation of a set of minimum BMPs at construction sites. These modifications are based on Regional Board findings and experience during implementation of Order No. R9-2002-0001.

²⁰⁸ USEPA, 1992. Guidance 833-8-92-002. Section 6.3.2.1.

²⁰⁹ Federal Register / Vol. 55, No. 222 / Friday, November 16, 1990 / Rules and Regulations. P. 48034.

²¹⁰ *Ibid.*

²¹¹ USEPA, 2000. Guidance 833-R-00-002. Section 4.6.2.4, P. 4-30.

²¹² *Ibid.*, P. 4-31.

²¹³ Tetra Tech, Inc. 2005. Program Evaluation Report. Orange County Storm Water Program: Cities of Laguna Beach, Laguna Hills, Lake Forest, and Rancho Santa Margarita.

Unlike Order No. R9-2002-0001, this Order does not require the Copermitttee to designate a set of minimum BMPs for high, medium, and low threat to water quality construction sites. This change was made in recognition of most Copermitttees' application of one consistent set of BMPs throughout their jurisdictions. The Copermitttees also desire to move toward a risk-based approach to BMP requirements.²¹⁴ As a result, the Order requires a minimum set of BMPs to be designated for all sites and that enhanced BMPs, including advanced treatment systems, be designated for sites upstream of 303(d) impairments and ESAs. Advanced treatment has been effectively implemented extensively in the other states and in the Central Valley Region of California.²¹⁵ In addition, the Regional Board's inspectors have observed advanced treatment being effectively implemented at large sites greater than 100 acres and at small, less than 5 acre, in-fill sites. Advanced treatment is often necessary for Copermitttees to ensure that discharges from construction sites are not causing or contributing to a violation of water quality standards. For example, the Basin Plan lists the water quality objective for turbidity as 20 NTU for all hydrologic areas and subareas except for the Coronado HA (10.10) and the Tijuana Valley (11.10). For certain construction sites with large slopes and exposed areas, the only technology that is likely to meet 20 NTU is advanced treatment combined with erosion and sediment controls. To ensure the MEP standard and water quality standards are met, the requirement for implementation of advanced treatment at high threat construction sites has been added to the Order, while still providing sufficient flexibility for each Copermitttee's unique program.

²¹⁴ Orange County Storm Water Copermitttees. 2006. Report of Waste Discharge (San Diego Region), Section 8, Construction

²¹⁵ SWRCB, 2004. Conference on Advanced Treatment at Construction Sites.

The Order does not include seasonal restrictions on grading. Seasonal restrictions on grading for storm water are difficult to implement due to the conflict between seasonal grading restrictions, endangered birds' breeding seasons and the seasonal passage of endangered salmonids; therefore the seasonal grading restrictions have not been included with the other BMPs in the Order. Found in southern California, the Least Bell's Vireo and the Coastal California Gnatcatcher are listed as federally endangered and threatened, respectively.²¹⁶ Permits issued by the California Department of Fish and Game (CDFG) restrict grading during these birds' breeding seasons, which is from April 10 to August 31 for the Least Bell's Vireo²¹⁷ and from February 15 to August 31 for the Coastal California Gnatcatcher.²¹⁸ Ideally storm water restrictions on grading would be during the wet season from October 1 through April 30.²¹⁹ Combined, these restrictions would limit construction grading to be during the month of September, which is infeasible. Section D.2.d of the Order still requires project proponents to minimize grading during the wet season and coincide grading with seasonal dry weather periods to the extent feasible.

Section F.2.e. (Inspections) establishes criteria for inspections based on risk factors including size, season, and location of the construction site. Modifications have been made to requirements of Order No. R9-2002-0001 based on the experience of the Copermitttees and Regional Board construction programs.

The Order requires sites in active grading during the wet season that are over 30 acres be inspected every two weeks, rather than sites over 50 acres being inspected weekly. In south Orange County approximately 15 percent (34 sites) of construction sites over one acre are larger than 30 acres, whereas about 9 percent (21 sites) of sites are over 50 acres.²²⁰ This may result in a net decrease of inspections of large sites, although more sites will be covered. The reduction in inspection frequency for sites greater than 50 acres is justified because the sites have generally improved their erosion and sediment control measures since adoption of Order No. R9-2002-0001. Biweekly inspections of these sites in the future should be sufficient to ensure compliance with local regulations.

²¹⁶ State of California, Department of Fish and Game, 2005. State and Federally Listed Endangered and Threatened Animals of California.

²¹⁷ United States Department of the Interior, Fish and Wildlife Service, 2001. Least Bell's Vireo Survey Guidelines.

²¹⁸ United States Department of the Interior, Fish and Wildlife Service, 1997. Coastal California Gnatcatcher (*Poliopitila californica californica*) Presence/Absence Survey Guidelines.

²¹⁹ Regional Board, 2001. Order No. 2001-01, San Diego County MS4 Permit. Directive F.2.g.(2).

²²⁰ Based on the State Board's database of sites covered by the Construction Storm Water General NPDES Permit, Order No. 99-08-DWQ. That general permit requires sites disturbing over one acre to file for coverage, so it provides a good basis for assessment.

The Order lowers the size of construction sites adjacent to or discharging directly to ESAs that receive scrutiny. Order No. R9-2002-0001 requires such sites five acres and more to be inspected weekly during the wet season. This Order requires such sites one acre and above to be inspected every two weeks during the wet season and once during August or September. The lower size threshold is consistent with Phase II storm water permits.

The Order omits Order No. R9-2002-0001's provision allowing a Copermitee to decrease the inspection frequency for high priority sites if the Copermitee certifies in writing to the Regional Board that they have recorded the site's Waste Discharge Identification Number, reviewed the site's Storm Water Pollution Prevention Plan (SWPPP), assured the site's SWPPP is in compliance, and assured the SWPPP is properly implemented at the site. Under Order No. R9-2002-0001, the Regional Board never received from any of the Copermitees a certification to decrease the inspection frequency at high priority sites. Since the certification process was never used, the language has been deleted from the Order.

This section also requires the Copermitees to track the number of inspections for each inventoried construction site. This requirement has been added to ensure that the Copermitees can demonstrate that construction sites are inspected at the minimum frequencies.

Section F.2.g.2 includes an additional requirement for notification to the Regional Board regarding construction sites has been added to this section. Copermitees are required to annually notify the Regional Board of construction sites that have suspected violations. This was added to enhance Regional Board and Permittee communication and coordination in regulating construction sites.

F.3 Existing Development

F.3.a. Municipal

The following legal authority applies to section D.3.a:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(1) provides that the proposed management program include "A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(3) provides that the proposed management program include "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of de-icing activities."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(4) provides that the proposed management program 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."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(5) provides that the proposed management program include "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."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(6) provides that the proposed management program include "A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities."

Federal NPDES regulation 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to "control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

Section F.3.a.2. (General BMP Implementation) requires the Copermittees to designate minimum BMPs for general municipal areas and activities, regardless of their threat to water quality. The requirement that different types of BMPs be designated for different threats to water quality categories of municipal areas and activities has been removed from the Order. This was done to help simplify and clarify the Order's requirements. BMPs required to be implemented at a site can now be based on the sources or activities present at the site. This is closer to the approach taken by the Copermittees in their JRMPs. Threat to water quality is used to determine inspection frequencies in section F.3.a.(7).

Section F.3.a.3, F.3.a.4, and F.3.a.5. (Specific BMP Implementation Categories) establishes requirements for specific categories of activities and areas. These are selected based on the CWA and findings of the Permittees in annual reports and ROWD that identify these activities as warranting special attention.

Pesticides, Herbicides, and Fertilizers. 40 CFR 122.26(d)(2)(iv)(A)(6) requires a description of a storm water program for pesticides, herbicides, and fertilizers. In addition, water quality data demonstrates widespread presence of such pollutants in receiving waters and MS4 discharges. In response to similar requirements of Order No. R9-2002-0001, the Copermitees have developed a specific model Integrated Pest Management, Pesticides, and Fertilizer guidelines.

Flood Control Structures. In order to more closely meet the intent of the federal regulations and guidance, the requirement has been modified. 40 CFR 122.26(d)(2)(iv)(A)(4) requires "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." Retrofitting flood control devices can reduce storm water pollutants and improve water quality. Copermitees have conducted many flood control retrofit projects, many of which have been partially funded with State grant awards.

USEPA expands on the federal provision with the following information: "Storm water management devices and structures that focus solely on water quantity are usually not designed to remove pollutants, and may sometimes harm aquatic habitat and aesthetic values" (1992). As flood control structures and other elements of the MS4 age and retrofitting becomes necessary, opportunities for water quality improvements arise.

Conveyance systems which take water quality consideration into account (such as grassed swales, vegetated detention ponds, etc.) can often cost less to construct than traditional concrete systems. Evaluation of the applicability of such systems during retrofitting must occur to ensure that pollutants in storm water runoff are reduced to the maximum extent practicable. USEPA supports utilizing BMPs for pollution reduction in flood management projects, stating that "The proposed management program must demonstrate that flood management projects take into account the effects on the water quality of receiving water bodies. [...] Opportunities for pollutant reduction should be considered".²²¹

²²¹ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. Washington D.C. EPA/833-B-92-002.

Existing Copermittee projects include two types of retrofits. The first type involves adding an engineered device to an existing structure in order to treat or divert runoff. Examples include catch basin inlet filters/screens, ultraviolet disinfection facilities, hydrodynamic separators, and diversions to the sanitary sewer. The second type involves re-installing pervious or natural treatment features to facilities. Examples include removing concrete portions of conveyances to create pervious conveyances; and creating treatment wetlands within flood detention facilities. The later type of retrofit is preferred by the Regional Board. They are likely more sustainable over the long-term because they may require less rigorous operation and maintenance than the former. They may also provide the additional benefit of providing significant or incidental opportunities for beneficial uses (e.g., recreation, wildlife, water supply).^{222,223}

Sweeping of Municipal Areas. Sweeping municipal areas would likely be done in the absence of the Order. However, in certain cases it is an important component of a jurisdictional runoff management program. The Order contains requirements to ensure that the use of street sweeping is optimized for runoff applications if it is to be used and reported as a BMP. The criteria in the Order are taken from industry guidance as reported by the Permittees in the Aliso Creek watershed.²²⁴

Section F.3.a.(6). (Operation and Maintenance of MS4 and Structural Controls) requires the Copermittees to inspect and remove waste from their MS4s prior to the rainy season.

Maintenance is critical to the successful implementation of every storm water runoff management program. USEPA finds that "Lack of maintenance often limits the effectiveness of storm water structural controls such as detention/retention basins and infiltration devices. [...] The proposed program should provide for maintenance logs and identify specific maintenance activities for each class of control, such as removing sediment from retention ponds every five years, cleaning catch basins annually, and removing litter from channels twice a year.

²²² Burton, Carmen et al. 2005. Assessing Water Source and Channel Type as Factors Affecting Benthic Macroinvertebrate and Periphyton Assemblages in the Highly Urbanized Santa Ana River Basin, California. American Fisheries Society Symposium. Vol.47 pp.239-262.

²²³ Stromberg, Juliet C. 2001. Restoration of Riparian Vegetation in the South-Western United States: the importance of flow regimes and fluvial dynamism. Journal of Arid Environments. Vol49, pp.17-34.

²²⁴ See 20th and 21st quarterly reports for the Aliso Creek watershed bacteria investigation, prepared by the Orange County Copermittees within the Aliso Creek watershed.

If maintenance activities are scheduled infrequently, inspections must be scheduled to ensure that the control is operating adequately. In cases where scheduled maintenance is not appropriate, maintenance should be based on inspections of the control structure or frequency of storm events. If maintenance depends on the results of inspections or if it occurs infrequently, the applicant must provide an inspection schedule. The applicant should also identify the municipal department(s) responsible for the maintenance program".²²⁵ The MS4 maintenance requirements are based on the above USEPA recommendations. This maintenance will help ensure that structural controls are in adequate condition to be effective year round, but especially at the beginning of and throughout the rainy season.

Two requirements have been added to the Order that were not within Order No. 2002-0001. Subsection (3) allows a decreased inspection frequency for facilities that are routinely clean, and Subsection (4) requires trash to be removed from channels in a timely manner. Typically, Copermittees have reported annual or semi-annual creek cleanups as significant BMPs. The large volumes of trash reported to be removed during these events demonstrates the significant amount of trash that accumulates in the channels. In addition, storm water runoff is a leading contributor to the accumulation of trash and debris along the beaches of Orange County.²²⁶ In order to reduce the effect of the trash, the Order requires that trash be removed more frequently.

Section F.3.a.(7). (Sewage Infiltration) requires the Copermittees to implement controls and measures to prevent and eliminate sewage infiltration or seepage from municipal sanitary sewers to MS4s through thorough, routine preventive maintenance of the MS4. This requirement is in Order No. R9-2002-0001 in the section on Illicit Discharge Detection and Elimination (section F.5.i).

Sections F.3.a.(8) and F.3.a.(9). (Inspections and Enforcement) establishes a minimum set of municipal areas and activities for oversight and inspection by the Copermittees and requires that Copermittees properly enforce runoff requirements at municipal areas and activities.

²²⁵ USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. Washington D.C. EPA/833-B-92-002.

²²⁶ Moore, S.L., D. Gregorio, M. Carreon, S B. Weisberg, and M. K. Leecaster. 2001. *Composition and distribution of beach debris in Orange County, California*. Marine Pollution Bulletin 42(3): 241-245..

F.3.b. Industrial and Commercial

The following legal authority applies to section F.3.b:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(C) provides that the proposed management program include “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.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(C)(1) provides that the Copermittee must “identify priorities and procedures for inspections and establishing and implementing control measures for such discharges.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(C)(2) provides that the proposed management program shall “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 Kjeldhal nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under 40 CFR 122.21(g)(7)(iii) and (iv).”

Federal NPDES regulation 40 CFR 122.26(d)(2)(ii) provides that the Copermittee “Provide an inventory, organized by watershed of the name and address, and a description (such as Standard Industrial Classification [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.”

Federal NPDES regulation 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to “control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(i)(A) provides that each Copermittee must demonstrate that it can 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 site of industrial activity.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A) provides that the Copermittee develop a proposed management program which includes “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.”

Section F.3.b. (Industrial and Commercial) requires the Copermittees to implement an industrial and commercial program to reduce pollutants in storm water runoff from all industrial and commercial sites/sources. The industrial and commercial sections of Order No. 2002-0001 have been combined into one section in this Order. This change will streamline and simplify the Order, without negatively impacting water quality. This change is not unprecedented because industrial and commercial facilities are commonly addressed together. For example, the Southern Riverside County MS4 Permit²²⁷ combined industrial and commercial programs into one section. In addition, in their Annual Reports and ROWD,²²⁸ the Copermittees jointly address industrial and commercial components. USEPA contractor Tetra Tech also evaluated and reported on the industrial and commercial programs jointly during their program evaluations.²²⁹

Section F.3.b.(1)(a) (Source Identification) requires that building material retailers and storage, animal facilities, and power washing services be included in the Copermittees’ inventory of commercial sites/sources. These activities have been identified annual MS4 program reports and quarterly Aliso Creek watershed reports as potentially significant sources of pollutants. This is not a significant change because Order No. R9-2002-0001 requires that any commercial site or source determined by a Copermittee to contribute a significant pollutant load to the MS4 be added to its inventory of commercial sites. Furthermore, the commercial BMP fact sheets developed by the Copermittees generally address the types of activities occurring at these facilities and practices.

²²⁷ Regional Board, 2004. Order No. R9-2004-001; Riverside County MS4 Permit. Section H.2; P. 24.

²²⁸ Orange County Storm Water Copermittees, 2006. Report of Waste Discharge (San Diego Region). Section 9.

²²⁹ Tetra Tech, Inc., 2005. Program Evaluation Reports Orange County Storm Water Programs: Cities of Laguna Beach, Laguna Hills, Lake Forest, and Rancho Santa Margarita.

The Order has revised requirements for identifying industrial sites/sources. The revised requirements are identical to those found in the Southern Riverside County MS4 permit.²³⁰ USEPA requires the same identification: "Measures to reduce pollutants in storm water discharges to municipal separate storm sewers 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)."²³¹ USEPA "also requires the municipal storm sewer permittee to describe a program to address industrial dischargers that are covered under the municipal storm sewer permit."²³² In order to more closely follow USEPA's guidance, this Order also includes operating and closed landfills, and hazardous waste treatment, disposal, storage and recovery facilities.

Section F.3.b.3. (Mobile Businesses) requires each Copermittee to develop and implement a program to reduce the discharge of storm water pollutants from mobile businesses to the MEP and to prevent the discharge of non-storm water. Mobile businesses are service industries that travel to the customer to perform the service rather than the customer traveling to the business to receive the service. Examples of mobile businesses are power washing, mobile vehicle washers, carpet cleaners, port-a-potty servicing, pool and fountain cleaning, mobile pet groomers, and landscapers. These mobile services produce waste streams that could potentially impact water quality if appropriate BMPs are not implemented.

Order No. R9-2002-0001 also requires BMP implementation for certain mobile businesses (e.g., mobile vehicle washing and mobile carpet cleaning). These storm water requirements of Order No. R9-2009-0002 are not significantly different from the existing requirements. The Order specifies mobile businesses must prevent non storm water dry weather flows from entering the MS4 (see C.1.b) for special attention based on reports from the Copermittees that mobile businesses have been difficult to control with existing programs.

Mobile businesses present a unique difficulty in storm water regulation. Due to the transient nature of the business, the regular, effective practice of unannounced inspections is difficult to implement. Also, tracking these mobile businesses is difficult because they are often not permitted or licensed and their services cross Copermittee jurisdictions. Mobile businesses that operate within a municipality may be based in another municipality or even outside the Region. The Order takes into account the difficulties in regulating mobile businesses.

Because BMPs have been developed already, but communication with mobile businesses may be difficult, the Order provides broad flexibility to the Copermittees for developing a targeted program within the Commercial portion of each JRMP.

²³⁰ Regional Board, 2004. Order No. R9-2004-001; Riverside County MS4 Permit. Section H.2.b)(2); P. 25.

²³¹ Federal Register / Vol. 55, No. 222 / Friday, November 16, 1990 / Rules and Regulations. P. 48056.

²³² Ibid.

Section F.3.b.4. (Inspections) includes requirements for inspections of industrial and commercial sites/sources. The Order is similar to the Southern Riverside County MS4 permit²³³ in requiring that inspections check for coverage under the General Industrial Permit; assessment of compliance with Copermittee ordinances and permits related to storm water and non-storm water runoff; assessment of BMP implementation, maintenance, and effectiveness; visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff; and education and outreach on storm water pollution prevention. The Order also requires that inspections include review of BMP implementation plans if the site uses or is required to use such a plan, and the review of facility monitoring data if the site monitors its runoff. Order No. 2002-0001 did not contain requirements for inspection procedures.

Changes in the Order's requirements for inspection procedures mimic USEPA's guidance: "Site inspections should include (1) an evaluation of the pollution prevention plan and any other pertinent documents, and (2) an onsite visual inspection of the facility to evaluate the potential for discharges of contaminated storm water from the site and to assess the effectiveness of the pollution prevention plan."²³⁴ In 1999, USEPA "recognized visual inspection as a baseline BMP for over 10 years," and "visual inspections are an effective way to identify a variety of problems. Correcting these problems can improve the water quality of the receiving water."²³⁵ Most, if not all, of the Order's procedures are being conducted by the Copermittees that follow the Model Existing Development Program of the DAMP.

With the exception of restaurants, the Order allows Copermittees to establish inspection frequencies, as long as at least 20 percent of the sites are inspected annually. Restaurants are now required to be inspected annually. Inspection frequencies in the Order have been modified from Order No. R9-2002-0001. Order No. R9-2002-0001 specifies frequencies for inspecting industrial sites based on threat to water quality and requires high priority commercial sites to be inspected as needed. Copermittees have been inspecting industrial sites according to Order No. R9-2002-0001. The Copermittees have been inspecting restaurants annually as part of the County Health Department inspections. For other commercial sites, the Copermittees have been focusing annual activities on certain commercial sectors, such as automobiles, with the goal of inspecting every high priority site at least once during the permit term. This change is not considered significant because it should allow the Copermittees to continue existing programs.

²³³ Regional Board, 2004. Order No. R9-2004-001; Riverside County MS4 Permit. Section H.2.d)(3);

²³⁴ USEPA, 1992. Guidance 833-8-92-002, section 6.3.3.4 "Inspection and Monitoring".

²³⁵ USEPA, 1999. 832-F-99-046, "Storm Water Management Fact Sheet – Visual Inspection".

Reports from the Aliso Creek watershed Copermittees demonstrate that as-needed inspections for restaurants means at least annually. Restaurants have been found to present many threats to water quality and standard educational efforts are not effective because restaurants are subject to frequent management changes. For these reasons, the Order requires restaurants to be inspected annually.

An additional notification to the Regional Board regarding industrial sites has been added. Copermittees are required to annually notify the Regional Board of industrial sites that have suspected violations. This was added to enhance Regional Board and Permittee communication and coordination in regulating industrial sites.

Section F.3.b.(6). (Training and Education) requires training and education measures generally consistent with the existing storm water programs. One distinction is that the Order requires each Copermittee to notify the owner/operator of each inventoried industrial and commercial site/source of the BMP requirements applicable to the site/source. This requirement is necessary to ensure that the owners and operators of commercial sites stay informed of appropriate BMPs. This is especially important because sites may be inspected as little as once every five years.

Section F.3.c. (Residential Component)

The following legal authority applies to section F.3.c:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A) provides that the Copermittee develop a proposed management program which includes "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."

Federal NPDES regulation 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to "control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

Section F.3.c (Residential Component) moves the common interest areas / homeowners' association component and the requirement for proper management of used oil, toxic materials, and other household hazardous wastes to the residential section of the Order, since these requirements generally apply to residential areas. These changes improve the organization of the Order and have no net effect on its implementation and enforcement. Other requirements for prioritization, BMP implementation, and enforcement are consistent with Order No. R9-2002-01.

Section F.3.d. (Retrofitting Existing Development)

Legal Authority: The legal authority for retrofitting existing development is the same legal authority as that identified for municipal, industrial, commercial and residential development sections (See fact sheet discussion on those sections, F.3.a – c). In particular, CWA sections 402(p)(3)(B)(ii-iii), and CWC section 13377 give the Regional Board the legal authority to require retrofitting of existing development.

A section has been added to require the retrofit of existing development (see Finding D.3.i and Discussion). This section contains specific requirements for the retrofit process. Retrofitting existing development is a widespread practice across the United States. Successful retrofitting programs have been implemented in such diverse locations as Seattle, Washington²³⁶, Portland Oregon²³⁷, Santa Monica, California²³⁸, Kansas City, Kansas²³⁹, and Montgomery County, MD²⁴⁰. When appropriately applied as the draft Tentative Order, retrofitting existing development meets the maximum extent practicable standard.

Existing BMPs are not sufficient, as evidenced by 303(d) listings and exceedances of Water Quality Objectives from the Copermittees monitoring reports. More advanced BMPs, including the retrofitting of existing development with LID, are part of the iterative process. Previous permits limited the requirement of treatment control BMPs to new development and redevelopment. Based on the current rate of redevelopment compared to existing BMPs, the use of LID only on new and redevelopment will not adequately address current water quality problems, including downstream hydromodification. Retrofitting existing development is practicable for a municipality through a systematic evaluation, prioritization and implementation plan focused on impaired water bodies, pollutants of concern, areas of downstream hydromodification, feasibility and effective communication and cooperation with private property owners.

²³⁶ SEA Street, http://www.seattle.gov/dpd/Planning/CityDesign/What_We_Do/Outreach/Folio/DPDS_008014.asp

²³⁷ Clean River Rewards, <http://www.portlandonline.com/BES/index.cfm?c=edeef>

²³⁸ City of Santa Monica, Urban Runoff program, <http://www.smgov.net/Departments/OSE/categories/content.aspx?id=4007>

²³⁹ 10,000 Rain Gardens, <http://www.rainkc.com/>

²⁴⁰ Rainscapes, <http://www.montgomerycountymd.gov/Content/DEP/Rainscapes/home.html>

F.4. Illicit Discharge Detection and Elimination

The following legal authority applies to section F.4:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B) provides that the proposed management program “shall be based on a description of a program, including a schedule, to detect and remove (or require the discharger to the municipal storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(1) provides that the Copermittee include in its proposed management program “a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal storm sewer system.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(2) provides that the Copermittee include in its proposed management program “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.”

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(B)(3) provides that the Copermittee include in its proposed management program “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.”

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(4) provides that the Copermittee include in its proposed management program “a description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer.”

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(5) provides that the Copermittee include in its proposed management program “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.”

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(6) provides that the Copermittee include in its proposed management program “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.”

Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(7) provides that the Copermittee include in its proposed management program “a description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary.”

Section F.4.a-b. (Prevent and Detect Illicit Discharges) requires the Copermittees to implement a program to actively seek and eliminate illicit connections and discharges (IC/ID). Additional wording has been added to this section to clarify and ensure that all appropriate (i.e., field personnel) municipal personnel are utilized in the program to observe and report these illicit discharges and connections. requirement has been added requiring submittal of the GIS layers of the MS4 map within 365 days of Order adoption.

Section F.4.e (Investigations) requires the Copermittees to conduct follow up investigations and inspect portions of the MS4 for illicit discharges and connections, based on dry weather effluent analytical monitoring results. The section also requires the Copermittees to establish criteria for triggering follow up investigations. Additional language has been added to this section to clarify the minimum level of effort and timeframes for follow up investigations when dry weather limitations are exceeded. Timely investigation and follow up of exceedances is necessary to identify sources of illicit discharges, especially since many of the discharges are transitory. The requirements for a 48-hour minimum response time when action levels are exceeded and for immediate response to obvious illicit discharges is necessary to ensure timely response by the Copermittees.

The Copermittees currently use action levels to facilitate the determination of when source investigation studies are warranted based on data from the dry-weather monitoring program. One set of criteria is based on regional averages of constituent concentrations that were developed based on randomly selected storm drains. Another set of criteria is based on trends at a particular station. These are reasonable criteria if decision-makers are properly trained and action levels set by the County are in compliance with dry weather non-storm water action levels as required in Section C. The ability of the local managers to interpret dry-weather monitoring data collected by the County has greatly improved in the last two years, and continued training is required in section F.4.i.

Section F.4.h. (Spill Response) requires each Copermittee to implement measures to prevent and respond to spills into its MS4. These requirements are similar to Order No. R9-2002-0001 and based on federal regulations at 40 CFR 122.26(d)(2)(iv)(B)(4). Those federal NPDES regulations clearly require that owners and operators of MS4s have procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer.

The Tentative Order includes sewage and non-sewage spills in the requirement for spill prevention and response. Federal regulations clearly define sewage as an illicit discharge that must be addressed by municipalities (see Phase II Final Rule, p.68758). Sewage is an illicit discharge to the MS4 that threatens public health. As such, the Copermittees must implement measures to prevent sewage from entering the MS4 system and must respond to illicit discharges that have entered the system. This section has been revised to clarify that management measures and procedures must be implemented to prevent, respond to, and cleanup spills.

This same requirement was adopted by the Regional Board in Order No, 2002-0001, but was subsequently stayed by the State Board in Order WQO 2002-0014. The City of Mission Viejo challenged the requirement to prevent and respond to sewage spills on the grounds that since the sanitary sewer systems in the City are operated by three water districts already regulated by a NPDES permit from the Regional Board, this requirement would cause delayed spill responses as the City and agencies try to determine jurisdiction and responsibilities. The State Board found that the costs of this requirement did not constitute harm, but agreed that harm could ensue from potential response delay and confusion. Although the entire permit requirement was stayed, neither the State Board, nor the Petitioner discussed spills other than sewage.

Subsequently, the Copermittees and the local sewer agencies have developed mature relationships and implemented procedures for spill response and sewage spill response.²⁴¹ As a result, the concerns expressed by the State Water Board are no longer warranted. The Model Sewage Spill Response Procedure is outlined in the Copermittees' Proposed 2007 Drainage Area Management Plan (DAMP). According to the 2007 DAMP, regardless of where the spill originates, if the spill has entered or may enter the storm drain system, the Copermittees respond to assist with the cleanup and remediation of the area.

Only three Permittees (Laguna Beach, San Clemente, and San Juan Capistrano) own or operate their own sewage collection systems, yet all Copermittees implement the programs for spill response. For the Copermittees that do not own or operate sewage systems, the Regional Board expects that they will continue to respond appropriately to reported or identified spills to the MS4 system.

²⁴¹ Sections 10.2.4 and 10.2.5 in the 2007 DAMP.

Section F.3.a.7 of the Tentative Order includes requirements for measures that must be taken to prevent sewage spills. Examples of measures being implemented by Copermitees include inspections of fats, oils, and grease management at restaurants. Other preventative measures can be implemented during routine planning efforts for new development and redevelopment projects. Similarly, building permit inspections should be used to verify the integrity of the sanitary and storm sewer infrastructure and ensure that cross-connections between the two are avoided.

G. Watershed Runoff Management Programs

The following legal authority applies to section G:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(a)(3)(ii) states: "The Director may [...] issue distinct permits for appropriate categories of discharges [...] including, but not limited to [...] all discharges within a system that discharge to the same watershed [...]"

Federal NPDES regulations 40 CFR 122.26(a)(3)(v) states: "Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system."

Federal NPDES regulation 40 CFR 122.26(a)(5) states: "The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)91)(v) of this section on a system-wide basis, a jurisdiction-wide basis, watershed basis, or other appropriate basis."

Federal NPDES regulation 40 CFR 122.26(d)(2)(iv) states: "Proposed programs may impose controls on a system-wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls."

Section G. (Watershed Runoff Management Program) requires Copermittees to continue implementation of their watershed runoff management programs (WRMPs), however the implementation approach has changed. Order No. R9-2002-01 required watershed RMPs to include a collaborative strategy to abate the sources and reduce the discharges causing high priority water quality problems. This strategy was to guide Watershed Copermittee's selection and implementation of Watershed Activities, so that the activities selected and implemented would remove that pollutant contribution responsible for the identified high priority water quality problem. Outcomes of these requirements were not able to demonstrate improvements to water quality.

Revised language in Order R9-2009-002 attempts to focus watershed copermittee's efforts and resources on addressing the highest water quality problems in the watershed by focusing attention on the health of the receiving water body and the most efficient use of the Watershed Copermittee's time and resources. Order R9-2009-002 requires the Watershed Copermittee's to follow a workplan approach towards assessing receiving water body conditions, prioritizing the Watershed Management Area's (WMAs) highest priority water quality problems, implementing effective BMPs, and measuring water quality improvement in the receiving water.

G1. (Lead Watershed Copermittee Identification) requires the watershed copermittee's to identify a Lead Watershed Copermittee for their WMA.

This requirement is the same to that found in Order 2002-01.

G.2 a-f. (Watershed Workplan) requires the Watershed Copermittees to develop and implement 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. Development of a workplan rather than watershed activities will allow the Copermittees flexibility to iteratively modify their watershed strategy over the course of future planning years as priorities change.

G.3. Watershed Workplan Implementation – Watershed Copermittee's shall begin implementing the Watershed Workplan within 30-days of approval by the Regional Board Executive Officer. Since the Copermittees are already familiar with the watershed program requirements implementing the watershed workplan within 30-days of approval by the Regional Board Executive Officer is reasonable.

G.4. Copermittee Collaboration – Watershed Copermittees shall collaborate to develop and implement the Watershed Workplan. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

This requirement is the same to that found in Order 2002-01.

G.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. Opportunity for the public to review and comment on the Watershed Workplan must occur before the workplan is implemented.

This requirement is similar to that found in Order 2002-01.

G.6. Watershed Workplan Review and Updates – Watershed Copermittees shall

review and update the Watershed Workplan annually to identify need 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 be conducted by the Watershed Copermittees, open to the public and adequately noticed, and occur once every calendar year. 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.

This section requires the copermittee's to review and update their workplan each year to incorporate changing priorities and evolving watershed strategies. This requirement is meant to take the place of Order No. 2002-01 requirement to submit Watershed Annual Reports.

G.7. Aliso Creek Watershed RMP Provisions. This requirement is the same to that found in Order 2002-01.

H. Fiscal Analysis

The following legal authority applies to section H:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(vi) provides that “[The Copermitttee must submit] 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.”

Section H has been expanded in order to develop more useful and meaningful fiscal reporting. The Copermitttees have identified a need to assess the current fiscal reporting process and have proposed to prepare a fiscal reporting strategy to better define the expenditure and budget line items included in the fiscal reports.²⁴² The Regional Board agrees that the process should be improved. A revamped fiscal reporting strategy will provide the Regional Board and the Copermitttees with better capability to manage performance of the programs.

The Copermitttees’ effort is expected to provide standardization of reporting so that figures between Copermitttees are comparable, which is one of many types of information which can be used by the Regional Board to better understand Copermitttee program implementation. Standardization and comparison of fiscal analysis reporting is supported by the State Board funded NPDES Stormwater Cost Survey, which finds that “standards for reporting costs and stormwater activities are needed to allow accurate cost comparisons to be made between stormwater activities.”²⁴³ This document also provides guidance regarding categorization of expenditures for tracking and reporting.

The Order establishes criterion for when Copermitttees must add narrative evaluations to the tables. This will address some of the variability in reporting and will provide the public and Regional Board with improved understanding of how resources are shifted in response to annual assessments. This will also help ensure that projected annual costs adequately reflect planned program modifications described in the annual reports.

²⁴² Orange County Storm Water Copermitttees. 2006. Report of Waste Discharge (San Diego Region), section 2.3.4.

²⁴³ Currier, et al., 2005. *NPDES Storm Water Cost Survey Final Report*. Prepared for California State Water Resources Control Board by Office of Water Programs, California State University, Sacramento. P. 63.

The Regional Board has chosen not to require a description of fiscal benefits realized from implementation of the storm water protection program. This is a recommendation from the National Association of Flood and Stormwater Management Agencies.²⁴⁴ For instance, the current fiscal assessment does 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 Regional 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. Finally, it will provide a clearer picture of the storm water and non-storm water runoff program to the public and Regional Board. However, qualitative assessments could be overly subjective and most Copermittees likely lack the ability to provide accurate quantitative assessments. The Regional Board encourages 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 Board²⁴⁵ or community indicators by the Community Indicators Project.²⁴⁶

Currently, each Orange County municipality's annual report includes a table based on a template developed by the principal Copermittee. The template was meant to facilitate reporting consistency among the 13 Copermittees. The annual report table contains estimates of spending during the reported period and estimates of the next year's spending. The tables separate capital costs from operations and maintenance costs and are arranged by program element. In addition to the tables, each municipality reports on the sources of the funds, (e.g., general fund, special fee, grants, etc.) to demonstrate that resources have been secured. There is very heavy reliance on general funds.

Review of the fiscal analysis tables included in the annual reports has not been as straightforward as expected, and the value of the information is moderate. Generally, questions regarding the financial reporting process of individual Permittees have been adequately resolved during meetings to discuss the annual reports. Based on those meetings, the Regional Board staff has found that cities do not use consistent methods to fill in the tables because they use different accounting and budgeting processes, and certain stormwater program expenditures are not easily categorized into the table formats. Furthermore, stormwater permit-related activities involve several departments, which makes it difficult for the storm water manager to gather and decipher actual costs.

²⁴⁴ National Association of Flood and Stormwater Management Agencies. 2006. *Guidance for Municipal Stormwater Funding*. Prepared under a grant provided by the USEPA.

²⁴⁵ State Water Board, 2005. NPDES Stormwater Cost Survey.

²⁴⁶ Orange County 2006 Community Indicators Project. 2006. Sponsored by the County of Orange, the Orange County Business Council, and the Children and Families Commission of Orange County. Available on-line at www.oc.ca.gov/ceocommunity.asp

These issues also make it difficult for the Copermittees to accurately compartmentalize expenditures within the format. The Copermittees are aware of the reporting discrepancies and have planned to modify the reporting template and guidelines. As a result, the current financial reporting provides estimates at best and cannot be reliably used to compare program implementation among most municipalities.

I. Total Maximum Daily Loads

This section has been added to address any TMDLs that are adopted by the Regional Board. See Finding E.10 and Discussion.

J. Program Effectiveness Component

The following legal authority applies to section J:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(d)(2)(v) provides that the Copermittees must include “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.” Under Federal NPDES regulation 40 CFR 122.42(c) applicants must provide annual reports on the progress of their storm water management programs.

Section J.1 (jurisdictional program effectiveness assessments) of the Order requires the Copermittees to assess the effectiveness of the implementation of their jurisdictional programs and activities. The section requires that the effectiveness strategy of the programs be designed around four classes of objectives and that the results are used to direct program modifications. The section does not specify the assessments to be conducted, but does require that assessment measures conform to the guidance developed by the California Storm Water Quality Association (CASQA). The Orange County Storm Water Program is supportive of the CASQA effort, and use of CASQA assessment techniques is consistent with the methodology proposed in the ROWD.^{247 248}

The section is also consistent with the plan of the Copermittees to improve the efficacy of the assessment process.²⁴⁹ The Copermittees currently report a series of metrics for spatial and temporal assessments across the County. The Program Effectiveness requirements of the Order provide the Copermittees with the framework for improving their standard assessment metrics.

²⁴⁷ The structure of planned program effectiveness is proposed in section 1.2.2 of the 2007 ROWD. The ROWD then identifies current and potential assessment outcome levels within each major program chapter (e.g., new development, construction, etc.).

²⁴⁸ CASQA 2007. Municipal Stormwater Program Effectiveness Assessment Guidance.

²⁴⁹ Orange County Storm Water Copermittees. 2006. Report of Waste Discharge (San Diego Region), section 3.3.2.

The Order provides focus to the assessment methodology by requiring that impaired waterbodies and environmentally-sensitive areas are specifically addressed. In this way, the high priority water quality issues will receive a high level of attention, consistent with USEPA and CASQA guidance for prioritization. The Order provides flexibility to establish the actual metrics for each assessment outcome level. The Order also provides the Copermittees flexibility to develop objectives for the general program components based on the CASQA guidance, as is proposed in the ROWD and DAMP.

In addition, Section J.1 requires that an effectiveness assessment strategy is developed and implemented in response to actions taken by a Copermittee to comply with Section A.3 (Prohibitions and Receiving Water Limitations) of the Order. Section A.3 outlines the procedure for addressing instances when jurisdictional programs implement control actions in response to determinations that discharges from the MS4 are causing or contributing to violations of water quality standards.

This section includes a requirement for the Copermittees to develop and implement a workplan identifying and addressing the highest priority issues in the watershed. The workplan requirement in the JRMP section has been added to ensure Copermittees are allocating resources and effort to address priority problems and pollutants identified in the watershed analysis. This section has been added to ensure Copermittees use the annual watershed water quality assessment to assess, adjust and tailor their JRMP programs.

Section J.2 (program modification) of the Order requires the Copermittees to improve jurisdictional activities or BMPs when they are found to be ineffective or when water quality impairments are continuing. This requirement fulfills the purpose of conducting effectiveness assessments – to improve and refine the Copermittees' programs. The requirement is consistent with USEPA's Phase II regulations, which state: "If the permittee determines that its original combination of BMPs are not adequate to achieve the objectives of the municipal program, the MS4 should revise its program to implement BMPs that are adequate [...]."²⁵⁰

Section J.3 (reporting) of the Order describes the information required to be submitted in jurisdictional annual reports pertaining to program effectiveness assessments, review, and response. The reporting will demonstrate whether Copermittees have appropriately responded to the effectiveness assessments.

²⁵⁰ Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68762.

K. Reporting

The following legal authority applies to section K:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.42(c) requires that “The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer system that has been designated by the director under § 122.26(a)(1)(v) of this part must submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include: (1) The status of implementing the components of the storm water management program that are established as permit conditions; (2) Proposed changes to the storm water management program that are established as permit condition. Such proposed changes shall be consistent with § 122.26(d)(2)(iii) of this part; (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under § 122.26(d)(2)(iv) and (d)(2)(v) of this part; (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; (5) Annual expenditures and budget for year following each annual report; (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; (7) Identification of water quality improvements or degradation.”

California Water Code section 13267 provides that “the Regional Board may require than any person who has discharged [...] shall furnish, under penalty of perjury, technical or monitoring reports which the regional board requires.”

Section K.1 (Jurisdictional Runoff Management Plans and Watershed Workplans) outlines the process and due dates for submitting plans. The information to be included in the Jurisdictional and Watershed plans must be sufficient to demonstrate the capacity to implement the requirements of Section G and Section J, respectively, of the Order.

Two general modifications from Order No. R9-2002-0001 result in reduced reporting effort by the Copermittees. First, in many cases, the requirements of the Order should not necessitate a complete rewrite of the plans, as was basically done in 2003. Only sections of the Order which are new or have been significantly changed should warrant rewriting of plans' sections. Second, the WRMP annual reporting is no longer due in January. Annual reporting will occur during a watershed review meeting conducted some time during the calendar year. The Regional Board plans to work with the Copermittees and provide guidance regarding where JRMPs must be updated in accordance with the Order. This will help ensure that rewriting, reporting, and review efforts are minimized.

The reporting requirements include two significant additions. The first addition is a summary reporting checklist which has been added to the reporting requirements. The checklist has been added to ensure that Copermittees evaluate and demonstrate compliance with all requirements in the Order.

Section K.2 (Other Required Reports) include requirements for information to be included in the SSMP update and the Report of Waste Discharge for the next permit reissuance. The Order requires submittal of a ROWD prior to the expiration of the Order. The section identifies the minimum information to be included in the ROWD, based on USEPA's May 17, 1996 guidance "Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems."

Section K.3 (Annual Reports) outlines the process and roles of the Copermittees for developing and submitting the JRMP annual report. Information to be included in the annual reports is described in Section K.3.a.3. The due dates have been changed. The JRMP is due approximately six weeks earlier than under Order No. R9-2002-0001. This change is necessary because the existing timelines prevented efficient response by the Copermittees to comments from the Regional Board and the Copermittees' own review. However, the Copermittees may propose alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance.

Each Copermittee is required to maintain records demonstrating that Permit activity requirements have been met, which allows the Regional Board to confirm compliance as needed, such as via inspections, program audits, or requests for information per California Water Code Sections 13225 and 13267.

Reporting requirements in the Order focus on results and responses to the effectiveness assessments conducted by the Copermittees. This will allow the Regional Board to determine how appropriately municipalities adapt and tailor their programs to findings from activities and monitoring results. Assessment of progress toward meeting the objectives is possible because the data collected by the Copermittees under Order No. R9-2002-0001 can be used to establish baseline conditions. Compared to activity-based reporting, this will greatly enhance the ability of the Regional Board, Copermittees, and the public to determine whether the programs are successful.

The Order reduces the amount of program activity-based reporting from Order No. R9-2002-0001. Under the CASQA assessment model, activity-based reporting includes primarily outcomes that document compliance with permit requirements (Level 1 outcomes), rather than being indicators of the impact of activity implementation.²⁵¹ This approach is consistent with guidance from the USEPA, which notes that annual reports should highlight program effectiveness as well as describing activities.²⁵² This emphasis is also consistent with recommendations from the National Academy of Public Administration in its report to USEPA on Evaluating Environmental Progress, which suggest that reviewing activities data provides limited value when evaluating the effectiveness of programs and resulting environmental conditions.²⁵³

The Order maintains some reporting requirements for certain activity-based outcomes. These are mostly focused on activities that establish or revise municipal processes related to storm water runoff and management. The processes required by the Order are especially important in situations where sustaining water quality improvements may require activities that extend beyond the five-year period of the NPDES permit.

In addition, the Order maintains many activity-based reporting requirements related to enforcement of local requirements, with an emphasis on the results from such activities. This is intended to facilitate review of the contributions that inspection and enforcement activities have made toward meeting the goals of the Order. Reporting of these types of activities is supported by recommendations from the National Academy of Public Administration in its report to the USEPA: *Evaluating Environmental Progress: How EPA and the States Can Improve the Quality of Enforcement and Compliance Information* (June 2001).²⁵⁴ Other activity-based reporting has been reduced to selected items based on consideration of program priorities.

Another source of prioritization for activity-based reporting is the *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 19, 2006). In particular, the panel highlighted needs to improve the design, maintenance, and inspections of best management practices.

²⁵¹ Level 1 outcomes under the CASQA guidance include documentation that required activities have been implemented.

²⁵² USEPA 2007. *MS4 Program Evaluation Guidance*. USEPA Office of Wastewater Management EPA-833-R-07-003. January 2007 field test version.

²⁵³ National Academy of Public Administration 2001. *Evaluating Environmental Progress: How EPA and the States Can Improve the Quality of Enforcement and Compliance Information* (June 2001). <http://www.napawash.org>

²⁵⁴ The National Academy of Public Administration report is available on-line at <http://www.napawash.org>

L. Modification of Programs

The following legal authority applies to section L:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Section L of the Order provides a process for the Copermitees to modify their runoff management programs. This process will be useful so that the Copermitees can continue to refine and improve their programs based on the findings of their annual program effectiveness assessments. The process allows for minor modifications to the Copermitees' programs where the Copermitees can exhibit that the modifications meet or exceed existing legal requirements under the Order. Such a process avoids lengthy and time consuming formal approvals of proposed modifications before the Regional Board, while still ensuring compliance with applicable legal standards and the Order. The process included in the Order is based on a process utilized by the San Francisco Bay Area Regional Water Quality Control Board in their MS4 permit for Alameda County.²⁵⁵

²⁵⁵ San Francisco Bay Area Regional Water Quality Control Board, 2003. Order No. R2-2003-0021. P. 45.

M. Principal Permittee Responsibilities

The following legal authority applies to section M:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.26(a)(3)(iii)(C) provides that "A regional authority may be responsible for submitting a permit application."

Federal NPDES regulation 40 CFR 122.26(d)(2)(i)(D) provides that "[The Copermitttee must demonstrate that it can control] through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system."

No significant changes were made to this section.

N. Receiving Waters Monitoring and Reporting

The following legal authority applies to section N:

Broad Legal Authority: CWA sections 402, 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Copermitees must conduct a comprehensive monitoring program as required under Federal NPDES regulations 40 CFR 122.26(d)(2)(iii) and 122.44.

See section T of this Fact Sheet/Technical Report for a discussion of changes to the Receiving Waters Monitoring and Reporting Program.

O. Standard Provisions, Reporting Requirements, And Notifications

The following legal authority applies to section O:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Standard provisions, reporting requirements, and notifications are consistent to all NPDES permits and are generally found in Federal NPDES regulation 40 CFR 122.41.

Section L.2 of the Order has been changed to remove the statement that all plans and reports submitted in compliance with the Order are an enforceable part of the Order. This statement has been removed because it is unnecessary. The Order itself contains sufficient detailed requirements to ensure that compliance with discharge prohibitions, receiving water limitations, non-storm water action levels and the narrative standard of MEP for storm water are achieved. Implementation by the Copermittees of programs in compliance with the Order's requirements, prohibitions, and receiving water limitations is the pertinent compliance standard to be used under the Order, as opposed to assessing compliance by reviewing the Copermittees' implementation of their plans alone.

Rather than being substantive components of the Order itself, the Copermittees' management plans are simply descriptions of their runoff management programs required under the Order. These plans serve as procedural correspondence which guides program implementation and aids the Copermittees and Regional Board in tracking implementation of the programs. In this manner, the plans are not functional equivalents of the Order. For these reasons, the Copermittees' runoff management plans need not be an enforceable part of the Order.

P. Attachment A – Basin Plan Prohibitions

The following legal authority applies to Attachment A:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: California Water Code Section 13243 provides that “A regional board, in a water quality control plan or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.”

California Water Code Section 13263(a) provides that waste discharge requirements prescribed by the SDRWQCB implement the Basin Plan.

No significant changes were made to this attachment.

Q. Attachment B – Standard Provisions

The following legal authority applies to Attachment B:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Specific Legal Authority: Standard provisions, reporting requirements, and notifications are consistent to all NPDES permits and are generally found in Federal NPDES regulation 40 CFR 122.41.

Attachment B includes Standard Provisions which have been developed by the State Board. These Standard Provisions ensure that NPDES permits are consistent and compatible with USEPA's federal regulations. Some Standard Provisions sections specific to publicly owned sewage treatment works are not included in Attachment B.

R. Attachment C – Definitions

The following legal authority applies to Attachment C:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv).

Attachment C contains definitions for terms found in the Order. In addition, definitions for terms previously defined in Order No. R9-2002-0001 Attachment D, but which are not found in the current Order, have been deleted.

An additional section which includes acronyms and abbreviations has been added. This is to ensure clarity and prevent confusion of terms. Definitions have been added for new terms used in the permit to provide a clear understanding of their meaning and use.

S. Attachment D – Summary of Submittals

The following legal authority applies to Attachment D:

Broad Legal Authority: CWA sections 402(p)(3)(B)(ii-iii), CWC section 13377, 13383, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv) and 122.44(i).

Specific Legal Authority: Federal NPDES regulation 40 CFR 122.42(c) requires that “The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer system that has been designated by the director under § 122.26(a)(1)(v) of this part must submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include: (1) The status of implementing the components of the storm water management program that are established as permit conditions; (2) Proposed changes to the storm water management program that are established as permit condition. Such proposed changes shall be consistent with § 122.26(d)(2)(iii) of this part; (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under § 122.26(d)(2)(iv) and (d)(2)(v) of this part; (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; (5) Annual expenditures and budget for year following each annual report; (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; (7) Identification of water quality improvements or degradation.”

California Water Code section 13267 provides that “the regional board may require than any person who has discharged [...] shall furnish, under penalty of perjury, technical or monitoring reports which the regional board requires.”

Attachment D to the Order provides a table summary of scheduled submittals required by the Order. Unscheduled submittals are no longer added to the table, since there is no proper due date for such submittals. A task summary has not been created for the Order, since the previous task summary was found to be redundant, repeating information found in the submittal summary and elsewhere in the Order.

A Jurisdictional Runoff Management Program (JRMP) Annual Report Checklist has been added to the reporting requirements. This addition is to determine and ensure that all requirements of the permit are being met. A Jurisdictional Runoff Management Program (JRMP) Annual Report Checklist has been added to the reporting requirements. This addition is to determine and ensure that all requirements of the permit are being met.

T. Attachment E - Receiving Waters and MS4 Discharge Monitoring and Reporting Program

The following legal authority applies to the Receiving Waters and MS4 Discharge Monitoring and Reporting Program:

Broad Legal Authority: CWA sections 402, 402(p)(3)(B)(ii-iii), CWC section 13377, and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B, C, E, and F) and 40 CFR 122.26(d)(2)(iv), 122.44 and 122.45.

Specific Legal Authority: Copermittees must conduct a comprehensive monitoring program as required under Federal NPDES regulations 40 CFR 122.26(d)(2)(iii).

Federal NPDES regulation 40 CFR 122.42(c) requires that "The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer system that has been designated by the director under § 122.26(a)(1)(v) of this part must submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include: (1) The status of implementing the components of the storm water management program that are established as permit conditions; (2) Proposed changes to the storm water management program that are established as permit condition. Such proposed changes shall be consistent with § 122.26(d)(2)(iii) of this part; (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under § 122.26(d)(2)(iv) and (d)(2)(v) of this part; (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; (5) Annual expenditures and budget for year following each annual report; (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; (7) Identification of water quality improvements or degradation."

California Water Code section 13267 provides that "the regional board may require than any person who has discharged [...] shall furnish, under penalty of perjury, technical or monitoring reports which the regional board requires."

1. Purpose

According to USEPA, the benefits of sampling data include, but are not limited to:

1. Providing a means for evaluating the environmental risk of storm water discharges by identifying types and amounts of pollutants present;
2. Determining the relative potential for storm water discharges to contribute to water quality impacts or water quality standard violations;
3. Identifying potential sources of pollutants; and

4. Eliminating or controlling identified sources more specifically through permit conditions.²⁵⁶

Equally important, monitoring programs are an essential link in the improvement of storm water management efforts. Data collected from monitoring programs can be assessed to determine the effectiveness of management programs and practices, which is vital for the success of the iterative approach used to meet the MEP standard for storm water. Specifically, when data indicates that a particular BMP or program component is not effective, improved efforts can be selected and implemented. Also, when water quality data indicate that water quality standards or objectives are being exceeded, particular pollutants, sources, and drainage areas can be identified and targeted for specific management efforts.

Considering the benefits described above, the Receiving Waters Monitoring and Reporting Program (MRP) has been designed to determine impacts to receiving water quality and beneficial uses from storm water runoff and to use the results to refine the Copermitttees' storm water runoff management programs for the reduction of storm water pollutant loadings to the MEP. For non-storm water discharges, monitoring has been designed for the identification of prohibited illicit discharges and to determine appropriate actions to take in response to dry weather non-storm water action levels. Additionally, the results from dry weather non-storm water monitoring can be used to evaluate exempted non-storm water discharges as a source or conveyance of pollutants. The primary goals of the MRP include:

1. Assess compliance with Order No. R9-2009-0002;
2. Measure and improve the effectiveness of the Copermitttees' runoff management programs;
3. Assess the chemical, physical, and biological impacts of receiving waters from MS4 discharges;
4. Characterize storm water runoff discharges;
5. Identify sources of specific pollutants;
6. Prioritize drainage and sub-drainage areas that need management actions;
7. Detect and eliminate illicit discharges and illicit connections to the MS4;
8. Assess the overall health of receiving waters; and
9. Provide information to implement required BMP improvements

²⁵⁶ USEPA, 1992. NPDES Storm Water Sampling Guidance Document. EPA/833-B-92-001.

Each of the components of the MRP is necessary to meet the objectives listed above. In addition, the MRP has been designed in accordance with the guidance provided by the Southern California Stormwater Monitoring Coalition's Model Monitoring Technical Committee in its August 2004 "Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California." This guidance document was developed in response to Senate Bill 72 (Kuehl), which addressed the standardization of sampling and analysis protocols in municipal stormwater monitoring programs. The technical committee which developed the guidance included representatives from Southern California Regional Water Quality Control Boards (including San Diego), municipal storm water Permittees (including the County of Orange), Heal the Bay, and the Southern California Coastal Water Research Project.

As its title suggests, the guidance essentially developed a model municipal storm water monitoring program for use in Southern California. The model program is structured around five fundamental management questions, outlined below. The MRP is designed as an iterative step towards ensuring that the Copermittees' monitoring program can fully answer each of the five management questions.

1. Are conditions in receiving waters protective, or likely to be protective, of beneficial uses?
2. What is the extent and magnitude of the current or potential receiving water problems?
3. What is the relative storm water runoff contribution to the receiving water problem(s)?
4. What are the sources of storm water runoff that contribute to receiving water problem(s)?
5. Are conditions in receiving waters getting better or worse?

The justifications for each component of the monitoring program are discussed below.

2. Monitoring Program

Mass Loading Station Monitoring

The intent of current mass loading monitoring as conducted by the Copermittees is to use water chemistry data from storm events and dry weather flows to calculate pollutant loads and to assess water quality with respect to applicable acute and chronic toxicity criteria from the California Toxics Rule (CTR).²⁵⁷

²⁵⁷ Orange County Storm Water Permittees. 2006. Report of Waste Discharge, section C-11.3.2.

Section II.A.1 of the MRP requires mass loading and toxicity monitoring at monitoring stations located at the bottom of major watersheds within Orange County. The mass loading monitoring will provide data representing event mean concentrations of pollutants, total pollutant loadings, and toxicity conditions from specific drainage areas. Mass loading monitoring stations are recommended by the Model Monitoring Technical Committee in order to answer management questions 1, 2, and 5.²⁵⁸ The stations are also expected to contribute towards meeting MRP goals 1, 2, 3, 4, 6, and 8. The locations of the mass loading monitoring stations are not changed from Order No. R9-2002-0001. However, the frequency of monitoring has been changed, and some revisions to the constituents have been made.

The frequency of mass loading monitoring in Order No. 2009-0002 has been modified to include two wet and two dry weather events. Currently three wet events have been targeted (though usually two or less have been sampled). This modification is not expected to affect long-term trend analyses for storm events since the monitoring to date has been sporadic.²⁵⁹ Dry weather monitoring is necessary because dry-weather flows in these watersheds are now perennial and changes have been made to the Order for non-storm water discharges. The addition of dry weather monitoring provides a more comprehensive temporal view of the watershed, which will improve the Copermittees' ability to understand the dynamics of annual pollutant loading.

In addition, the required constituents include some revisions to Order No. R9-2002-0001. The changes are made to be compatible with the federal NPDES regulations and in response to data collected during the current permit term. The changes include:

1. All events must now include Biological Oxygen Demand, 5-day Chemical Oxygen Demand, Total Organic Carbon, Dissolved Organic Carbon. These are specifically identified in 40 CFR 122.26(d)(2)(iii)(B), but were omitted from Order No. R9-2002-01.
2. Carbamate and Pyrethroid pesticides must initially be monitored in Prima Deshecha and Segunda Deshecha watersheds. If carbamate and/or pyrethroid pesticides are found to correlate with observed acute or chronic toxicity, then sampling and analysis for that pesticide must be added to all stations displaying toxicity. The Copermittees suggest adding these pesticides to Prima and Segunda Deshecha watersheds in an attempt to find a cause for observed persistent toxicity at those stations.²⁶⁰ If these pesticides are found in these watersheds, then they will likely be present in the other developed watersheds of the Region.

²⁵⁸ Model Monitoring Technical Committee, 2004. Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California. Chapter 5.

²⁵⁹ Mass loading monitoring has been hampered by technical difficulties. For instance, only four of six stations were operational during the 2004-05 season, and only three stations were operational during 2002-04 season.

²⁶⁰ Orange County Storm Water Permittees. 2006. Report of Waste Discharge, section C-11.4.1.

3. Impaired water body pollutants. Specific pollutants have been added in response to the U.S. Environmental Protection Agency approval of California's 2004-2006 Section 303(d) Water Quality Limited Waters List. Monitoring for these pollutants is specific to the watershed in which the impairment is located.
4. Dimethoate monitoring has been eliminated because data collected to date has not observed any significant levels at the mass emissions stations.
5. A requirement to collect a grab sample for total petroleum hydrocarbons whenever a sheen is observed has been added at the suggestion of the County of Orange.

Bioassessment

Section II.A.2 of the MRP requires the Copermitttees to conduct bioassessment monitoring. Bioassessment monitoring is a cost-effective tool that measures the effects of water quality over time.²⁶¹ It is an important indicator of stream health and impacts from storm water and non-storm water runoff. It can detect impacts that chemical and toxicity monitoring cannot. USEPA encourages permitting authorities to consider requiring biological monitoring methods to fully characterize the nature and extent of impacts from runoff.²⁶² Therefore, the Regional Board commonly requires bioassessment monitoring in MS4 and other types of discharge permits.

Bioassessment is the direct measurement of the biological condition, physical condition, and attainment of beneficial uses of receiving waters (typically using benthic macroinvertebrates, periphyton, and fish). Bioassessment monitoring integrates the effects of both water chemistry and physical habitat impacts (e.g., sedimentation or erosion) of various discharges on the biological community native to the receiving waters. Moreover, bioassessment is a direct measurement of the impact of cumulative, sub-lethal doses of pollutants that may be below reasonable water chemistry detection limits, but that still have biological affects.

²⁶¹ California Department of Fish and Game, 2002. California Regional Water Quality Control Board, San Diego Region 2002 Biological Assessment Report: Results of May 2001 Reference Site Study and Preliminary Index of Biotic Integrity.

²⁶² USEPA, 1999. Rapid Bioassessment Protocols for Use in Wadeable Streams and Rivers. EPA 841-B-99-002. P. 2-5.

Because bioassessment focuses on communities of living organisms as integrators of cumulative impacts resulting from water quality or habitat degradation, it defines the ecological risks resulting from storm water and non-storm water MS4 runoff. Bioassessment not only identifies that an impact has occurred, but also measures the effect of the impact and tracks recovery when control or restoration measures have been taken. These features make bioassessment a powerful tool to assess compliance, evaluate the effectiveness of BMPs, and to track both short and long-term trends (MRP goals 1,2,3, and 8). Bioassessment can also help answer management questions 1, 2, and 5.

The Order also identifies the most current established protocol to be used in identifying bioassessment reference stations. The protocol referenced in the Order is specified because it provides a qualitative and repeatable method for identifying reference sites. Moreover, the protocol is well established, since it has been peer reviewed and published.

The Order includes four modifications to the bioassessment monitoring required under Order 2002-0001. These changes include:

1. Bioassessment monitoring must utilize the targeted riffle composite approach, which is consistent with the State Board's Surface Water Ambient Monitoring Program (SWAMP) Quality Assurance Management Plan (QAMP), as amended. Through SWAMP, various bioassessment methods were evaluated and it was found that the targeted riffle composite approach was a particularly efficient method, providing accurate data in a cost efficient manner.
2. Bioassessment monitoring to include assessment of periphyton (algae). Advantages of bioassessment using periphyton include: (1) they have rapid reproduction rates and very short life cycles, making them valuable indicators of short-term impacts; (2) as primary producers, they are most directly affected by physical and chemical factors; (3) sampling is easy and inexpensive; and (4) algal assemblages are sensitive to some pollutants which may not visibly affect other aquatic assemblages.²⁶³ Future bioassessment must use algal IBI scores, when developed.

²⁶³ USEPA, 1999. Rapid Bioassessment Protocols for Use in Wadeable Streams and Rivers. EPA 841-B-99-002. P. 3-3.

3. One of the two required annual monitoring events has been eliminated for streams exhibiting perennial flows. The Copermittees suggest this approach in response to analyses that indicate that the physical habitat conditions are better correlated than aquatic chemistry data with IBI scores.²⁶⁴ The Copermittees analyses indicate that although biological communities are different in the Fall and Spring, both seasonal communities indicate the same common relationships to spatial biological patterns and potential variables that explain the differences. For instance, downstream urbanized locations which exhibit perennial flows display lower IBI scores than reference sites regardless of the season, even if the biological community at a downstream site differs between the Fall and Spring.
4. The number of bioassessment stations has been reduced from 12 to six. This will allow resources to be available to implement the Stormwater Monitoring Coalition's program for Regional Monitoring of Southern California's Coastal Watersheds (Section II.D.3). The Regional Monitoring program calls for six sites to be sampled each year and includes each of the basic elements within the Copermittees' bioassessment monitoring program. Although the amount of toxicity tests are reduced, wetland status analyses will also be analyzed. The Regional Monitoring program is discussed in Section II.D.3 below.

Follow-up Analyses and Actions

Section II.A.3 of the MRP requires the Copermittees to use the results of the chemistry, toxicity, and bioassessment monitoring to determine if impacts from MS4 discharges are occurring and when follow-up actions are necessary. The triad approach allows a wide range of measurements to be combined to more efficiently identify pollutants, their sources, and appropriate follow-up actions. Results from the three types of monitoring shall be assessed to evaluate the extent and causes of pollution in receiving waters and to prioritize management actions to eliminate or reduce the sources. The framework provided is to be used to determine conclusions from the data and appropriate follow-up actions. The framework is proposed by the Copermittees and derived from the Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California.²⁶⁵ These follow-up actions are expected to primarily help answer management questions 2 and 4, as well as address MRP goals 2, 4, 5, 6 and 7.

²⁶⁴ Orange County Storm Water Copermittees. 2006. Report of Waste Discharge (San Diego Region), section 11 and 2005-06 Annual Report section 11.3

²⁶⁵ Model Monitoring Technical Committee, 2004. Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California. P. 5-61.

When, based on the framework in Table 2 of the M&R Program, data indicates the presence of toxic pollutants in runoff, the Copermittees are required to conduct a Toxicity Identification Evaluation (TIE). A TIE is a set of procedures used to identify the specific chemical(s) responsible for toxicity to aquatic organisms. When discharges are toxic to a test organism, a TIE must be conducted to confirm potential constituents of concern and rule out others, therefore allowing Copermittees to determine and prioritize appropriate management actions. If a sample is toxic to more than one species, it is necessary to determine the toxicant(s) affecting each species. If the type and source of pollutants can be identified based on the data alone and an analysis of potential sources in the drainage area, a TIE is not necessary.

When a TIE identifies a pollutant associated with MS4 discharge as a cause of toxicity, it is then necessary to conduct follow-up actions to identify the causative agents of toxicity, isolate the sources of toxicity, evaluate the effectiveness of toxicity control options, and then confirm the reduction in toxicity. Follow-up actions should analyze all potential source(s) causing toxicity, potential BMPs to eliminate or reduce the pollutants causing toxicity, and suggested monitoring to demonstrate that toxicity has been removed.

Ambient Coastal Receiving Waters Monitoring

The Copermittees have been implementing a phased Ambient Coastal Monitoring Program that initially involved monitoring chemistry and aquatic toxicity of dry and storm water discharges to ecologically sensitive areas along the coastline. Later, aerial photographs of storm water plumes were taken to estimate the spatial extent of the impact of storm water runoff. The results were used to identify storm drains for source and toxicity identification studies, including sampling of storm water plumes.

Section II.A.4 of the MRP allows the Copermittees to continue the existing program, while requiring that the special studies be consistent with the MRP goals and that stations be located within Areas of Special Biological Significance.

Coastal Storm Drain Monitoring

Section II.A.5 of the MRP has been extensively modified and changed to a Regional Monitoring Program.

Section II.A.5.a. Coastal storm drain monitoring has been replaced with a Regional Bacteria Monitoring section. Coastal storm drain monitoring is critical because one of the primary impacts to coastal receiving waters is the loss of recreational beneficial uses resulting from high levels of bacteria in storm water and non-storm water MS4 runoff. The regional monitoring program is expected to help answer management questions 1, 2, 3, 4 and 5, as well as address MRP goals 1, 2, 3, 4, 5, 6, 7, and 8.

The changes to the coastal storm drain monitoring program have been made in response to the Copermittees' request. The Copermittees recommend participation in the regional program to save cost, prevent redundancy, improve notification times and provide more effort toward intensive investigations of problematic storm drains.²⁶⁶

This section has been modified to allow the Copermittees to participate in the development and subsequent regional bacteria monitoring program upon review and approval from the Executive Officer. An adaptive approach is consistent with the Model Monitoring Technical Committee's recommendations.

High Priority Inland Aquatic Habitats

Section II.A.6 of the MRP has been removed.

Wet Weather MS4 Runoff Discharge Monitoring

Section II.B of the MRP requires the Copermittees to develop and implement a program to monitor and characterize pollutant discharges from MS4 outfalls. Currently the Copermittees do not monitor the discharge of storm water from the MS4 outfalls. As a result, a substantial amount of information regarding the quality of MS4 effluent is unknown. The collection of wet-weather data will enable the Copermittees to assess the effectiveness of existing storm water BMP measures. This data can be used to more effectively target storm water management program efforts. The MRP also requires compliance with Section D of the Order for Storm Water Action Levels.

The monitoring of outfalls is expected to be used to identify storm drains that are discharging pollutants in concentrations that may pose a threat to receiving waters. Source investigations are expected to be conducted as a response to the data.

The MRP provides the Copermittees great flexibility in assigning stations for wet-weather monitoring. Copermittees are to choose the number and frequency of monitoring stations, thus determining the overall cost of their program.

The monitoring requirements also include a requirement to measure receiving water hardness when comparing storm water MS4 discharge data to Storm Water Action Levels for priority pollutants (e.g. metals). The effect of these constituents upon receiving waters will vary depending upon the hardness of receiving waters.

²⁶⁶ Ibid

Section II.B.2 requires the Copermittees to develop and implement a program to identify sources of discharges of pollutants causing the high priority water quality problems within each watershed. This requirement should be easily met because of the foundation already developed by the Copermittees in response to Order No. R9-2002-0001. To some extent, the Copermittees do conduct follow-up monitoring in response to dry-weather outfall data. The ROWD and 2007 DAMP describe some guidance that is provided by the County to the Copermittees, and it is expected that the Copermittees will develop follow-up monitoring programs for storm water discharges. The ROWD does recommend that additional training be provided for the municipalities with respect to interpreting and using the data collected by the County. In addition, many of the Copermittees have developed procedures and experience in conducting follow-up investigations in response to the bacteria investigations in the Aliso Creek watershed.²⁶⁷

Identification of sources causing high priority water quality problems is a central purpose of storm water runoff management programs. Monitoring which enables the Copermittees to identify sources of water quality problems aids the Copermittees in focusing their management efforts, improving their programs and choosing additional and/or better BMPs. In turn, the Copermittees' programs can abate identified sources, which will improve the quality of storm water runoff discharges and receiving waters. This monitoring is needed to address management question 4. Moreover, in its review of the San Diego County Copermittees' monitoring proposal, Tetra Tech, Inc. finds that "after some years of assessment monitoring, it is time to look more systematically at determining the relative urban contributions and the sources of urban runoff that contribute to identified receiving water problems."²⁶⁸

Non-storm Water Dry Weather Action Levels

Section II.C of the MRP describes the monitoring to be conducted by the Copermittees to determine compliance with dry weather, non-storm water action levels.

Section II.B.3 has been changed by removal of the Dry Weather Field Screening and Analytical Monitoring and subsequent replacement with section II.C for Dry Weather Non-Storm Water Action Level Monitoring. This change is required to assess compliance with action levels for non-storm water discharges from the MS4 into receiving waters. The required sampling frequency has been changed to allow Copermittees to sample a representative number of discharge points and the sampling methodology has been changed to grab sampling. This is expected to allow Copermittees to maintain a cost-neutral dry weather monitoring program that is similar to their existing IC/ID monitoring program.

²⁶⁷ Copermittees in the Aliso Creek watershed include the County of Orange and the Cities of Aliso Viejo, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, and Mission Viejo.

²⁶⁸ Tetra Tech Inc., 2006. Review of San Diego County MS4 Monitoring Program.

Special Studies

Section II.D.1 of the MRP absorbs the bacteria monitoring and reporting program currently in place in the Aliso Creek watershed.²⁶⁹ This monitoring effort has been required by the Regional Board pursuant to authorities provided under California Water Code sections 13225 and 13267. The monitoring and reporting is focused solely on the MS4s in the Aliso Creek watershed and has effectively been integrated already into the Copermittees' programs. Inclusion of it into the MRP is done for organizational purposes and will have no other net effect.

Section II.D.3 includes a requirement to participate in the program for Regional Monitoring of Southern California's Coastal Watersheds developed by the Stormwater Monitoring Coalition. That program calls for the sampling of six locations within the Permit area each year. All sampling will be SWAMP comparable. Sampling includes water chemistry, aquatic toxicity (*Ceriodaphnia dubia*), physical habitat, benthic macroinvertebrates, wetland status (based on California Rapid Assessment Method protocols), and periphyton.

Section II.D.4 includes a requirement that the Copermittees conduct a sediment toxicity special study. This study has been added to the Monitoring and Reporting requirements to assess the quality of urban stream sediments and possible contamination due to runoff from the MS4. Toxicity tests focusing on aqueous toxicity may not account for the full toxicity of receiving waters if constituents, such as heavy metals or pesticides, are bound to sediments. Southern California studies have shown that stream sediments can exhibit significant levels of toxic metals and pesticides.^{270,271}

Section II.D.5 includes a requirement that the Copermittees conduct a Trash and Litter Impairment Investigation (see Finding C.8 and Discussion).

Monitoring Provisions

Section II.E of the MRP includes monitoring provisions which are standard requirements for all municipal storm water permits.

²⁶⁹ On October 12, 2005, the Regional Board accepted the revised Aliso Creek watershed bacteria monitoring plan proposal from the MS4 Permittees. The Regional Board concluded that the scope of the current bacteria monitoring in the watershed was no longer warranted and that the proposed changes would constitute an effective interim program until adoption of a Total Maximum Daily Load, requiring a bacteria reduction and assessment program for the watershed. In addition, the Regional Board recognized that as a result of reduced monitoring costs, the municipalities expect to direct additional resources toward implementation of management practices to reduce indicator bacteria and pathogens.

²⁷⁰ Holmes, R.W., Anderson, B.S., Phillips, B.M., Hunt, J.W., Crane, D.B., Mekebri, A. and V. Connor. 2008. Statewide Investigation of the Role of Pyrethroid Pesticides in Sediment Toxicity in California's Urban Waterways. *Environmental Science Technology* 42: 7003-7009.

²⁷¹ Crane, D.B. and C. Younghans-Haug. 1992. Oxadiazon residue concentrations in sediment, fish, and shellfish from a combined residential/agricultural area in Southern California. *Bulletin of Environmental Contamination and Toxicology*. Volume 48, no. 4.

2. Reporting Program

Section III of the MRP discusses submittal of the Jurisdictional Runoff Management Program Annual Reports and the Receiving Waters Monitoring Annual Reports. In effect, a description of the monitoring program will be submitted with the Jurisdictional RMPs, and the monitoring data and assessment will be submitted one month later. The MRP continues the reporting approach utilized under the requirements of Order No. R9-2002-0001, where Lead Permittees for each watershed submit their annual reports to the Principal Permittee to be unified into one document.

The reporting requirements for the Aliso Creek watershed are also specified in this section. These reporting requirements are identical to the current reporting required by the Regional Board for the bacteria investigation. They are specified in this section because the requirements are more specific than reporting required for other watershed RMPs.

U. Attachment F - Source Data

Attachment F contains data utilized for the development of Storm Water Action Levels and Non-storm Water Action Levels.

Tab 29

ATTACHMENT A**BASIN PLAN PROHIBITIONS**

California Water Code Section 13243 provides that a Regional Board, in a water quality control plan, may specify certain conditions or areas where the discharge of waste or certain types of waste is not permitted. The following discharge prohibitions are applicable to any person, as defined by Section 13050(c) of the California Water Code, who is a citizen, domiciliary, or political agency or entity of California whose activities in California could affect the quality of waters of the state within the boundaries of the San Diego Region.

1. The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code Section 13050, is prohibited.
2. The discharge of waste to land, except as authorized by waste discharge requirements or the terms described in California Water Code Section 13264 is prohibited.
3. The discharge of pollutants or dredged or fill material to waters of the United States except as authorized by a NPDES permit or a dredged or fill material permit (subject to the exemption described in California Water Code Section 13376) is prohibited.
4. Discharges of recycled water to lakes or reservoirs used for municipal water supply or to inland surface water tributaries thereto are prohibited, unless this Regional Board issues a NPDES permit authorizing such a discharge; the proposed discharge has been approved by the State Department of Health Services and the operating agency of the impacted reservoir; and the discharger has an approved fail-safe long-term disposal alternative.
5. The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited. Allowances for dilution may be made at the discretion of the Regional Board. Consideration would include streamflow data, the degree of treatment provided and safety measures to ensure reliability of facility performance. As an example, discharge of secondary effluent would probably be permitted if streamflow provided 100:1 dilution capability.
6. The discharge of waste in a manner causing flow, ponding, or surfacing on lands not owned or under the control of the discharger is prohibited, unless the discharge is authorized by the Regional Board.
7. The dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters in any manner which may permit its being transported into the waters, is prohibited unless authorized by the Regional Board.
8. Any discharge to a storm water conveyance system that is not composed entirely of "storm water" is prohibited unless authorized by the Regional Board. [The federal regulations, 40 CFR 122.26(b)(13), define storm water as storm water

runoff, snow melt runoff, and surface runoff and drainage. 40 CFR 122.26(b)(2) defines an illicit discharge as any discharge to a storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from fire fighting activities. [§122.26 amended at 56 FR 56553, November 5, 1991; 57 FR 11412, April 2, 1992].

9. The unauthorized discharge of treated or untreated sewage to waters of the state or to a storm water conveyance system is prohibited.
10. The discharge of industrial wastes to conventional septic tank/subsurface disposal systems, except as authorized by the terms described in California Water Code Section 13264, is prohibited.
11. The discharge of radioactive wastes amenable to alternative methods of disposal into the waters of the state is prohibited.
12. The discharge of any radiological, chemical, or biological warfare agent into waters of the state is prohibited.
13. The discharge of waste into a natural or excavated site below historic water levels is prohibited unless the discharge is authorized by the Regional Board.
14. The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited.
15. The discharge of treated or untreated sewage from vessels to Mission Bay, Oceanside Harbor, Dana Point Harbor, or other small boat harbors is prohibited.

Tab 30

ATTACHMENT C**ACRONYMS AND ABBREVIATIONS**

ADT	Average Daily Traffic
AMAL	Average Monthly Action Level
ASBS	Area of Special Biological Significance
AST	Active Sediment Treatment
BMP	Best Management Practice
Basin Plan	Water Quality Control Plan for the San Diego Basin
BU	Beneficial Use
CASQA	California Stormwater Quality Association
CEQA	California Environmental Quality Act
CFR	Code of Federal Regulations
CWA	Clean Water Act
CWC	California Water Code
CZARA	Coastal Zone Act Reauthorization Amendments of 1990
DAMP	Drainage Area Management Plan
DNQ	Detected, but not Quantified
EIA	Effective Impervious Area
ESAs	Environmentally Sensitive Areas
GIS	Geographic Information System
HMP	Hydromodification Management Plan
IBI	Index of Biotic Integrity
JRMP	Jurisdictional Runoff Management Plan
LID	Low Impact Development
MDAL	Maximum Daily Action Level
MEP	Maximum Extent Practicable
ML	Minimum Level
MS4	Municipal Separate Storm Sewer System
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
OCVCD	Orange County Vector Control District
Copermittees	County of Orange, the 11 incorporated cities within the County of Orange in the San Diego Region, and the Orange County Flood Control District
Regional Board	California Regional Water Quality Control Board, San Diego Region
RGOs	Retail Gasoline Outlets
ROWD	Orange County Copermittees' Report of Waste Discharge (application for NPDES reissuance)
RWLs	Receiving Water Limitations
SAL	Storm Water Action Level
SIC	Standard Industrial Classification Code
SSMP	Standard Urban Storm Water Mitigation Plan
State Board	State Water Resources Control Board
SWQPA	State Water Quality Protected Area
TMDL	Total Maximum Daily Load

USEPA	United States Environmental Protection Agency
WLA	Waste Load Allocation
WQMP	Water Quality Management Plan
WRMP	Watershed Runoff Management Plan

DEFINITIONS

Active Sediment Treatment - Using mechanical or chemical means to flocculate and remove suspended sediment from runoff from construction sites prior to discharge.

Anthropogenic Litter – Trash generated from human activities, not including sediment.

Average Monthly Action Level – the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.

Basin Plan – Water Quality Control Plan, San Diego Basin, Region 9, and amendments, developed by the Regional Board.

Beneficial Uses - The uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. "Beneficial Uses" of the waters of the State that may be protected include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. Existing beneficial uses are uses that were attained in the surface or ground water on or after November 28, 1975; and potential beneficial uses are uses that would probably develop in future years through the implementation of various control measures. "Beneficial Uses" are equivalent to "Designated Uses" under federal law. [California Water Code Section 13050(f)].

Best Management Practices (BMPs) - Defined in 40 CFR 122.2 as schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. In the case of municipal storm water permits, BMPs are typically used in place of numeric effluent limits.

Bioassessment - The use of biological community information to evaluate the biological integrity of a water body and its watershed. With respect to aquatic ecosystems, bioassessment is the collection and analysis of samples of the benthic macroinvertebrate community together with physical/habitat quality measurements associated with the sampling site and the watershed to evaluate the biological condition (i.e. biological integrity) of a water body.

Biocriteria - Under the CWA, numerical values or narrative expressions that define a desired biological condition for a water body that are legally enforceable. The USEPA defines biocriteria as: "numerical values or narrative expressions that describe the

reference biological integrity of aquatic communities inhabiting waters of a given designated aquatic life use... (that)...describe the characteristics of water body segments least impaired by human activities.”

Biofiltration - refers to 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.

Clean Water Act Section 402(p) [33 USC 1342(p)] - The federal statute requiring municipal and industrial dischargers to obtain NPDES permits for their discharges of storm water.

Clean Water Act Section 303(d) Water Body - An impaired water body in which water quality does not meet applicable water quality standards and/or is not expected to meet water quality standards, even after the application of technology based pollution controls required by the CWA. The discharge of runoff to these water bodies by the Copermittees is significant because these discharges can cause or contribute to violations of applicable water quality standards.

Construction Site – Any project, including projects requiring coverage under the General Construction Permit, that involves soil disturbing activities including, but not limited to, clearing, grading, disturbances to ground such as stockpiling, and excavation.

Contamination - As defined in the Porter-Cologne Water Quality Control Act, contamination is “an impairment of the quality of waters of the State by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. ‘Contamination’ includes any equivalent effect resulting from the disposal of waste whether or not waters of the State are affected.”

Critical Channel Flow (Qc) – The channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc, it should be based on the weakest boundary material – either bed or bank.

CWA – Federal Clean Water Act

CWC – California Water Code

Daily Discharge – Daily Discharge is 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.

Detected, but not Quantified – those sample results less than the reporting level, but greater than or equal to the laboratory's Method of Detection Limit (MDL.)

Development Projects - New development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision.

Dilution Credit – the amount of dilution granted to a discharger in the calculation of a WQBEL, based on the allowance of a specific mixing zone. It is calculated from the dilution ratio, or determined through conducting of a mixing zone study, or modeling of the discharge and receiving water.

Dry Season – May 1 through September 30 of each year.

Dry Weather – weather is considered dry if the preceding 72 hours has been without precipitation.

Effectiveness Assessment Outcome Level 1 - Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it.

Effectiveness Assessment Outcome Level 2 - Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, businesses, and municipal employees.

Effectiveness Assessment Outcome Level 3 - Behavioral Change and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation.

Effectiveness Assessment Outcome Level 4 - Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed.

Effectiveness Assessment Outcome Level 5 - Changes in Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s.

Effectiveness Assessment Outcome Level 6 - Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity, or beneficial use attainment.

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 Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); State Water Quality Protected Areas; water bodies designated with the RARE beneficial use by the State Water Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); areas designated as preserves or their equivalent under the Natural Communities Conservation Program within the Cities and County of Orange; and any other equivalent environmentally sensitive areas which have been identified by the Copermittees.

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.

Feasibility Analysis – Detailed description of the selection process for the treatment control BMPs for a Priority Development Project, including justification of why one BMP is selected over another. For a Priority Development Project where a treatment control BMP with a low removal efficiency ranking (as identified by the Model SUSMP) is proposed, the analysis shall include a detailed and adequate justification exhibiting the reasons implementation of a treatment control BMP with a higher removal efficiency is infeasible for the Priority Development Project or portion of the Priority Development Project.

Flow Duration – The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). The simplest way to visualize this is to consider a histogram of pre- and post-project flows using long-term records of hourly data. To maintain pre-project flow duration means that the total number of hours (counts) within each range of flows in a flow-duration histogram cannot increase between the pre- and post-project condition. Flow duration within the range of geomorphologically significant flows is important for managing erosion.

GIS – Geographic Information System

Grading - The cutting and/or filling of the land surface to a desired slope or elevation.

Hazardous Material – Any substance that poses a threat to human health or the environment due to its toxicity, corrosiveness, ignitability, explosive nature or chemical reactivity. These also include materials named by the USEPA in 40 CFR 116 to be reported if a designated quantity of the material is spilled into the waters of the U.S. or emitted into the environment.

Hazardous Waste - Hazardous waste is defined as “any waste which, under Section 600 of Title 22 of this code, is required to be managed according to Chapter 30 of Division 4.5 of Title 22 of this code” [CCR Title 22, Division 4.5, Chapter 11, Article 1].

Household Hazardous Waste – Paints, cleaning products, and other wastes generated during home improvement or maintenance activities.

Hydromodification – The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes.

Illicit Connection – Any connection to the MS4 that conveys an illicit discharge.

Illicit Discharge - Any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from fire fighting activities [40 CFR 122.26(b)(2)].

Implementation Assessment – Assessment conducted to determine the effectiveness of Copermittee programs and activities in achieving measurable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed.

Inactive Slopes – Slopes on which no grading or other soil disturbing activities are conducted for 10 or more days.

Inland Surface Waters – all surface waters of the State that do not include the ocean, enclosed bays, or estuaries.

Integrated Assessment – Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality.

Jurisdictional Runoff Management Plan (JRMP) – 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.

Maximum Daily Action Level (MDAL) – is 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 Regional Board, the Regional Board defines MEP.

In a memo dated February 11, 1993, entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel, SWRCB addressed the achievement of the MEP standard as follows:

"To achieve the MEP standard, municipalities must employ whatever Best Management Practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost prohibitive. The major emphasis is on technical feasibility. Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or the BMPs would not be technically feasible, or the cost would be prohibitive. In selecting BMPs to achieve the MEP standard, the following factors may be useful to consider:

- a. *Effectiveness: Will the BMPs address a pollutant (or pollutant source) of concern?*
- b. *Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?*
- c. *Public Acceptance: Does the BMP have public support?*
- d. *Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?*
- e. *Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc?*

The final determination regarding whether a municipality has reduced pollutants

to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger. If a municipality reviews a lengthy menu of BMPs and chooses to select only a few of the least expensive, it is likely that MEP has not been met. On the other hand, if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit derived, it would have met the standard. Where a choice may be made between two BMPs that should provide generally comparable effectiveness, the discharger may choose the least expensive alternative and exclude the more expensive BMP. However, it would not be acceptable either to reject all BMPs that would address a pollutant source, or to pick a BMP base solely on cost, which would be clearly less effective. In selecting BMPs the municipality must make a serious attempt to comply and practical solutions may not be lightly rejected. In any case, the burden would be on the municipal discharger to show compliance with its permit. After selecting a menu of BMPs, it is the responsibility of the discharger to ensure that all BMPs are implemented.”

Minimum Level – the concentration at which the entire analytical system must give a recognizable signal and acceptable calibration point. The ML is the concentration in a sample that is equivalent to the concentration of the lowest calibration standard analyzed by a specific analytical procedure, assuming that all the method sample weights, volumes and processing steps have been followed.

Municipal Separate Storm Sewer System (MS4) – A conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designated or used for collecting or conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.26.

National Pollutant Discharge Elimination System (NPDES) - The national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 318, 402, and 405 of the CWA.

NOI – Notice of Intent

Non-Storm Water - All discharges to and from a MS4 that do not originate from precipitation events (i.e., all discharges from a MS4 other than storm water). Non-storm water includes illicit discharges, non-prohibited discharges, and NPDES permitted discharges.

Nuisance - As defined in the Porter-Cologne Water Quality Control Act a nuisance is “anything which meets all of the following requirements: 1) Is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as

to interfere with the comfortable enjoyment of life or property. 2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. 3) Occurs during, or as a result of, the treatment or disposal of wastes.”

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 – Order No. R9-2009-0002 (NPDES No. CAS0108740)

Person - A person is defined as an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof [40 CFR 122.2].

Point Source - Any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operations, landfill leachate collection systems, vessel, or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

Pollutant - Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated.

Pollution - As defined in the Porter-Cologne Water Quality Control Act: “the alteration of the quality of the waters of the State by waste, to a degree that unreasonably affects the either of the following: 1) The waters for beneficial uses; or 2) Facilities that serve these beneficial uses.” Pollution may include contamination.

Pollutants of Concern – Pollutants for which water bodies are listed as impaired under CWA section 303(d), pollutants associated with the land use type of a development, and/or pollutants commonly associated with runoff. Pollutants commonly associated with runoff include total suspended solids; sediment; pathogens (e.g., bacteria, viruses, protozoa); heavy metals (e.g., copper, lead, zinc, and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers); oxygen-demanding substances (decaying vegetation, animal waste, and anthropogenic litter).

Pollution Prevention - Pollution prevention is defined as practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control BMPs, treatment control BMPs, or disposal.

Post-Construction BMPs - A subset of BMPs including structural and non-structural controls which detain, retain, filter, or educate to prevent the release of pollutants to surface waters during the final functional life of developments.

Pre-Project or Pre-Development Runoff Conditions (Discharge Rates, Durations, Etc.) – Runoff conditions that exist onsite immediately before the planned development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development.

Principal Copermitttee – County of Orange

Priority Development Projects - New development and redevelopment project categories listed in Section F.1.d(2) of Order No. R9-2009-0002.

Receiving Waters – Waters of the United States.

Receiving Water Limitations (RWLs) - Waste discharge requirements issued by the Regional Board typically include both: (1) "Effluent Limitations" (or "Discharge Limitations") that specify the technology-based or water-quality-based effluent limitations; and (2) "Receiving Water Limitations" that specify the water quality objectives in the Basin Plan as well as any other limitations necessary to attain those objectives. In summary, the "Receiving Water Limitations" provision is the provision used to implement the requirement of CWA section 301(b)(1)(C) that NPDES permits must include any more stringent limitations necessary to meet water quality standards.

Redevelopment - The creation, addition, and or replacement of impervious surface on an already developed site. Examples include the expansion of a building footprint, road widening, the addition to or replacement of a structure, and creation or addition of impervious surfaces. Replacement of impervious surfaces includes any activity that is not part of a routine maintenance activity where impervious material(s) are removed, exposing underlying soil during construction. Redevelopment does not include trenching and resurfacing associated with utility work; resurfacing existing roadways; new sidewalk construction, pedestrian ramps, or bikelane on existing roads; and routine replacement of damaged pavement, such as pothole repair.

Retain – to keep or hold in a particular place, condition, or position without discharge to surface waters.

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.

Sediment - Soil, sand, and minerals washed from land into water. Sediment resulting from anthropogenic sources (i.e. human induced land disturbance activities) is considered a pollutant. This Order regulates only the discharges of sediment from anthropogenic sources and does not regulate naturally occurring sources of sediment. Sediment can destroy fish-nesting areas, clog animal habitats, and cloud waters so that sunlight does not reach aquatic plants.

Shared Treatment Control BMP - BMPs used by multiple developments to infiltrate, filter, or treat the required volume or flow prior to discharge to a receiving water. This could include, for example, a treatment BMP at the end of an enclosed storm drain that collects runoff from several commercial developments.

Source Control BMP – Land use or site planning practices, or structural or nonstructural measures that aim to prevent runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and runoff.

State Water Quality Protection Area – A nonterrestrial marine or estuarine area designated to protect marine species or biological communities from an undesirable alteration in natural water quality, including, but not limited to, areas of special biological significance that have been designated by the State Water Resources Control Board through its water quality control planning process. Areas of special biological significance are a subset of State Water Quality Protection Areas, and require special protection as determined by the State Water Resources Control Board pursuant to the California Ocean Plan adopted and reviewed pursuant to Article 4 (commencing with Section 13160) of Chapter 3 of Division 7 of the California Water Code and pursuant to the Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays and Estuaries of California (California Thermal Plan) adopted by the state board.

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.

Standard Storm Water Mitigation Plan (SSMP) – A plan developed to mitigate the impacts of runoff from Priority Development Projects.

Third Party Inspectors - Industrial and commercial facility inspectors who are not contracted or employed by a regulatory agency or group of regulatory agencies, such as the Regional Board or Copermittees. The third party inspector is not a regular facility employee self-inspecting their own facility. The third party inspector could be a contractor or consultant employed by a facility or group of businesses to conduct inspections.

Total Maximum Daily Load (TMDL) - The maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. Under CWA section 303(d), TMDLs must be developed for all water bodies that do not meet water quality standards after application of technology-based controls.

Toxicity - Adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). The water quality objectives for toxicity provided in the Water Quality Control Plan, San Diego Basin, Region 9, (Basin Plan), state in part...“All waters shall be free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life....The survival of aquatic life in surface waters subjected to a waste discharge or other controllable water quality factors, shall not be less than that for the same water body in areas unaffected by the waste discharge”.

Treatment Control BMP – Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants, filtration, biological uptake, media absorption or any other physical, biological, or chemical process.

Waste - As defined in CWC Section 13050(d), "waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal."

Article 2 of CCR Title 23, Chapter 15 (Chapter 15) contains a waste classification system that applies to solid and semi-solid waste, which cannot be discharged directly or indirectly to water of the state and which therefore must be discharged to land for treatment, storage, or disposal in accordance with Chapter 15. There are four classifications of waste (listed in order of highest to lowest threat to water quality): hazardous waste, designated waste, non-hazardous solid waste, and inert waste.

Water Quality Assessment – Assessment conducted to evaluate the condition of non-storm water and storm water discharges, and the water bodies which receive these discharges.

Water Quality Objective - Numerical or narrative limits on constituents or characteristics of water designated to protect designated beneficial uses of the water. [California Water Code Section 13050 (h)]. California's water quality objectives are established by the State and Regional Water Boards in the Water Quality Control Plans. Numeric or narrative limits for pollutants or characteristics of water designed to protect the beneficial uses of the water. In other words, a water quality objective is the maximum concentration of a pollutant that can exist in a receiving water and still generally ensure that the beneficial uses of the receiving water remain protected (i.e., not impaired). Since water quality objectives are designed specifically to protect the beneficial uses, when the objectives are violated the beneficial uses are, by definition, no longer protected and become impaired. This is a fundamental concept under the Porter Cologne Act. Equally fundamental is Porter Cologne's definition of pollution. A condition of pollution exists when the water quality needed to support designated beneficial uses has become unreasonably affected or impaired; in other words, when the water quality objectives have been violated. These underlying definitions (regarding beneficial use protection) are the reason why all waste discharge requirements implementing the federal NPDES regulations require compliance with water quality objectives. (Water quality objectives are also called water quality criteria in the CWA.)

Water Quality Standards - The beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.,) of water and the water quality objectives necessary to protect those uses.

Waters of the State - Any water, surface or underground, including saline waters within the boundaries of the State [CWC section 13050 (e)]. The definition of the Waters of the State is broader than that for the Waters of the United States in that all water in the State is considered to be a Waters of the State regardless of circumstances or condition. Under this definition, a MS4 is always considered to be a Waters of the State.

Waters of the United States - As defined in the 40 CFR 122.2, the Waters of the U.S. are defined as: "(a) All waters, which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (b) All interstate waters, including interstate "wetlands;" (c) All other waters such as intrastate lakes, rivers, streams (including

intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition; (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition; (f) The territorial seas; and (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA."

Watershed - That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as drainage area, catchment, or river basin).

Watershed Runoff Management Plan (WRMP) – A written description of the specific watershed runoff management measures and programs that each watershed group of Copermittees 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.

WDRs – Waste Discharge Requirements

Wet Season – October 1 through April 30 of each year.

Tab 31

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Los Angeles Regional Quality Control Board
Order No. 01-182
Permit CAS004001
Parts 4C2a., 4C2b, 4E & 4F5c3

Filed September 2, 2003, (03-TC-04)
September 26, 2003 (03-TC-19)
by the County of Los Angeles, Claimant

Filed September 30, 2003 (03-TC-20 &
03-TC-21) by the Cities of Artesia, Beverly
Hills, Carson, Norwalk, Rancho Palos Verdes,
Westlake Village, Azusa, Commerce, Vernon,
Bellflower, Covina, Downey, Monterey Park,
Signal Hill, Claimants

Case Nos.: 03-TC-04, 03-TC-19,
03-TC-20, 03-TC-21

*Municipal Stormwater and Urban Runoff
Discharges*

STATEMENT OF DECISION
PURSUANT TO GOVERNMENT CODE
SECTION 17500 ET SEQ.; TITLE 2,
CALIFORNIA CODE OF
REGULATIONS, DIVISION 2,
CHAPTER 2.5, ARTICLE 7.

(Adopted July 31, 2009)

STATEMENT OF DECISION

The Commission on State Mandates (“Commission”) heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Leonard Kaye and Judith Fries appeared on behalf of the County of Los Angeles. Howard Gest appeared on behalf of the cities. Michael Lauffer appeared on behalf of the State Water Resources Control Board and the Regional Water Quality Control Board. Carla Castaneda and Susan Geanacou appeared on behalf of the Department of Finance. Geoffrey Brosseau appeared on behalf of the Bay Area Stormwater Management Agencies Association.

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 4-2.

Summary of Findings

The consolidated test claim, filed by the County of Los Angeles and several cities, allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of various facilities to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board.

The Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate on local agencies subject to the permit that are not subject to a trash total

maximum daily load:¹ “Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.”

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

BACKGROUND

The claimants allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board (LA Regional Board), a state agency.

History of the test claims

The test claims were filed in September 2003,² by the County of Los Angeles and several cities within it (the permit covers the Los Angeles County Flood Control District and 84 cities in Los Angeles County, all except Long Beach). The Commission originally refused jurisdiction over the permits based on Government Code section 17516’s definition of “executive order” that excludes permits issued by the State Water Resources Control Board (State Water Board) or Regional Water Quality Control Boards (regional boards). After litigation, the Second District Court of Appeal held that the exclusion of permits and orders of the State and Regional Water Boards from the definition of “executive order” is unconstitutional. The court issued a writ commanding the Commission to set aside the decision “affirming your Executive Director’s rejection of Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21” and to fully consider those claims.³

The County of Los Angeles and the cities re-filed their claims in October and November 2007. The claims were consolidated by the Executive Director in December 2008. Thus, the

¹ A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

² Originally, test claims 03-TC-04 (*Transit Trash Receptacles*) and 03-TC-19 (*Inspection of Industrial/Commercial Facilities*) were filed by the County of Los Angeles on September 5, 2003. Test claim 03-TC-21 (*Stormwater Pollution Requirements*) was filed by the Cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina on September 30, 2003. Test claim 03-TC-20 (*Waste Discharge Requirements*) was filed by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village on September 30, 2003.

³ *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.

reimbursement period is as though the claims were filed in September 2003, i.e., beginning July 1, 2002.⁴

Before discussing the specifics of the permit, an overview of municipal stormwater pollution puts the permit in context.

Municipal stormwater

One of the main objectives of the permit is “to assure that stormwater discharges from the MS4 [Municipal Separate Storm Sewer Systems]⁵ shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-stormwater to the MS4 has been effectively prohibited.” (Permit, p. 13.)

Stormwater runoff flows untreated from urban streets directly into streams, lakes and the ocean. To illustrate the effect of stormwater⁶ on water pollution, the Ninth Circuit Court of Appeal has stated the following:

Storm water runoff is one of the most significant sources of water pollution in the nation, at times “comparable to, if not greater than, contamination from industrial and sewage sources.” [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.⁷

⁴ Government Code section 17557, subdivision (e).

⁵ Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

⁶ Storm water means “storm water runoff, snow melt runoff, and surface runoff and drainage.” (40 C.F.R. § 122.26 (b)(13).)

⁷ *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

Because of the stormwater pollution problems described by the Ninth Circuit above, California and the federal government regulate stormwater runoff as described below.

California law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is “to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise “the principal state agencies with primary responsibility for the coordination and control of water quality.” (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board).

Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards “formulate and adopt water quality control plans for all areas within [a] region” (§ 13240).⁸

Much of what the regional board does, especially as pertaining to permits like the one in this claim, is based in federal law as described below.

Federal law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants⁹ from point sources¹⁰ to waters of the United States, since

⁸ *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

⁹ According to the federal regulations, “Discharge of a pollutant” means: (a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.” (40 C.F.R. § 122.2.)

¹⁰ A point source is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

discharges of pollutants are illegal except under a permit.¹¹ The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations¹² are not “less stringent” than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), “[t]he primary means” for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)¹³

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California’s permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a regional board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

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

¹¹ 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

¹² *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of “pollutants” which are “discharged” from “point sources” into “waters of the United States,” the waters of the “contiguous zone,” or the ocean. (40 C.F.R. § 122.2.)

¹³ *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th 613, 621. Actually, State and regional board permits allowing discharges into state waters are called “waste discharge requirements” (Wat. Code, § 13263).

than required by federal law-from taking into account the economic effects of doing so.¹⁴

Actions that dischargers must implement as prescribed in permits are commonly called “best management practices” or BMPs.¹⁵

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), “Municipal and Industrial Stormwater Discharges.” Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges “associated with industrial activity,” discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.¹⁶

NPDES permits are required for “A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.”¹⁷ The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.¹⁸

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application.

¹⁴ *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th 613, 627-628.

¹⁵ Best management practices, or BMPs, means “schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of “waters of the United States.” BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” (40 CFR § 122.2.)

¹⁶ *Environmental Defense Center, Inc. v. U.S. E.P.A.*, *supra*, 344 F.3d 832, 841-842.

¹⁷ 33 USCA 1342 (p)(2)(C).

¹⁸ 33 USCA 1342 (p)(3)(B).

The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

[A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.¹⁹

General state-wide permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,²⁰ as described in the permit as follows:

To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. ... Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations. (Permit, p. 11.)

The State Board has statutory fee authority to conduct inspections to enforce the general state-wide permits.²¹ The statewide permits are discussed in further detail in the analysis.

The Los Angeles Regional Board permit (Order No. 01-182, Permit CAS004001)

To obtain the permit, the County of Los Angeles, on behalf of all permittees, submitted on January 31, 2001 a Report of Waste Discharge, which constitutes a permit application, and a Stormwater Quality Management Program, which constituted the permittees' proposal for best management practices that would be required in the permit.²²

¹⁹ 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

²⁰ A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

²¹ Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

²² State Water Resources Control Board, comments submitted April 18, 2008, page 8 and attachment 36.

The permit states that its objective is: “to protect the beneficial uses of receiving waters in Los Angeles County.”²³ The permit was upheld by the Second District Court of Appeal in 2006, which described it as follows:

The 72-page permit is divided into 6 parts. There is an overview and findings followed by a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees.²⁴

After finding that “the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from “municipal separate storm sewer systems” (storm drain systems)” and that the discharges were the subject of regional board permits in 1990 and 1996, the regional board found that the storm drain systems in the county discharged a host of specified pollutants into local waters. The permit summed up by stating: “Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region.”²⁵

The permit also specifies prohibited and allowable discharges, receiving water limitations, the implementation of the Storm Water Quality Management Program “requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible.”²⁶ As the court described the permit:

In the prohibited discharges portion of the permit, the county and the cities were required to “effectively prohibit non-stormwater discharges” into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-stormwater emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the

²³ Permit page 13. The permit also says: “This permit is intended to develop, achieve, and implement a timely comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the US subject to the Permittees’ jurisdiction.”

²⁴ *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 990.

²⁵ *County of Los Angeles v. California State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985, 990

²⁶ *County of Los Angeles v. California State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985, 994.

regional board; “uncontaminated ground water infiltrations” ... and waters from emergency fire-fighting flows.²⁷

There is also a list of permissible discharges that are incidental to urban activity, as specified (e.g., landscape irrigation runoff, etc.). In the part on receiving water limitations, the permit prohibits discharges from storm sewer systems that “cause or contribute” to violations of “Water Quality Standards” objectives in receiving waters as specified in state and federal water quality plans. Storm or non-stormwater discharges from storm sewer systems which constitute a nuisance are also prohibited.²⁸

To comply with the receiving water limitations, the permittees must implement control measures in accordance with the permit.²⁹

The permittees are also to implement the Storm Water Quality Management Program (SQMP) that meets the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduces the pollutants in stormwaters to the maximum extent possible with the use of best management practices. And the permittees must revise the SQMP to comply with specified total maximum daily load (TMDL) allocations.³⁰ If a permittee modified the countywide SQMP, it must implement a local management program. Each permittee is required by November 1, 2002, to adopt a stormwater and urban runoff ordinance. By December 2, 2002, each permittee must certify that it had the legal authority to comply with the permit through adoption of ordinances or municipal code modifications.³¹

²⁷ *County of Los Angeles v. California State Water Resources Control Board, supra*, 143 Cal.App.4th 985, 991-992.

²⁸ “‘Nuisance’ means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes.” *Id.* at 992.

²⁹ If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee must immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that describes the best management practices currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes these changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board. *Id.* at 993.

³⁰ A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <<http://www.epa.gov/OWOW/tmdl>> as of October 3, 2008.

³¹ *County of Los Angeles v. California State Water Resources Control Board, supra*, 143 Cal.App.4th 985.

The permit gives the County of Los Angeles additional responsibilities as principal permittee, such as coordination of the SQMP and convening watershed management committees. In addition, the permit contains a development construction program under which permittees are to implement programs to control runoff from construction sites, with additional requirements imposed on sites one acre or larger, and more on those five acres or larger. Permittees are to eliminate all illicit connections and discharges to the storm drain system, and must document, track and report all cases.

In this claim, however, claimants only allege activities in parts 4C2a, 4C2b, 4E and 4F5c3 of the permit. These parts concern placement and maintenance of trash receptacles at transit stops, and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites, as quoted below.

Co-Claimants' Position

Co-claimants assert that parts 4C2a, 4C2b, 4E and 4F5c3 of the LA Regional Board's permit constitute a reimbursable state-mandate within the meaning of article XIII B, section 6, and Government Code section 17514.

Transit Trash Receptacles: Los Angeles County ("County") filed test claims 03-TC-04 and 03-TC-19. In 03-TC-04, *Transit Trash Receptacles*, filed by the County, and 03-TC-20, *Waste Discharge Requirements*, filed by the cities, the claimants allege the following activities as stated in the permit part 4F5c3 (Part 4, Special Provisions, F. Public Agency Activities Program, 5. Storm Drain Operation and Management):

- c. Permittees not subject to a trash TMDL³² shall: [¶]...[¶]
 - (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Claimant County asserts that this permit condition requires the following:

1. Identifying all transit stops within its jurisdiction except for the Los Angeles River and Ballona Creek Watershed Management areas.
2. Selecting proper trash receptacle design and evaluating proper placement of trash receptacles.
3. Designing receptacle pad improvement, if needed.
4. Constructing and installing trash receptacle units.
5. Collecting trash and maintaining receptacles.

Inspection of Industrial and Commercial Facilities: In claim 03-TC-19, *Inspection of Industrial/Commercial Facilities*, filed by the County, and 03-TC-20, *Waste Discharge Requirements*, filed by the cities, claimants allege the following activities as stated in the permit parts 4C2a and 4C2b (Part 4, Special Provisions, C. Industrial/Commercial Facilities Control Program):

³² A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <<http://www.epa.gov/OWOW/tmdl>> as of October 3, 2008.

2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:

a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections-: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with State law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP [Storm Water Quality Management Program].

At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on stormwater pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;
- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;

- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO [Retail Gasoline Outlet] and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;
- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices.

b) Phase I Facilities³³

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:³⁴ Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:³⁵ Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity³⁶ to stormwater. For those facilities that do

³³ On page 62 of the permit, U.S. EPA Phase I Facilities are defined as “facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

³⁴ Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): “*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...; Restaurants; Wholesale trade (scrap, auto dismantling) ...; Automotive service facilities; Fabricated metal products ...; Motor freight ...; Chemical/allied products ...; Automotive Dealers/Gas Stations ...; Primary Metals.*”

³⁵ Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): “*Electric/Gas/Sanitary ...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products ...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products ...; Miscellaneous Manufacturing ...; Food and kindred Products ...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...; Laundries ...; Instruments ...; Textile Mills Products ...; Apparel ...*”

³⁶ “Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Inspection of Construction Sites: In claims 03-TC-20 and 03-TC-21, *Waste Discharge Requirements*, the cities allege the activities in permit parts 4C2a, 4C2b, and 4F5c3, as listed in the test claims cited above, in addition to the following activities as stated in part 4E of the permit (Part 4, Special Provisions, E. Development Construction Program):

- For construction sites one acre or greater, each Permittee shall comply with all conditions in section E1 above and shall: ...

(b) Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. The Local SWPPP [Storm Water Pollution Prevention Plan] shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Part 4E3 of the Order provides, in relevant part, as follows:

3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E1 and E2 and shall:

- a) require, prior to issuing a grading permit for all projects requiring coverage under the state general permit,³⁷ proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction

except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;” [40 CFR §122.26 (b)(14), Emphasis added.]

³⁷ A general permit means “an NPDES ‘permit’ issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA [Clean Water Act] within a geographical area.” (40 CFR § 122.2.) California has issued one general permit for construction activity and one for industrial activity.

Activity Storm Water Permit]³⁸ and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.

- b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
- c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

Both county and city claimants allege more than \$1000 in costs in each test claim to comply with the permit activities.

In comments submitted June 4, 2009 on the draft staff analysis, the County of Los Angeles asserts that local agencies do not have fee authority to collect trash from trash receptacles that must be placed at transit stops, and that voter approval under Proposition 218 would be required to do so. The County also argues that voter approval under Proposition 218 would be required for stormwater inspection costs, and cites as evidence the City of Santa Clarita's stormwater pollution prevention fee, as well as legislative proposals now in the legislature that would, if enacted, provide fee authority.

In comments submitted June 8, 2009 on the draft staff analysis, the cities disagree with the conclusion that they have fee authority to recoup the costs of the transit-stop trash receptacles, and disagree that they have fee authority to inspect facilities covered by the state-issued general stormwater permits, as discussed in more detail below.

State Agency Positions

Department of Finance: Finance, in comments filed March 27, 2008 on all four test claims, alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because "The permit conditions imposed on the local agencies are required by federal laws" so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that "requirements of the permit are federally required to comply with the NPDES [National Pollutant Discharge Elimination System] program ... [and] is enforceable under the federal CWA [Clean Water Act]."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The permittees submitted a Storm Water Quality Management Program prevention report with their applications, in which they had the option to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies prescribed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,³⁹ which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

³⁸ See page 11, paragraph 22 of the permit for a description of the statewide permits.

³⁹ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance submitted comments on the draft staff analysis on June 19, 2009, agreeing that the local agencies have fee authority sufficient to pay for the mandated activities. Finance disagrees, however, with the portion of the analysis that finds that the activities are not federal mandates.

State Water Resources Control Board: The State Board filed comments on the four test claims on April 18, 2008, noting that the federal CWA mandates that municipalities apply for and receive permits regulating discharges of pollutants from their municipal separate storm sewer system (MS4) to waters of the United States. "Pursuant to federal regulations, the Permit contains numerous requirements for the cities and County to take actions to reduce the flow of pollutants into the rivers and the Bay, known as Best Management practices (BMPs)."

The State Board asserts that the permit is mandated on the local governments by federal law, and applies to many dischargers of stormwater, both public and private, so it is not unique to local governments. The federal mandate requires that the permit be issued to the local governments, and the specific requirements challenged are consistent with the minimum requirements of federal law. According to the State Board, even if the permit were interpreted as going beyond federal law, any additional state requirements are de minimis. And the costs are not subject to reimbursement because the programs were proposed by the cities and County themselves, and because they have the ability to fund these requirements through charges and fees and are not required to raise taxes.

In comments filed with the State Board on April 10, 2008 (attached to the State Board comments on the test claim), the United States Environmental Protection Agency (U.S. EPA) asserts that the permit conditions reduce pollutants to the "maximum extent practicable." The transit trash receptacle and inspection programs, according to U.S. EPA, are founded in section 402 (p) of the Clean Water Act, and are well within the scope of the federal regulations (40 CFR § 122.26 (d)(2)(iv)(A)(3)).

In its comments on the draft staff analysis submitted June 5, 2009, the State Board agrees with the conclusion and staff recommendation to deny the test claim, but disagrees with parts of the analysis. The State Board asserts that federal law: (1) requires local agencies to obtain NPDES permits from California Water Boards, and (2) mandates the permit, which is less stringent than permits for private industry. The State Board also states that the permit does not exceed the minimum federal mandate, as found by a court of appeal. Finally, the State Board argues that the federal stormwater law is one of general application, and therefore does not impose a state mandate.

Interested Party Positions

Bay Area Stormwater Management Agencies Association: In comments on the draft staff analysis received June 3, 2009 (although the letter is dated April 29, 2009) the Bay Area Stormwater Management Agencies Association (BASMAA) states that this matter is of statewide importance with broad implications, and fundamentally a matter of public finance. BASMAA also urges keeping the voters' objectives paramount. BASMAA agrees that the permit requirements are a new program or higher level of service and that the requirements go beyond the federal Clean Water Act's mandates. As for the portion of the draft staff analysis that

discusses local agency fee authority, BASMAA calls it “myopic” saying it “falls short in its consideration of all potentially relevant issues and appellate court precedents that need to be presented to the Commission to serve the interest of the public.” (Comments p. 3.) BASMAA contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the Proposition 218 voting requirement or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding “funded vs. unfunded” requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

League of California Cities and California State Association of Counties (CSAC): In joint comments on the draft staff analysis received June 4, 2009, the League of Cities and CSAC agree with the draft staff analysis that the permit is a mandate, but question whether the *Connell and County of Fresno* decisions are still valid as applied to Government Code section 17556, subdivision (d), which prohibit the Commission from finding costs mandated by the state if the local agency has fee authority. This is because of the voters’ approval of Proposition 218 in 1996. The League and CSAC urge the Commission not to find that fee authority exists for local agencies (1) to the extent there may be doubt about whether a local agency has it, and (2) to the extent that there is no person upon which the local agency can impose the fee.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution⁴⁰ recognizes the state constitutional restrictions on the powers of local government to tax and spend.⁴¹ “Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”⁴² A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

⁴⁰ Article XIII B, section 6, subdivision (a), provides:

(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

⁴¹ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 735.

⁴² *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

task.⁴³ In addition, the required activity or task must be new, constituting a “new program,” or it must create a “higher level of service” over the previously required level of service.⁴⁴

The courts have defined a “program” subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.⁴⁵ To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.⁴⁶ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”⁴⁷

Finally, the newly required activity or increased level of service must impose costs mandated by the state.⁴⁸

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.⁴⁹ In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”⁵⁰

The permit provisions in the consolidated test claim are discussed separately to determine whether they are reimbursable state-mandates.

⁴³ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

⁴⁴ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

⁴⁵ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.)

⁴⁶ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

⁴⁷ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

⁴⁸ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

⁴⁹ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

⁵⁰ *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue 1: Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, and whether they constitute a federal mandate.

A. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which defines an “executive order” for purposes of state mandates, as “any order, plan, requirement, rule, or regulation issued by any of the following:

- (a) The Governor.
- (b) Any officer or official serving at the pleasure of the Governor.
- (c) Any agency, department, board, or commission of state government.”⁵¹

The LA Regional Water Board is a state agency.⁵² The permit it issued is both a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) the result of claimants’ discretion?

The permit provisions require placing and maintaining trash receptacles at transit stops and inspecting specified facilities and construction sites.

The Department of Finance, in comments submitted March 27, 2008, asserts that the claimants had discretion over what activities and conditions to include in the permit application, so that any resulting costs are downstream of the claimant’s decision to include those provisions in the permit. Thus, Finance argues that the costs are not mandated by the state.

Similarly, the State Board, in its April 18, 2008 comments, cites the Stormwater Quality Management Program (SQMP) submitted by the county that constituted the claimants’ proposal for the BMPs required under the permit. The State Water Board refers to (on p. 28 of the SQMP) the county’s proposal to “collect trash along open channels and encourage voluntary trash collection in natural stream channels.” The State Water Board further states that the SQMP (pp. 22-23) contains the municipalities’ proposal for (1) site visits to industrial and commercial facilities, including automotive service businesses and restaurants to verify evidence of BMP

⁵¹ Section 17516 also states: ““Executive order” does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code.” The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates*, *supra*, 150 Cal.App.4th 898, 904.

⁵² Water Code section 13200 et seq.

implementation, and (2) maintaining a database of automotive and food service facilities including whether they have NPDES stormwater permit coverage.

Claimant County of Los Angeles, in its June 23, 2008 rebuttal comments (pp.3-4), stated whether or not most jurisdictions place transit receptacles at transit stops is not relevant to the existence of a state mandate because Government Code section 17565 provides that if a local agency has been incurring costs for activities that are subsequently mandated by the state, the activities are still subject to reimbursement. The County also states that the permit application only proposed an industrial/commercial *educational* site visit program, not an inspection program. The claimants allege that the inspection program was previously the state's duty, but that the permit shifted it to the local agencies.

Claimant cities in their June 28, 2008 comments also construe the SQMP proposal as involving only educational site visits, which they characterize as very different from compliance inspections. And cities assert that “nowhere in the Report of Waste Discharge do the applicants propose compliance inspections of facilities that hold general industrial and general construction stormwater permits for compliance with those permits.” According to the cities, the city and county objected orally and in writing to the inspection permit provision.

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

[A]ctivities undertaken at the option or discretion of a local government entity ... do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.⁵³

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants were required by state and federal law to submit the NPDES permit application in the form of a Report of Waste Discharge and SQMP. Submitting them was not discretionary. According to the record,⁵⁴ the county on behalf of all claimants, submitted on January 31, 2001 a Report of Waste Discharge (ROWD), which constitutes a permit application, and a SQMP, which constitutes the claimants' proposal for best management practices that would be required in the permit.

The duty to apply for an NPDES permit is not within the claimants' discretion. According to the federal regulation:

a) *Duty to apply.* (1) Any person⁵⁵ who discharges or proposes to discharge pollutants ... and who does not have an effective permit ... must submit a

⁵³ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

⁵⁴ State Water Resources Control Board, comments submitted April 18, 2008, page 8 & attachment 36.

⁵⁵ *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

complete application to the Director in accordance with this section and part 124 of this chapter.⁵⁶

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: “Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state ... shall file a report of the discharge in compliance with the procedures set forth in Section 13260 ...”⁵⁷ Thus, submitting the ROWD is not discretionary.

Federal regulations also anticipate the filing of an application for a stormwater permit, which contains the information in the SQMP. The regulation states in part:

(d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application.⁵⁸

According to the permit, section 122.26, subdivision (d), of the federal regulations contains the essential components of the SQMP (p. 32), which is an enforceable element of the permit (p. 45). Section 122.26, subdivision (d)(2)(iv)(C), in the federal regulations is interpreted in the permit to “require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4.” (p. 35.) In short, the claimants were required by law to submit the ROWD and SQMP, with specified contents.

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which were not the result of the claimants’ discretion.

C. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b)?

The next issue is whether the parts of the permit at issue are federally mandated, as asserted by the State Board and the Department of Finance (whose comments are detailed below). If so, the parts of the permit would not constitute a state mandate.

In *County of Los Angeles v. Commission on State Mandates*, the court stated as follows regarding this permit: “We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances.”⁵⁹ But after

⁵⁶ 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

⁵⁷ Water Code section 13376.

⁵⁸ 40 Code of Federal Regulations, section 122.26 (d).

⁵⁹ *County of Los Angeles v. Commission on State Mandates*, *supra*, 150 Cal.App.4th 898, 914.

summarizing the arguments on both sides, the court declined to decide the issue, stating: “Resolution of the federal or state nature of these [permit] obligations therefore is premature and, thus, not properly before this court.”⁶⁰ The court agreed with the Commission (calling it an “inescapable conclusion”) that the federal versus state issues in the test claims must be addressed in the first instance by the Commission.⁶¹

The California Supreme Court has stated that “article XIII B, section 6, and the implementing statutes ... by their terms, provide for reimbursement only of *state-* mandated costs, not *federally* mandated costs.”⁶²

When analyzing federal law in the context of a test claim under article XII B, section 6, the court in *Hayes v. Commission on State Mandates* held that “[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies’ taxing and spending limitations” under article XIII B.⁶³ When federal law imposes a mandate on the state, however, and the state “freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.”⁶⁴

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find “costs mandated by the state” if “[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.”

In *Long Beach Unified School Dist. v. State of California*,⁶⁵ the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.⁶⁶ The *Long Beach* court stated that unlike the federal law at issue, “the executive

⁶⁰ *Id.* at page 918.

⁶¹ *Id.* at page 917. The court cited *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830, 837, in support.

⁶² *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th 859, 879-880, emphasis in original.

⁶³ *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra*, 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

⁶⁴ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1594.

⁶⁵ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

⁶⁶ *Id.* at page 173.

Order and guidelines require specific actions ... [that were] required acts. These requirements constitute a higher level of service.”⁶⁷

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not “less stringent” than those set out in the Clean Water Act.⁶⁸ Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.⁶⁹ The federal Clean Water Act also allows for more stringent measures, as follows:⁷⁰

Permits for discharges from municipal storm sewers [¶]...[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the ... State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

As discussed further below, the Commission finds that the permit activities are not federally mandated because federal law does not require the permittees to install and maintain trash receptacles at transit stops, or require inspections of restaurants, automotive service facilities, retail gasoline outlets or automotive dealerships. As to inspecting phase I facilities or construction sites, the federal regulatory scheme authorizes states to perform the inspections under a general statewide permit, making it possible to avoid imposing a mandate on the local agencies to do so.

In its June 2009 comments on the draft staff analysis, the State Board disagrees that specific mandates in the permit exceed the federal requirements, the State Board argues:

This approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California’s Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California’s Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. ... The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not convert the federal mandate into a state mandate.⁷¹

The Commission disagrees. Based on the *Long Beach Unified School Dist.* case discussed above and applied in the analysis below, the specific requirements in the permit may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act.

⁶⁷ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155, 173.

⁶⁸ 33 U.S.C. § 1370.

⁶⁹ *City of Burbank v. State Water Resources Control Board, supra*, 35 Cal.4th 613, 618, 628.

⁷⁰ 33 USCA section 1370.

⁷¹ State Board comments submitted June 2009, page 6.

Finance, in its June 2009 comments on the draft staff analysis, distinguishes this permit from the issue in the *Long Beach Unified School Dist.* case. According to Finance, in *Long Beach*, the courts had suggested certain steps and approaches that might help alleviate racial discrimination, although the state's executive order and guidelines required specific actions. But in this claim, federal law requires NPDES permits to include specific requirements.

The Commission agrees that NPDES permits are required to include specific measures. But as discussed in more detail below, those measures are not the same as the specific requirements at issue in this permit (in Parts 4C2a, 4C2b, 4E, and 4F5c3).

The State Board's June 2009 comments also discuss *County of Los Angeles v. State Water Resources Control Board*,⁷² which involved the same permit as in this test claim. The State Board asserts that this case holds, in an unpublished part, that "the permit did not exceed the federal minimum requirements for the MS4 program."⁷³ (Comments, p. 5.) The State Board asserts that the Commission is bound by this decision.

The Commission reads the *County of Los Angeles* case differently than the State Board. The plaintiffs (permittees and others) in that case challenged the permit on a variety of issues, including that the regional board did not have jurisdiction to issue it, and that it violated the California Environmental Quality Act. The court did not, however, discuss the permit conditions at issue in this test claim. In the portion cited by the State Board, the court was addressing the consideration of the permit's economic effects. One of the plaintiffs' challenges to the permit was that the regional board was required to consider the economic effects in issuing the permit. By alleging the regional board had not done so, the plaintiffs argued that the permit imposed conditions more stringent than required by the federal Clean Water Act. The court held that the plaintiff's contentions were waived for failure to set forth all the documents received by the regional board, and that the regional board had considered the costs and benefits of implementation of the permit. In other parts of the opinion, however, the court acknowledged the regional board's authority to impose permit restrictions beyond the "maximum extent feasible"⁷⁴

The *County of Los Angeles* case is silent on the permit provisions at issue in this claim⁷⁵ (Parts 4C2a, 4C2b, 4E, and 4F5c3) except when it said: "we need no [sic] address the parties'

⁷² *County of Los Angeles v. State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985.

⁷³ The court's opinion, including the unpublished parts, are in attachment 26 of the State Board's comments submitted April 18, 2008.

⁷⁴ See page 18 of attachment 26 of the State Board's comments submitted April 18, 2008.

⁷⁵ In *County of Los Angeles*, the plaintiffs also challenged the following parts of the permit: (1) part 2.1 that deals with receiving water restrictions and that prohibits all water discharges that violate water quality standards or objectives regardless of whether the best management practices are reasonable; (2) part 3.C, which requires the permittees to revise their storm water quality management programs in order to implement the total maximum daily loads for impaired water bodies, and (3) parts 3.G and 4., which authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. The court held that these contentions were waived for failure to set forth all the

remaining contentions concerning trash receptacles.”⁷⁶ The court also said inspections under the permit were not unlawful. Nonetheless, the case is not binding on the Commission in deciding the issues in this claim.

California in the NPDES program: By way of background, under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, the section that describes the NPDES program (and which, in subdivision (p), describes the requirements for the municipal stormwater system permits) states in part:

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

[S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is neither required to have an NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program⁷⁷ to comply with the Federal Water Pollution Control Act of 1972 stated the following findings and declaration in Water Code section 13370:

- (a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants ... to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.
- (b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.
- (c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the

applicable evidence, and that the regional board has authority to impose restrictions beyond the maximum extent feasible.

⁷⁶ See page 22, attachment 26 of the State Board’s comments submitted April 18, 2008.

⁷⁷ Water Code section 13374 states: “The term ‘waste discharge requirements’ as referred to in this division is the equivalent of the term ‘permits’ as used in the Federal water Pollution Control Act, as amended.”

provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this Water Code section 13370, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen⁷⁸ to effect the stormwater permit program.

Any further discussion in this analysis of federal “requirements” should be construed in the context of California’s choice to participate in the federal regulatory NPDES program.

In its June 2009 comments on the draft staff analysis, the State Board argues as follows:

[T]he ... analysis treats the state’s decision to *administer* the NPDES permit program in 1972 as the ‘choice’ referred to in *Hayes*. ... The state’s ‘choice’ to administer the program in lieu of the federal government does not alter the federal requirement on municipalities to reduce pollutants in these discharges to the maximum extent practicable.⁷⁹

Finance, in its June 2009 comments, also disagrees with this part of the draft staff analysis, asserting that the duty to apply for a NPDES permit is required by federal law on public and private dischargers, which in this case are local agencies.

Even though California opted into the NPDES program, further analysis is needed to determine whether the federal regulations impose a mandate on the local agencies. To the extent that state requirements go beyond the federal requirements, there would be a state mandate.⁸⁰ Thus, the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402(p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26.

Placing and maintaining trash receptacles at transit stops (part 4F5c3): This part of the permit states:

c. Permittees not subject to a trash TMDL⁸¹ shall: [¶]...[¶]
(3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

The comments of the State Water Board and U.S. EPA assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations. The U.S.

⁷⁸ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

⁷⁹ State Board comments submitted June 2009, page 4.

⁸⁰ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155, 173. Government Code section 17556, subdivision (b).

⁸¹ A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

EPA submitted a letter to the State Water Board regarding the permit conditions in April 2008, which the State Water Board attached to its comments. Regarding the trash receptacles, the letter states:

[M]aintaining trash receptacles at all public transit stops is well within the scope of these [Federal] regulations. Among the minimum controls required to reduce pollutants from runoff from commercial and residential areas are practices for “operating and maintaining public streets, roads, and highways ... [40 CFR] § 122.26(d)(2)(iv)(A)(3).”⁸²

U.S. EPA also cites EPA’s national menu of BMPs for stormwater management programs, “which recommends a number of BMPs to reduce trash discharges.” Among the recommendations is ‘improved infrastructure’ for trash management when necessary, which includes the placement of trash receptacles at appropriate locations based on expected need.”⁸³

The State Water Board, in comments filed April 18, 2008, states that part 4F of the permit (regarding trash receptacles) concerns “the municipalities’ own activities, as opposed to its regulation of discharges into its system by others.” The State Water Board cites the same section 122.26 regulation as U.S. EPA, and states that the requirements “reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable. It is federal law that animates the requirement and federal law that mandates specificity in describing the BMPs.” The State Water Board alleges that two appellate courts⁸⁴ have determined that the permit provisions constitute the “maximum extent practicable” standard, which is the minimum requirement under federal law.

The Department of Finance also asserts that the permit requirements are a federal mandate.

The County of Los Angeles, in comments filed June 23, 2008, states that “Nothing in the federal Clean Water Act requires the County to install trash receptacles at transit stops. Nothing in the federal regulations or the Clean Water Act itself imposes this obligation.” The county states that the U.S.EPA’s citation to BMPs for stormwater management programs “may be permitted under federal law ... and even encouraged as ‘reasonable expectations.’ But such requirements are not mandated on the County by federal law.” The County admits the existence of “an abundance of federal guidance and encouragement to have the County install and maintain trash receptacles at all public transit stops. But these are merely federal suggestions, not mandates.”

The city claimants, in comments filed June 25, 2008, also argue that the requirement for transit trash receptacles is not a federal mandate, stating that nothing in the Clean Water Act or the federal regulations requires cities to install trash receptacles at transit stops. City claimants also submit a survey of other municipal stormwater permits, finding that none of those issued by U.S. EPA required installation of trash receptacles at transit stops.

⁸² Letter from Alexis Strauss, Director, Water Division, U.S. EPA, to Tam M. Doduc, Chair, and Dorothy Rice, Executive Director, State Water Resources Control Board, April 10, 2008, page 3.

⁸³ *Id.* at page 3.

⁸⁴ The State Water Board cites: *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region* (2006) 135 Cal.App.4th 1377; *County of Los Angeles v. California State Water Resources Control Board* (2006) 148 Cal.App.4th 985.

The federal law applicable to this issue is section 402 of the Clean Water Act, which states:

Permits for discharges from municipal storm sewers--

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator⁸⁵ or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations state as follows:

- (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator⁸⁶ of a discharge⁸⁷ from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]
- (2) Part 2 of the application shall consist of: [¶]...[¶]
- (iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design

⁸⁵ Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

⁸⁶ "Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2.)

⁸⁷ "Discharge when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures⁸⁸ to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]...[¶]

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities. (40 CFR § 122.26(d)(2)(iv)(A)(3).) [Emphasis added.]

The Commission finds that the plain language of the federal statute (33 USCA § 1342 (p)(3)(B)) and regulation (40 CFR § 122.26 (d)(2)(iv)(A)(3)) does not require the permittees to install and maintain trash receptacles at transit stops.

Specifically, the state freely chose⁸⁹ to impose the transit trash receptacle requirement on the permittees because neither the federal statute nor the regulations require it. Nor do they require the permittees to implement “practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems”⁹⁰ although the regulation requires a description of practices for doing so. Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that “mandate costs that exceed the mandate in the federal law or regulation.”⁹¹

⁸⁸ Minimum control measures are defined in 40 CFR § 122.34 to include: 1) Public education and outreach on storm water impacts; (2) Public involvement/participation; (3) Illicit discharge detection and elimination. (4) Construction site storm water runoff control; (5) Post-construction storm water management in new development and redevelopment.; (6) Pollution prevention/good housekeeping for municipal operations.

⁸⁹ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1593-1594.

⁹⁰ 40 CFR § 122.26(d)(2)(iv)(A)(3).

⁹¹ Government Code section 17556, subdivision (c).

In *Long Beach Unified School Dist. v. State of California*,⁹² the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.⁹³ The *Long Beach Unified School District* court stated:

Where courts have suggested that certain steps and approaches may be helpful [in meeting constitutional and case law requirements] the executive Order and guidelines require *specific actions*. ...[T]he point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.⁹⁴ [Emphasis added.]

The reasoning of *Long Beach Unified School Dist.* is applicable to this claim. Although “operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems...”⁹⁵ is a federal requirement on municipalities, the permit requirement to place trash receptacles at all transit stops and maintain them is an activity, like in *Long Beach Unified School Dist.*, that is a *specified action* going beyond federal law.⁹⁶

Neither of the cases cited by the State Water Board demonstrate that placing trash receptacles at transit stops is required by federal law. In *City of Rancho Cucamonga v. Regional Water Quality Control Board – Santa Ana Region*⁹⁷ the court upheld a stormwater permit similar to the one at issue in this claim. The City of Rancho Cucamonga challenged the permit on a variety of grounds, including that it exceeded the federal requirements for stormwater dischargers to “reduce the discharge of pollutants to the maximum extent practicable”⁹⁸ and that it was overly prescriptive. The court concluded that the permit did not exceed the maximum extent practicable standard and upheld the permit in all respects. There is no indication in that case, however, that the permit at issue required trash receptacles at transit stops. Similarly, in a suit regarding the same permit at issue in this case, the *Los Angeles County*⁹⁹ court dismissed various challenges to the permit, but made no mention of the permit’s transit trash receptacle provision.

⁹² *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

⁹³ *Id.* at page 173.

⁹⁴ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155, 173.

⁹⁵ 40 Code of Federal Regulations, section 122.26 (d)(2)(iv)(A)(3).

⁹⁶ *Ibid.*

⁹⁷ *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region*, *supra*, 135 Cal.App.4th 1377.

⁹⁸ 33 USCA section 1342 (p)(3)(B)(iii).

⁹⁹ *County of Los Angeles v. California State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985.

Therefore, the Commission finds that placing and maintaining trash receptacles at all transit stops within the jurisdiction of each permittee, as specified, is not a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b).

Part 4F5c3 of the permit states as follows:

- c. Permittees not subject to a trash TMDL shall: (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Based on the mandatory language (i.e., “shall”) in part 4F5c3 of the permit, the Commission finds it is a state mandate for the claimants that are not subject to a trash TMDL to place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003, and to maintain all trash receptacles as necessary.

Inspecting commercial facilities (part 4C2a): Section 4C2a of the permit requires inspections of restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships as follows:

2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:

(a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with Statw law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on stormwater pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;

- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;
- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;

- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices. [¶]...[¶]

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The state asserts that these inspection requirements in permit part 4C2a are a federal mandate.

In comments filed April 18, 2008, the State Water Board quotes from the MS4 Program Evaluation Guide issued by U.S. EPA, asserting that it requires inspections of businesses. The State Water Board also states:

The federal regulations also specifically require local stormwater agencies, as part of their responsibilities under NPDES permits, to conduct inspections. [citing 40 CFR § 122.26(d)(2)(iv)(C).] Throughout the federal law, there are numerous requirements for entities that discharge pollutants to waters of the United States to monitor and inspect their facilities and their effluent. [citing Clean Water Act §402(b)(2)(B); 40 CFR § 122.44(i).] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers they must conduct inspections.

Similarly, the April 10, 2008 letter from U.S. EPA to the State Water Board and attached to the Board's comments submitted April 18, 2008, states:

A program for commercial and industrial facility inspection and enforcement that includes restaurants and automobile facilities, would appear to be both practicable and effective. Such an inspection program ensures that stormwater discharges from such facilities are reducing their contribution of pollutants and that there are no non-stormwater discharges or illicit connections. Thus these programs are founded in both 402 (p)(3)(B)(ii) and (iii) and are well within the scope of 40 CFR § 122.26(d)(2)(iv)(A) and (B).

The County of Los Angeles, in its June 23, 2008 rebuttal comments, asserts that federal law requires prohibiting non-stormwater discharges into the storm sewers, and reducing the discharge of pollutants in stormwater to the maximum extent practicable (33 USC 1342(p)) but not inspecting restaurants, automotive service facilities, retail gas outlets, or automotive dealerships.

Only municipal landfills, hazardous waste treatment, disposal and recovery facilities and related facilities are required to be inspected (40 CFR § 122.26(d)(2)(iv)(C)).

In comments received June 25, 2008, the city claimants argue that the LA Regional Board freely chose to impose the permit requirements on the permittees, and make the following arguments: (1) The inspection obligations were not contained in two prior permits issued to the cities and the County—thus, the requirements are not federal mandates; (2) No federal statute or regulation requires the cities or the County to inspect restaurants, automotive service facilities, retail gas outlets, automotive dealerships or facilities that hold general industrial permits; (3) Stormwater NPDES permits issued by the U.S. EPA do not contain the requirement to inspect restaurants, auto service facilities, retail gas outlets and automotive dealerships, or require the extensive inspection of facilities that hold general industrial stormwater permits as contained in the Order [i.e. permit]; (4) The Administrator of U.S. EPA, as well as the head of the water division for U.S. EPA Region IX, have specifically stated that a municipality has an obligation under a stormwater permit only to assure compliance with local ordinances; the state retains responsibility to inspect for compliance with state law, including state-issued permits.

The city claimants dispute the State Board's contention that the court in *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377 held that federal law required inspections like those at issue in the permit. The cities quote part of the *City of Rancho Cucamonga* case with the following emphasis:

Rancho Cucamonga and the other permittees are responsible for inspecting construction and industrial sites and commercial facilities within their jurisdiction for compliance with and enforcement of local municipal ordinances and permits. *But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.* The Regional Board may conduct its own inspections but permittees must still enforce their own laws at these sites. (40 C.F.R. § 122.26, subd. (d)(2) (2005).)

In discussing the federal mandate issue, the applicable federal law is section 402 of the Clean Water Act, which states that municipal storm sewer system permits:

(i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations (40 CFR § 122.26 (d)(2)(iv)(B)&(C)) state as follows:

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

operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

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

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

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-stormwater discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States [¶]...[¶]

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

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges. (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

There is a requirement in subdivision (d)(2)(iv)(B)(1) for implementing and enforcing “an ordinance, orders, or similar means to prevent illicit discharges to the municipal separate storm system.” There is no express requirement in federal law, however, to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Nor does the

portion of the MS4 Program Evaluation Guide quoted by the State Water Board contain mandatory language to conduct inspections for these facilities.

In its April 2008 comments, the State Water Board argues that this reading of the regulations is not reasonable, and that U.S. EPA acknowledged that the initial selection by MS4s was only a starting point. In its comments (p.15), the State Water Board also states:

Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the ‘discretion’ exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a ‘free choice.’ The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.

The State Water Board would have the Commission read requirements into the federal law that are not there. The Commission, however, cannot read a requirement into a statute or regulation that is not on its face or its legislative history.¹⁰⁰

Based on the plain language of the federal regulations that are silent on the types of facilities at issue in the permit, the Commission finds that performing inspections at restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships, as specified in the permit, is not a federal mandate.

Moreover, the requirement to inspect the facilities listed in the permit is an activity, as in the *Long Beach Unified School Dist.* case discussed above,¹⁰¹ that is a specified action going beyond the federal requirement for inspections “to prevent illicit discharges to the municipal separate storm sewer system.” (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, the inspections are not federally mandated.

The permit states in part: “Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified ...” Based on the mandatory language in part 4C2a of the permit, the Commission finds that this part is a state mandate on the claimants to perform the inspections at restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships at the frequency and levels specified in the permit.

Inspecting phase I industrial facilities (part 4C2b): Part 4C2b of the permit regarding phase I industrial facilities requires the following:

¹⁰⁰ *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 219-220. “Rules governing the interpretation of statutes also apply to interpretation of regulations.” *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

¹⁰¹ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

b) Phase I Facilities¹⁰²

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:¹⁰³ Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:¹⁰⁴ Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to stormwater. For those facilities that do have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

¹⁰² On page 62 of the permit, U.S. EPA Phase I Facilities are defined as “facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

¹⁰³ Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): “*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...; Restaurants; Wholesale trade (scrap, auto dismantling) ...; Automotive service facilities; Fabricated metal products ...; Motor freight ...; Chemical/allied products ...; Automotive Dealers/Gas Stations ...; Primary Metals.*”

¹⁰⁴ Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): “*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...; Laundries ...; Instruments...; Textile Mills Products ...; Apparel ...*”

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The issue is whether these inspection requirements for phase I industrial facilities is a federal mandate. The governing federal regulation is 40 CFR section 122.26 (d)(2)(iv)(B)&(C), which is cited above. Specifically on point is subpart (C), which states that the proposed management program must include the following:

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

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges; (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

The phase I facilities in the permit are defined to include.

(i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities. (Permit, p. 62)

And the Tier 1 facilities in the permit include municipal landfills, hazardous waste treatment, disposal and recovery facilities and facilities subject to SARA Title III (see permit attachment B, pp. B-1 to B-2). Thus, there is a federal requirement to inspect these phase I and tier 1 facilities in the permit. The issue is whether this requirement constitutes a federal mandate on local agencies. The Commission finds that it does not.

It is the state that mandates the phase I inspection and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.¹⁰⁵ This is because the federal regulatory scheme provides an alternative means of regulating and inspecting these industrial facilities under the state-enforced, statewide permit, as follows:

¹⁰⁵ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1593-1594.

(c) Application requirements for stormwater discharges associated with industrial activity¹⁰⁶ and stormwater discharges associated with small construction activity -

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

The state has issued a statewide general activity industrial permit (GIASP) that is enforced through the regional boards.¹⁰⁷ This, along with the statewide construction permit, is described in the permit itself:

To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was reissued on August 19, 1999. The GIASP was reissued on April 17, 1997. Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and

¹⁰⁶ According to 40 CFR § 122.26, (b)(14): “Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶](x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.”

¹⁰⁷ For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: “This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs).”

non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.¹⁰⁸

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspections of industrial facilities (specified in part 4C2b of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4C2b of the permit. In fact, the State Board collects fees for the regional boards for performing inspections under the GIASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

In its April 18, 2008 comments, the State Water Board asserts:

Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the ‘discretion’ exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a ‘free choice.’ The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.¹⁰⁹

The Commission disagrees. Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the “owner or operator of the discharge”) the Commission finds that the state has freely chosen¹¹⁰ to impose these activities on the permittees. Therefore, the Commission finds that there is no federal mandate on the claimants to perform inspections of phase I facilities as specified in part 4C2b of the permit.

As to whether the permit is a state mandate, part 4C2b contains the following mandatory language:

¹⁰⁸ Permit, page 11, paragraph 22.

¹⁰⁹ State Water Board comments, submitted April 18, 2008, page 15.

¹¹⁰ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

b) Phase I Facilities¹¹¹

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below. [Emphasis added.]

Frequency of Inspection

Facilities in Tier 1 Categories:¹¹² Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:¹¹³ Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity¹¹⁴ to stormwater. For those facilities that do

¹¹¹ On page 62 of the permit, U.S. EPA Phase I Facilities are defined as “facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

¹¹² Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): “*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...; Restaurants; Wholesale trade (scrap, auto dismantling) ...; Automotive service facilities; Fabricated metal products ...; Motor freight ...; Chemical/allied products ...; Automotive Dealers/Gas Stations ...; Primary Metals.*”

¹¹³ Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): “*Electric/Gas/Sanitary ...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products ...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products ...; Miscellaneous Manufacturing ...; Food and kindred Products ...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...; Laundries ...; Instruments ...; Textile Mills Products ...; Apparel ...*”

¹¹⁴ “Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Based on this mandatory language to perform the inspections of phase I facilities as specified, the Commission finds that part 4C2b of the permit is a state-mandate.

Inspecting construction sites (part 4E): Part 4E of the permit contains the following requirements:

- Implement a program to control runoff from construction activity at all construction sites within each permittees jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

For construction sites one acre or greater, each permittee shall:

- Require the preparation and submittal of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
 - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).
 - If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
 - If non-compliance continues the Regional Board shall be notified for further joint enforcement actions. (Permit, 4E2b.)

except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.” [40 CFR §122.26 (b)(14), Emphasis added.]

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP (Permit, 4E2c.)
- For sites five acres and greater:
 - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
 - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
 - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
 - For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
 - Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

The applicable federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) on the issue of whether the inspection of construction sites is a federal mandate is as follows:

(d) Application requirements for large¹¹⁵ and medium¹¹⁶ municipal separate storm sewer discharges. The operator¹¹⁷ of a discharge from a large or medium

¹¹⁵ “(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as

municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

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

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in stormwater runoff

determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ...” (40 CFR § 122.26 (b)(4).)

¹¹⁶ “(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ...” (40 CFR § 122.26 (b)(7).)

¹¹⁷ “*Owner or operator* means the owner or operator of any ‘facility or activity’ subject to regulation under the NPDES program.” (40 CFR § 122.2.)

from construction sites to the municipal storm sewer system, which shall include:
[¶]...[¶]

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

The language of the federal regulation indicates a duty to inspect construction sites and enforce control measures as specified in part 4E of the permit. The *Rancho Cucamonga* case cited by the State Board also states that federal law requires NPDES permittees to inspect construction sites.¹¹⁸

The issue, however, is whether the federal requirements to inspect construction sites and enforce control measures amounts to a federal mandate on the local agencies. The Commission finds that it does not. First, the federal regulations quoted above do not specify the frequency or other specifics of the inspection program as the permit does. These are activities, as in the *Long Beach Unified School Dist.* case discussed above,¹¹⁹ that are specified actions going beyond the federal requirement for inspections “to prevent illicit discharges to the municipal separate storm sewer system.” (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, it is not a federal mandate for the local agency permittees to inspect construction sites.

Moreover, it is the state that mandates the inspections of construction sites and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.¹²⁰ The federal regulations do not require: (1) a municipality to have a separate permit for construction activity or enforcement; or (2) that the inspections and related activities in part 4E of the permit be conducted by the owner or operator of the discharge. Rather, these activities may be conducted by the state under a state-wide, state-enforced, general permit, as stated in the federal stormwater regulation (40 CFR § 122.26 (c)), which states in part:

(c) Application requirements for stormwater discharges associated with industrial activity [includes construction activity of five or more acres] and stormwater discharges associated with small construction activity¹²¹ [construction activity from one to less than five acres]--

¹¹⁸ *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region, supra*, 135 Cal.App.4th 1377, 1390.

¹¹⁹ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

¹²⁰ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹²¹ According to 40 CFR § 122.26, (b)(15): “Storm water discharge associated with small construction activity means the discharge of storm water from: (i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. [Emphasis added.]

The state has issued a statewide general construction permit, as described on page 11 of the permit as quoted above, which is enforced through the regional boards.¹²² In fact, the State Board collects fees for the regional board for performing inspections under the GCASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities (in part 4E of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4E of the permit. Therefore, the Commission finds that the requirement for local-agency permittees to inspect construction sites in section 4E of the permit is not a federal mandate.

The Commission finds that, based on the permit's mandatory language, the following activities in part 4E are state mandates on the permittees within the meaning of article XIII B, section 6:

- Implement a program to control runoff from construction activity at all construction sites within each permittee's jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

For construction sites one acre or greater:

- Require the preparation of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
 - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).

Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where: ...”

¹²² For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: “This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs).”

- If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
- If non-compliance continues, notify the Regional Board for further joint enforcement actions. (Permit, 4E2b.)
- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP. (Permit, 4E2c.)
- For sites five acres and greater:
 - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
 - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
 - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

One of the requirements in part 4E3c of the permit is to: "Use an effective system to track grading permits issued by each permittee. To satisfy this requirement, the use of a database or

GIS system is encouraged, but not required.” The Commission finds that, based on the plain language of this provision, using an effective system to track grading permits is a state mandate, although use of a database or GIS system is not.

Overall, the Commission finds that the permit provisions (parts 4C2a, 4C2b, 4E & 4F5c3) are subject to article XIII B, section 6, of the California Constitution.

Issue 2: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) impose a new program or higher level of service?

The next issue is whether the permit provisions at issue, i.e., found above to be state-mandated, are a program, and whether they are a new program or higher level of service.

First, courts have defined a “program” for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.¹²³

The State Water Board, in its April 2008 comments, argues that the NPDES program is not a program because “the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES stormwater permits.”

In comments submitted June 25, 2008, the cities call the State Board’s argument inapposite, and cite the *Carmel Valley Fire Protection District* case¹²⁴ regarding whether the permit constitutes a “program.” According to claimant, “[t]he test is not whether the general program applies to both governmental and non-governmental entities. The test is whether the specific executive orders at issue apply to both government and non-governmental entities.”

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. The permit activities are limited to local governmental entities. The permit defines the “permittees” as the County of Los Angeles and 84 incorporated cities within the Los Angeles County Flood Control District (Permit, p. 1 & attachment A). The permit lists no private entities as “permittees.” Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County. (Or as stated on page 13 of the permit: “The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County.”) Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

In its comments on the draft staff analysis submitted June 5, 2009, the State Board disagrees with this conclusion because NPDES permits may also apply to private entities.

The State Board made this same argument in *County of Los Angeles v. Commission on State Mandates*, which the court addressed by stating: “[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation

¹²³ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra*, 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.)

¹²⁴ *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6.”¹²⁵

In other words, the issue is not whether NPDES permits generally constitute a “program” within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities (parts 4C2a, 4C2b, 4E & 4F5c3) in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.

The next step to determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption.¹²⁶

The Commission finds that local agencies were not required by state or federal law to place and maintain trash receptacles at transit stops before the permit was adopted. Whether or not most cities or counties do so, as argued by the State Water Board in its April 2008 comments, is not relevant to finding a state-mandated new program or higher level of service because even if they do, Government Code section 17565 states: “If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate.”

Because the transit trash receptacle requirement is newly mandated by the permit, and based on the plain language of part 4F5c3 of the permit, the Commission finds that it is a new program or higher level of service to place trash receptacles at transit stops and maintain them as specified in the permit.

For the same reason, the Commission finds that the inspections and enforcement activities at industrial and commercial facilities, including restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, and phase I facilities (in parts 4C2a & 4C2b of the permit) as well as inspection and enforcement at construction sites (in part 4E of the permit) are a new program or higher level of service. These were not required activities of the permittees prior to the permit’s adoption.

In sum, the Commission finds that all the permit provisions at issue in this test claim impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E & 4F5c3) impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

¹²⁵ *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

¹²⁶ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

The final issue is whether the permit provisions impose costs mandated by the state,¹²⁷ and whether any statutory exceptions listed in Government Code section 17556 apply to the test claims. Government Code section 17514 defines “cost mandated by the state” as follows:

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

Government Code section 17564 requires reimbursement claims to exceed \$1000 to be eligible for reimbursement.

In test claims 03-TC-20 and 03-TC-21, the cities’ claimant representative declares (p. 24) that the cities will incur costs estimated to exceed \$1000 to implement the permit conditions.

In test claim 03-TC-04, the County of Los Angeles states (p. 18) that the costs in providing the services claimed “far exceed the minimum reimbursement amount of \$1000 per annum.” In the attached declaration for *Transit Trash Receptacles*, the County declares (pp. 22-23) the following itemization of costs from December 13, 2001 to October 31, 2002:

- (1) Identify all transit stops in the jurisdiction: \$19,989.17;
- (2) Select proper trash receptacle design, evaluate proper placement, specification and drawing preparation: \$38,461.87;
- (3) Preliminary engineering works (construction contract preparation, specification reviewing process, bid advertising and awarding): \$19,662.02;
- (4) Construct and install trash receptacle units: \$230,755.58, construction management \$34,628.31;
- (5) Trash collection and receptacle maintenance in FY 2002-03, \$3,513.94, maintenance contractor costs for maintaining and collecting trash in FY 2002-03, \$93,982.50;
- (6) Projected costs for on-going maintenance in FY 2003-04, \$375,570.00.

Similarly, attached to claim 03-TC-19 (pp. 20-21) are declarations that itemize the County of Los Angeles’ costs for *Inspection of Industrial/Commercial Facilities* program, from December 13, 2001 to September 15, 2003, as follows:

- (1) inspect 1744 restaurants: \$234,931.83;
- (2) inspect 1110 automotive service facilities: \$149,526.36;
- (3) inspect 249 retail gasoline outlets and automotive dealerships: \$33,542.45;
- (4) Identify and inspect all Phase I (387 Tier 1 and 543 Tier 2) facilities within the jurisdiction: \$125,155.31;
- (5) Total \$543,155.95.

¹²⁷ *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

These declarations illustrate that the costs associated with the permit activities exceed \$1,000. The Commission, however, cannot find “costs mandated by the state” within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Did the claimants request the activities in the permit within the meaning of Government Code section 17556, subdivision (a)?

The first issue is whether the claimants requested the activities in the permit. The Department of Finance and the State Water Board both asserted that they did. As discussed above, the claimants were required to submit a Report of Waste Discharge and Stormwater Quality Management Plan before the permit was issued.

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

(a) The claim is submitted by a local agency ... that requested legislative authority for that local agency ... to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency ... that requests authorization for that local agency ... to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request “legislative authority” to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Do the claimants have fee authority for the permit activities within the meaning of Government Code section 17556, subdivision (d)?

Government Code section 17556, subdivision (d), states:

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ... if, after a hearing, the commission finds any one of the following: [¶]...[¶] (d) The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The constitutionality of Government Code section 17556, subdivision (d), was upheld by the California Supreme Court in *County of Fresno v. State of California*,¹²⁸ in which the court held that the term “costs” in article XIII B, section 6, excludes expenses recoverable from sources other than taxes. The court stated:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra*, 43 Cal.3d at p. 61.) The provision was intended to

¹²⁸ *County of Fresno v. State of California*, *supra*, 53 Cal.3d 482.

preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.

In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that “The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that” the local government “has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” Considered within its context, the section effectively construes the term “costs” in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.¹²⁹

In *Connell v. Superior Court*,¹³⁰ the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked “sufficient” fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program.” The court rejected the districts’ argument that “authority” as used in the statute should be construed as a “practical ability in light of surrounding economic circumstances” because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the Districts to levy fees “sufficient” to cover their costs. Thus, the court concluded that the plain language of section

¹²⁹ *County of Fresno v. State of California*, *supra*, 53 Cal.3d 482, 487.

¹³⁰ *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.¹³¹

In its April 18, 2008 comments (p. 19), the State Board asserted that the claimants have fee authority to pay for the trash receptacle and inspection programs in the permit. Likewise, the Department of Finance, in its March 2008 comments, states that “some local agencies have set fees to be used toward funding the claimed permit activities” that should be considered offsetting revenues.

Los Angeles County, in its comments submitted in June 2008, states (p. 2) that it is “without sufficient fee authority to recover its costs.” The County points out that the state or regional board has fee authority in Water Code section 13260, subdivision (d)(2)(B)(iii) for inspections of industrial and commercial facilities, but those fees are not shared with the County or the cities.¹³² The County also states that the inspections are to determine compliance with the general industrial permit that is enforced by the regional boards.¹³³

In their comments received June 25, 2008, the city claimants assert that they do not have fee authority. The cities first note that, for facilities that hold state-issued general industrial or general construction stormwater permits, the state already imposes an annual fee and therefore has occupied the field (Wat. Code, § 13260, subd. (d)(2)(B)(iii)). The cities also relate the difficulty of imposing a fee for inspecting restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships because, although the cities could enact a general businesses license on all businesses, “the cities could not charge other businesses for the cost of inspecting this subgroup without again running the risk of charging fees on the other businesses for services not related to regulation of them.” The cities also dispute the State Water Board’s assertion that transit users could be charged a fee for the transit trash receptacles because the County and cities do not operate the transit system.

¹³¹ *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, 398-402.

¹³² Water Code section 13260, subdivision (d)(2)(B)(i) - (iii) states:

- (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund. (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

¹³³ Page 3 of the General Industrial Permit states in part: “Following adoption of this General Permit, the Regional Water Boards shall enforce its provisions.”

In comments on the draft staff analysis submitted in June 2009, the League of California Cities and California State Association of Counties (CSAC) question whether the decisions in *Connell* (1997), and *County of Fresno* (1991), can any longer be cited as good authority for the constitutionality of Government Code section 17556, subdivision (d), given the voter-approval requirement of Proposition 218 (discussed below) added to the state Constitution in 1996. Proposition 218 requires, among other things, that new or increased property-related fees be approved by a majority of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners, except for property-related fees for sewer, water, or refuse collection services (Cal. Const., art. XIII D, § 6, subd. (c)).

The League and CSAC also urge the Commission, to the extent there may be legal doubt whether a local agency has the authority to impose a fee, to not find that the fee authority exception to reimbursement in Government Code section 17556, subdivision (d), applies.

The Commission disagrees with the League and CSAC. The Commission cannot ignore the precedents of *Connell* or *County of Fresno*, or find that they conflict with article XIII D of the California Constitution (Proposition 218), until the issue is decided by a court of law. With regards to Government Code section 17556, subdivision (d), article III, section 3.5 of the California Constitution forbids the Commission or any state agency from declaring a statute unenforceable or refusing to enforce it on the basis of its unconstitutionality unless an appellate court declares that it is unconstitutional. Since no appellate court has so declared, the Commission is bound to uphold and analyze the application of Government Code section 17556, subdivision (d), to this test claim.

The issue of local fee authority for the municipal stormwater permit activities, however, is one of first impression for the Commission. Although there are no authorities directly on point, some legal principles emerge that guide the analysis, as discussed below.

1. Local fee authority to inspect commercial and industrial and construction sites (parts 4C2a, 4C2b & 4E)

Fee authority to inspect under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”

The Third District Court of Appeal has stated that article XI, section 7, includes the authority to impose fees. In *Mills v. Trinity County*,¹³⁴ a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without the two-thirds affirmative vote of the county electors. In upholding the fees, the court stated:

[S]o long as the local enactments are not in conflict with general laws, the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution.¹³⁵

¹³⁴ *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656.

¹³⁵ *Mills v. County of Trinity, supra*, 108 Cal.App.3d 656, 662.

In addition to the *Mills* case, courts have held that water pollution prevention is a valid exercise of government police power.¹³⁶ And municipal inspections in furtherance of sanitary regulations have been upheld as “an exercise of that branch of the police power which pertains to the public health.”¹³⁷

In *Sinclair Paint v. State Board of Equalization*,¹³⁸ the California Supreme Court upheld a fee imposed on manufacturers of paint that funded a child lead-poisoning program, ruling it was a regulatory fee and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution (Proposition 13). The court recognized that determining under Proposition 13 whether impositions were fees or taxes is a question of law. In holding that the fee on paint manufacturers was “regulatory” and not a special tax, the court stated:

From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less “regulatory” in nature than the initial permit or licensing programs that allowed them to operate.

Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.¹³⁹ [Emphasis added.]

The *Sinclair Paint* court also recognized that regulatory fees help to prevent pollution when it stated: “imposition of ‘mitigating effects’ fees in a substantial amount ... also ‘regulates’ future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products.”¹⁴⁰

Although the court’s holding in *Sinclair Paint* applied to a state-wide fee, the language it used (putting “ordinances” in the same category as “statutes”) recognizes that local agencies also have the police power to impose regulatory fees. Moreover, the court relied on local government police power cases in its analysis.¹⁴¹

¹³⁶ *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

¹³⁷ *Sullivan v. City of Los Angeles Dept. of Bldg. & Safety* (1953) 116 Cal.App.2d 807, 811.

¹³⁸ *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

¹³⁹ *Sinclair Paint v. State Board of Equalization*, *supra*, 15 Cal.4th 866, 877.

¹⁴⁰ *Sinclair Paint v. State Board of Equalization*, *supra*, 15 Cal.4th 866, 877.

¹⁴¹ *Sinclair Paint v. State Board of Equalization*, *supra*, 15 Cal.4th 866, 873. The Court stated: “Because of the close, ‘interlocking’ relationship between the various sections of article XIII A (Citation omitted) we believe these “special tax” cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, “special taxes” under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases.”

A regulatory fee is an imposition that funds a regulatory program¹⁴² and is “enacted for purposes broader than the privilege to use a service or to obtain a permit. ...the regulatory program is for the protection of the health and safety of the public.”¹⁴³ Courts will uphold regulatory fees if they comply with the following principles:

Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A section 4 analysis if the “fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes.” [Citations omitted] “A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation.” [Citations omitted] “Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement.” [Citations omitted] Regulatory fees are valid despite the absence of any perceived “benefit” accruing to the fee payers. [Citations omitted] Legislators “need only apply sound judgment and consider ‘probabilities according to the best honest viewpoint of informed officials’ in determining the amount of the regulatory fee.”¹⁴⁴ [Emphasis added.]

Local fees for inspections of commercial and industrial facilities, and construction sites, would be preventative and could be imposed to comply with the criteria the courts have used to uphold regulatory fees, articulated above. And the regulatory fees fall within the local police power to prevent, clean up, or mitigate pollution.

Therefore, pursuant to article XI, section 7, the Commission finds that the claimants have fee authority within the meaning of Government Code section 17556, subdivision (d), sufficient to carry out the mandated activities in parts 4C2a, 4C2b and 4E of the permit. Therefore, the Commission finds that there are no “costs mandated by the state” within the meaning of Government Code section 17514 and 17556 to perform the activities in those parts of the permit (commercial, phase I, and construction site inspections and related activities).

In fact, in June 2005, claimant Covina adopted stormwater inspection fees on restaurants, retail gasoline outlets, automotive service facilities, etc., as part of its business license fee, expressly for the purpose of complying with the permit at issue in this test claim.¹⁴⁵

Statutory fee authority to operate and maintain storm drains: Health and Safety Code section 5471 expressly authorizes cities and counties to charge fees for storm drainage maintenance and operation services:

¹⁴² *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

¹⁴³ *Ibid.*

¹⁴⁴ *California Assn. of Prof. Scientists v. Dept. of Fish and Game, supra*, 79 Cal.App.4th 935, 945.

¹⁴⁵ City of Covina, Resolution No. 05-6455.

[A]ny entity¹⁴⁶ shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. ... Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities

The statute makes no mention of “inspecting” commercial or industrial facilities or construction sites. Rather, the fee revenues are used for “maintenance and operation” of storm drainage facilities. Thus, for the types of businesses regulated by the permit (restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites) the Commission cannot find that pursuant to Health and Safety Code section 5471, the claimants have fee authority “sufficient” to pay for the mandated inspection program within the meaning of Government Code section 17556. The statute’s “operation and maintenance” of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

2. Local fee authority under the police power and the Public Resources Code to place and maintain trash receptacles at transit stops (Permit, 4F5c3)

As discussed above, part 4F5c3 of the permit requires the County and cities to place and maintain trash receptacles at transit stops in their jurisdictions. Public Resources Code section 40059, subdivision (a), suggests that the County and cities have fee authority to perform this activity as follows:

(a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

The statute gives local governments the authority over the “nature, location and extent of providing solid waste handling services” and is broad enough to encompass “placing and maintaining” receptacles at transit stops. The statute also provides local governments with broad authority over the “level of services, charges and fees.”

The draft staff analysis determined that the claimants had fee authority under Public Resources Code section 40059 and the police power (Cal. Const. art. XI, § 7) to install and maintain trash receptacles at transit stops and recommended that the Commission deny the test claim with respect to part 4F5c3 of the permit.

¹⁴⁶ Entity is defined to include “counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems.” Health and Safety Code section 5470, subdivision (e).

The city claimants, in June 2009 comments on the draft staff analysis, argue that section 40059, subdivision (a), does not apply here because it was adopted as a “savings provision” in legislation establishing the Integrated Waste Management Board (IWMB) in order to ensure that local trash collection agreements would not be affected by the IWMB legislation. The cities also cite *Waste Resources Technologies v. Department of Public Health* (1994) 23 Cal.app.4th 299, which held that the statute reflected the Legislature’s intent to allow for local regulation of waste collection. According to the cities, the statute “was not intended as an *imprimatur* for local agencies to assess fees on their residents or on businesses to pay for the costs of trash generated by transit users when that requirement was established not as a matter of local choice but rather state mandate.” (Comments, p. 7.)

The cities also argue that a valid fee must have a causal connection or nexus between the person or entity paying the fee, and the benefit or burden being addressed. Claimants assert that there is no group on which the claimants can assess a fee that has a relationship with the trash receptacles because the burden is created by the transit riders but benefits the public at large. City claimants also argue that they cannot assess fees on transit agencies or increase transit fares to recoup the cost of installing and maintaining trash receptacles because they have no authority to do so. As an example, the claimants cite the Metropolitan Transit Authority’s (the largest public transit operator in Los Angeles County) authority to set fares (Pub. Util. Code, § 30638) that rests exclusively with the MTA’s board.

As to the police power, City claimants argue that they cannot use it to assess fees on property owners or businesses for the cost of transit trash receptacles because doing so would collect more than the actual cost of the collection and thereby create a special tax that would require a two-thirds vote (Cal. Const. art. XIII A, § 4). And according to the claimants, they do not have statutory fee authority to assess property owners for the cost of installing and maintaining trash receptacles. Finally, claimants assert that a fee on property owners for transit stop trash receptacles, even if it were not a special tax, would require a vote under Proposition 218 (Cal. Const., art. XIII D).

The County of Los Angeles, in its June 2009 comments on the draft staff analysis, argues that local agencies do not have fee authority over bus operators, and for support cites *Biber Electric Co. v. City of San Carlos* (1960) 181 Cal.App.2d 342, which held that a local fee would conflict with a general state Vehicle Code provision. The County also asserts that no fee could be imposed on bus riders because the pollution prevention would benefit all county residents, not only those riding buses, and that such a fee would require a vote under Proposition 218 because the fee’s purpose would be excluding trash from storm drains rather than routine collection.

The League of California Cities and CSAC, in their June 2009 comments on the draft staff analysis, criticize the conclusion that fee authority exists for transit trash receptacles because the analysis does not discuss upon whom the fee would be imposed. They also dispute the application of the *Connell* case because the issue is not whether the fee is economically feasible, but whether it is legally feasible. The League and CSAC point out that local agencies have no authority to impose the fee on transit agencies or their ridership, and that Proposition 218 imposes procedural and substantive requirements on adjacent business owners and residences, so that the local agency could not impose the fee or assessment on them without their consent. Thus, the League and CSAC argue that the local agencies do not have fee authority pursuant to

Government Code section 17556, subdivision (d): “sufficient to pay for the mandated program or increased level of service.”

After considering these arguments, the Commission agrees that Government Code section 17556, subdivision (d), does not apply to the placement and maintenance of transit trash receptacles as specified in the permit because the claimants do not have the authority to impose fees.

Michael Lauffer was asked at the Commission hearing on July 31, 2009, why the transit trash requirement in the permit was not imposed on transit agencies. Mr. Lauffer testified that transit agencies were not named historically on the permits, and that the Board, at the time it established the requirements, thought it was appropriate to place them on municipalities. He also testified that nothing would prevent the municipalities under the permit from working with Metropolitan Transit Authority (MTA) to cooperatively implement the transit trash requirement, or to have the MTA carry out the primary obligation for meeting it. He added that the transit stops were public facilities, the language used in the federal regulations, which is why the permit included the requirement to place the trash receptacles there.¹⁴⁷

Because the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks)¹⁴⁸ or transit district property (for bus or metro or subway stations), there are no entities on which the claimants would have authority to impose the fees. The plain language of Public Resources Code section 40059 provides no fee authority over transit districts or transit riders, and the Metropolitan Transit Authority’s fee statutes grant fee authority exclusively to its board (Pub. Util. Code, §§ 30638 & 130051.12).

Additionally, the claimants do not have fee authority under the police power because they do not provide the “services necessary to the activity for which the fee is charged.”¹⁴⁹

Thus, the Commission finds that part 4F5c3 of the permit imposes costs mandated by the state within the meaning of Government Code section 17514 and 17556.

The remainder of this analysis addresses the arguments raised by the claimants that their local fee authority for inspections would be preempted by a statute granting the state fee authority, and that a local fee would be a special tax. The application of Proposition 218 on the fee authority for inspection is also discussed.

¹⁴⁷ Commission on State Mandates, Public Hearing, Reporter’s Transcript of Proceedings, July 31, 2009, pages 52-53.

¹⁴⁸ “The general rule views the sidewalk as part of the street; it ... holds the city liable for pedestrian injuries caused by the dangerous condition of the sidewalk.” *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 832.

¹⁴⁹ *California Assn. of Prof. Scientists v. Dept of Fish and Game, supra*, 79 Cal.App.4th, 935, 945.

3. Local fee authority to inspect industrial or construction sites (parts 4C2a, 4C2b & 4E) performed under the statewide general permits would not be preempted by state fee authority in Water Code section 13260, subdivision (b)(2)(B)

In their comments submitted in June 2008 (p. 14), the city claimants argue that the permittees cannot impose fees for inspections of industrial or commercial or construction sites as follows:

[W]ith respect to facilities that hold state-issued general industrial or general construction stormwater permits, the state had occupied the field. ...[T]he state already imposes an annual fee on general industrial and general construction stormwater permittees. That fee is explicitly designated, in part, to cover inspections of these facilities and regulatory compliance. Water Code § 13260(d)(2)(B).

This state fee thus preempts any fee that the Cities or County could charge for inspection of these facilities.

The cities also assert that in 2001, the regional board initiated negotiation of a contract with the County whereby the regional board would pay the County to perform inspections of facilities that held general industrial stormwater permits (the 'Phase I facilities') on the regional board's behalf. Immediately after the permit was issued, the regional board terminated those negotiations.

In comments submitted in June 2009 on the draft staff analysis, city claimants clarify that their comments "are not directed towards the claimants' ability to assess fees for inspections of the other commercial establishments, i.e., restaurants and automotive service facilities, retail gasoline outlets and automobile dealerships, or Phase I facilities or construction sites that are not required to hold a state-issued general industrial or general construction stormwater permit."

According to the city claimants, fees for inspecting the phase I industrial facilities and construction sites under the statewide permits (the GIASP and GCASP) would be preempted by state fee authority in Water Code section 13260, under which the State Board collects fees for inspecting those sites. The city claimants state the fact that the specific destination of the funds from the fees in Water Code section 13260, subdivision (d)(2)(iii) is spelled out is evidence of intent that the Legislature fully occupied the field for inspections of GIASP and GCASP permit holders.

Because the fee authority to inspect commercial facilities (identified in the permit as restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships) is not contested by the city claimants, the discussion below is limited to industrial and construction site inspections performed under the statewide permits concurrently with the permit at issue in this claim.

The California Supreme Court has outlined the following rules as to when a statute preempts a local ordinance by fully occupying the field:

A local ordinance *enters a field fully occupied* by state law in either of two situations-when the Legislature "expressly manifest[s]" its intent to occupy the legal area or when the Legislature "impliedly" occupies the field. (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p.

551[“[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost.”.)

When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when “ ‘(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the’ locality.” (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)¹⁵⁰

The state statute at issue, the stormwater fee statute, in subdivision (d) of section 13260 of the Water Code, reads in pertinent part:

(d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]...[¶]

(2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.

(B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

¹⁵⁰ *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068. Emphasis in original.

(ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in that region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. (Wat. Code, § 13260, subs. (d)(1) & (d)(2).) [Emphasis added.]

The State Water Board has adopted regulations to implement the stormwater fee that include fee schedules based on the threat to water quality and a complexity rating.¹⁵¹ At the hearing on July 31, 2009, Michael Lauffer of the State Water Board testified that the fee is established annually by the State Board, based on the legislative appropriation for the boards to carry out their responsibilities. Mr. Lauffer testified that the annual fee for industrial facilities under this Water Code statute is \$833, and the fee for construction facilities is variable, starting at \$238, plus \$24 per acre, with a cap of \$2,600.¹⁵²

The issue is whether Water Code section 13260, subdivision (d)(1) and (d)(2), preempts local fee authority. In resolving this, we look for express or implied preemption or intent to occupy the field.¹⁵³

First, there is no express intent on the face of the Water Code statute to preempt any local fee ordinance because the statute is silent on local fees. As to implied intent to occupy the field of law, the Supreme Court has stated that it may be found if:

(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.¹⁵⁴

The city claimants, in their comments on the draft staff analysis submitted in June 2009, argue as follows with regard to Water Code section 13260:

Here, the Legislature adopted a statute that specifically established a mechanism for fees to be assessed on GIASP and GCASP holders, for those funds to be

¹⁵¹ Fees for NPDES permits for municipal separate stormwater sewer systems are in subdivision (b) of section 2200 of title 23 of the California Code of Regulations.

¹⁵² Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, page 111.

¹⁵³ *O'Connell v. City of Stockton*, *supra*, 41 Cal.4th 1061, 1068.

¹⁵⁴ *O'Connell v. City of Stockton*, *supra*, 41 Cal.4th 1061, 1068.

segregated and sent to the regional boards, and for a specified amount of those funds (“not less than 50 percent of the money”) to be used by the regional boards “solely” on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. Water Code section 13260(d)(2)(iii). Such a specific determination as to the destination of the funds for the purposes of inspection and compliance evidences the intent of the Legislature that the issue of funding for GIASP and GCASP inspections be “fully occupied.”

The Commission disagrees. Specific determination of funds is not a factor the courts use to determine whether a state statute fully occupies the field. Applying the Supreme Court’s factors from the *O’Connell v. City of Stockton* case, the subject matter of stormwater fees has not been “so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern.”¹⁵⁵ The Water Code’s single fee statute for state permit holders does not rise to that level. Second, the Commission cannot find that “the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action.”¹⁵⁶ No clear indication of a paramount state concern can be found on the face of the Water Code fee statute. And the third instance does not apply because the subject is not “of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.”

The legislative history of the Water Code provision does not indicate any intent to occupy the field. The legislative history of the amendment to require 50 percent of the fees to be used for stormwater inspection and regulatory compliance issues indicated as follows:

...California's 1994 Water Quality Inventory Report states that storm waters and urban run-off are the leading sources of pollution in California estuaries and ocean waters. Proponents argue that non-compliance is rampant, with approximately 10,000 industries in the Los Angeles area alone who are required but have failed to obtain storm water permits. Further, proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site and question whether adequate revenues are returned to the regional boards for this program.¹⁵⁷

The Legislature acknowledged that the state inspections at the time the statute was enacted were inadequate to prevent the pollution that the statewide permits were intended to prevent.

And the regional board, via the permit, acknowledges the role of both local regulation and state regulation under the general permits. Page 11 of the permit states:

¹⁵⁵ *O’Connell v. City of Stockton, supra*, 41 Cal.4th 1061, 1068.

¹⁵⁶ *Ibid.*

¹⁵⁷ Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assem. Bill No. 1186 (1997-1998 Reg. Sess.) as amended August 6, 1997.

The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.

As to inspection of construction sites, section 4E of the permit states:

If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Moreover, the Water Code statute provides broader fee authority than a local inspection fee. The statute requires the regional board to “spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.” (Wat. Code, § 13260, subd. (d)(2)(iii). Emphasis added.) Because the fees for GIASP and GCASP permit holders may also be spent on “regulatory compliance issues” in addition to the inspections, the Commission cannot find that a local fee ordinance would duplicate or be “coextensive” with state fee authority, and therefore cannot find that the state fee statute occupies the field. A local fee would merely partially overlap with the state fee.

As for the phase I facilities¹⁵⁸ subject to inspection, the inspections do not occupy the field because the permit specifies that these need not be inspected if the regional board has inspected them within the past 24 months.

According to the State Board’s April 2008 comments, the overlapping fees were envisioned by U.S./EPA.

In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge stormwater “associated with industrial activity.” (fn. CWA § 402(p)(2)(B)). As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits. (fn. CWA § 402(p).) The State Water Board has issued

¹⁵⁸ On page 62 of the permit, U.S. EPA Phase I Facilities are defined as “facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

permits for industrial and construction discharges of stormwater, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review stormwater practices, was specifically envisioned and required by U.S. EPA in adopting its stormwater regulations.

U.S./EPA, in its “MS4 Program Evaluation Guidance” document, acknowledged regulation at both the local and state levels as follows:¹⁵⁹

In addition to regulation of construction site stormwater at the local level, EPA regulations also require construction sites disturbing greater than one acre to obtain an NPDES permit. This permit can be issued by the state permitting authority or EPA, depending on whether the state has been delegated the NPDES authority. This dual regulation of construction sites at both the local and state or federal level can be confusing to permittees and construction operators.¹⁶⁰

In fact, as to inspection duties and costs under two permit systems, one court has stated regarding a permit similar to the one in this claim:

Rancho Cucamonga and the other permittees are responsible for inspection construction and industrial sites and commercial facilities within their jurisdiction for compliance with the enforcement of local municipal ordinance and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.¹⁶¹

The reasoning of the *City of Rancho Cucamonga* case is instructive because a local regulatory fee could be used for local-government inspections, and the state fee is for state or regional inspections under the general statewide permits.

The state permit program and local inspection program under the regional board’s permit can be viewed as two programs with similar, overlapping goals. Viewed in this way, the fees for two sets of inspections for construction sites (or for phase I facilities not inspected by the regional board within the past two years) would not necessarily exceed the costs of both sets of inspections.

In short, a local regulatory fee ordinance that provided for inspections of the industrial facilities and construction sites specified in the permit (parts 4C2a, 4C2b & 4E) would not be preempted

¹⁵⁹ State Water Resources Control Board, comments submitted April 18, 2008, attachment 33.

¹⁶⁰ *Ibid.*

¹⁶¹ *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra*, 135 Cal.App.4th 1377. The test claim record is silent as to the number of facilities within the permit area that are subject to the General Industrial Activity Storm Water Permit, or how many construction sites within the permit area are subject to the General Construction Activity Storm Water Permit.

by the state fee authority in Water Code section 13260 or in title 23 of the California Code of Regulations.

4. Local fee authority to inspect industrial or construction sites covered under the state permits would not be a “special tax” under article XIII A, section 4, of the California Constitution

In their June 2008 rebuttal comments, the city claimants assert that they do not have sufficient fee authority under Government Code section 17556, subdivision (d). They focus on facilities that hold state-issued general industrial or construction stormwater permits and pay the state-imposed fees pursuant to Water Code section 13260, arguing that an additional local fee for inspecting these facilities would be considered a special tax. According to the city claimants:

In order for a fee to be considered a “fee” as opposed to a “special tax,” the fee cannot exceed the reasonable cost of providing the services necessary for which the fee is charged. See *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660. Any fee assessed by the Cities or the County for inspection of these facilities would be a double assessment, and thus run afoul of this rule.

The city claimants, in their June 2009 comments on the draft staff analysis, again assert that forcing claimants to recover their costs for inspecting the state-permitted GIASP and GCASP facilities and sites, the regional board is creating a special tax on holders of those state permits.

Special taxes are governed by article XIII A, section 4, of the California Constitution:

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Government Code section 50076 states that a fee is not a special tax under article XIII A, section 4, if the fees are: (1) “charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged,” and (2) “are not levied for unrelated revenue purposes.” The California Supreme Court has reaffirmed this rule.¹⁶²

The Commission finds that a local regulatory stormwater fee, if appropriately calculated and charged, would not be a special tax within the meaning of article XIII A, section 4. There is no evidence in the record that a local regulatory fee charged for the stormwater inspections would exceed the reasonable cost of providing the inspections and related services or would otherwise violate the criteria in section 50076.

As the court stated in the *Connell v. Superior Court* case discussed above:

¹⁶² *Sinclair Paint v. State Board of Equalization, supra*, 15 Cal.4th at p. 876: “[T]he term “special taxes” in article XIII A, section 4, does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes.”

The [Water] Districts argue any fees levied by the districts “cannot exceed the cost to the local agency to provide such service,” because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.¹⁶³

Similarly, in this claim no one is suggesting that the local agencies levy regulatory fees that exceed their costs. Therefore, the Commission finds that a local regulatory fee for stormwater would not be a “special tax” under article XIII A, section 4, of the California Constitution for the activities at issue in the permit.

5. The local fee to inspect industrial and construction sites would not be subject to voter approval under article XIII D (Proposition 218) of the California Constitution

Some local government fees are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 (1996). Article XIII D defines a property-related fee or charge as any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service. Among other things, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (article XIII D, § 6, subd. (c)). Exempt from voter approval, however, are property-related fees for sewer, water, or refuse collection services (*Ibid*).

In 2002, an appellate court decision in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to impose storm water fees if they are imposed “as an incident of property ownership.”

The Commission finds that local fees for inspections of phase I facilities, restaurants, retail gasoline outlets, automotive dealerships, etc., would not be subject to the vote requirement of Proposition 218. In a case involving inspections of apartments in the City of Los Angeles in which a fee was charged to landlords, the California Supreme Court ruled that the regulatory fee for inspecting apartments was not a “levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service”¹⁶⁴ within the meaning of Proposition 218. The court interpreted the phrase “incident of property ownership” as follows:

The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge

¹⁶³ *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, 402.

¹⁶⁴ That is the definition of “fee” or “charge” in article XIII D, section 2, subdivision (e).

against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.¹⁶⁵

[¶]...[¶] In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners*. The [City of Los Angeles'] ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords.¹⁶⁶

Following the reasoning of the *Apartment Assoc.* case, the inspection fees on restaurants, retail gasoline outlets, automotive dealerships, phase I facilities, etc., like the fee in *Apartment Assoc.*, would not be imposed on landowners as landowners, nor as an incident of property ownership, but by virtue of business ownership. Thus, the inspection fee would fall outside the voter requirement of Proposition 218.

As to the fees for inspecting construction sites, the Commission finds that they too would not be subject to Proposition 218's voter requirement. Article XIII D of the California Constitution states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."¹⁶⁷

Moreover, the California Supreme Court, in determining whether water connection fees are within the purview of Proposition 218, reasoned that "water service" fees were within the meaning of "property-related services" but "water connection" fees were not.

Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.¹⁶⁸

The Supreme Court's reasoning applies to local stormwater fees for inspecting construction sites. That is, the fee would not be an incident of property ownership because it results from the owner's voluntary decision to build on or develop the property. Therefore, the Commission finds that local inspection fees for stormwater compliance at construction sites would not be within the purview of the election requirement of Proposition 218. A recent report by the Office of the Legislative Analyst concurs with this conclusion.¹⁶⁹

¹⁶⁵ *Apartment Assoc. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

¹⁶⁶ *Id.* at 842 [Emphasis in original.]

¹⁶⁷ Article XIII D, section 1, subdivision (b).

¹⁶⁸ *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427.

¹⁶⁹ "Local governments finance stormwater clean-up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two-thirds of the voters, or a majority of property owners.

In its June 2009 comments, the County disagrees that stormwater pollution fees would not be subject to the voter requirement in Proposition 218, or that fee authority exists. In support, the County points to unadopted legislation pending in the current or in past legislative sessions that would provide fee authority or expressly exempt stormwater fees from the Proposition 218 voting requirement. For example SCA 18 (2009) would add “stormwater and urban runoff management” fees to those expressly exempted from the vote requirement in article XIII D, putting them in the same category as trash and sewer fees. SB 2058 (2002) would have required the regional water boards to share their fees with counties and cities. And SB 210 (2009) would provide cities and counties with stormwater regulatory or user-based fee authority.

The Commission finds that the unadopted legislative proposals cited by the County are unconvincing to show a lack of regulatory fee authority for business inspections as discussed above. First, courts have said that “As evidence of legislative intent, unadopted proposals have been held to have little value.”¹⁷⁰ Second, if they were enacted, the legislative proposals would grant broader fee authority than is found in this analysis. For example, SCA 18, by adding a stormwater exception from the vote requirement in Proposition 218, would authorize *user* fees on residential property for stormwater and urban runoff programs, whereas this analysis addresses the much narrower issue of *regulatory* fees on businesses for inspections. Likewise, SB 2058 would have required the State Board’s permit fees to be shared with “counties and cities” for the broad purpose of carrying out stormwater programs rather than for the narrower purpose of inspecting businesses. And SB 210 would likewise provide fee authority that is broader than regulatory fees; as the May 28, 2009 version expressly states in proposed section 16103, subdivision (c), of the Water Code: “The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.” In short, the legislative proposals cited by the County do not indicate that fee authority does not exist. Rather, the proposals would, if enacted, provide broader fee authority than now exists.

In comments received June 3, 2009, the Bay Area Stormwater Management Agencies Association (BASMAA) contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the voting requirements of Proposition 218 or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding “funded vs. unfunded” requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two-thirds of the electorate.” Office of the Legislative Analyst. *California’s Water: An LAO Primer* (October 22, 2008) page 56.

¹⁷⁰ *County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1590.

The Commission disagrees. BASMAA raises issues that are outside the scope of the portions of the Los Angeles stormwater permit (parts 4C2a, 4C2b, 4E & 4Fc3) that were pled by the test claimants. Because the Commission's jurisdiction is limited by those parts of the permit pled in the test claim, it cannot opine on other issues outside the pleadings, even if it would raise issues closely related to other NPDES permits (or even other parts of this NPDES permit).

In sum, the Commission finds that the inspections and related activities at issue in the Los Angeles stormwater permit are not subject to voter approval in article XIII D of the California Constitution (Proposition 218), so a regulatory fee ordinance for stormwater inspections would not be subject to voter approval.

Given the existence of local regulatory fee authority under the police power (Cal. Const, art. XI, § 7), and lacking any evidence or information to the contrary, the Commission finds that the claimants' authority to adopt a regulatory fee is sufficient (pursuant to Gov. Code, § 17556, subd. (d)) to pay for the inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites, and related activities specified in the permit. Therefore, for the inspections and related activities at issue, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

For the reasons discussed above, the Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate within the meaning of Government Code sections 17514 and 17556: For local agencies subject to the permit that are not subject to a trash TMDL¹⁷¹ to: "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

¹⁷¹ A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

Abbreviations

BMP - Best management practice
CWA – Clean Water Act
GCASP - General Construction Activity Storm Water Permit
GIASP - General Industrial Activity Storm Water Permit
MS4 - Municipal Separate Storm Sewer Systems
NOI - Notice of Intent for coverage under the GCASP
NPDES - national pollutant discharge elimination system
RGO - Retail Gasoline Outlet
ROWD – Report of Waste Discharge
SQMP - Storm Water Quality Management Program
SWPPP - Storm Water Pollution Prevention Plan
TMDL - Total Maximum Daily Load
U.S. EPA – United States Environmental Protection Agency
WDID - Waste Discharger Identification

Tab 32

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

10-TC-12

Water Code Division 6, Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4;

Filed on June 30, 2011;

By, South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, Biggs-West Gridley Water District, Claimants;

Consolidated with

12-TC-01

Filed on February 28, 2013;

California Code of Regulations, title 23, sections 597, 597.1 597.2, 597.3, and 597.4, Register 2012, No. 28;

By, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, Glenn-Colusa Irrigation District, Claimants.

Case Nos.: 10-TC-12 and 12-TC-01

Water Conservation

DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(Adopted December 5, 2014)

(Served December 12, 2014)

DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 5, 2014. Dustin Cooper, Peter Harman, and Alexis Stevens appeared on behalf of the claimants. Donna Ferebee and Lee Scott appeared on behalf of the Department of Finance. Spencer Kenner appeared on behalf of the Department of Water Resources. Dorothy Holzem of the California Special Districts Association and Geoffrey Neill of the California State Association of Counties also appeared on behalf of interested persons and parties.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed decision to deny the test claim by a vote of six to zero.

Summary of the Findings

The Commission finds that the two original agricultural water supplier claimants named in each test claim, Richvale Irrigation District and Biggs-West Gridley Water District, are not eligible to claim reimbursement under article XIII B, section 6, because they do not collect or expend tax revenue, and are therefore not subject to the limitations of articles XIII A and XIII B. However, two substitute agricultural water supplier claimants, Oakdale Irrigation District and Glenn-Colusa Irrigation District, are subject to articles XIII A and XIII B and are therefore claimants eligible to seek reimbursement under article XIII B, section 6. As a result, the Commission has jurisdiction to hear and determine test claims 10-TC-12 and 12-TC-01.

The Commission finds that the Water Conservation Act of 2009 (Act), and the Agricultural Water Measurement regulations promulgated by the Department of Water Resources (DWR) to implement the Act, impose some new required activities on urban water suppliers and agricultural water suppliers, including measurement requirements, conservation and efficient water management requirements, notice and hearing requirements, and documentation requirements, with specified exceptions and limitations.

However, the Commission finds that several agricultural water suppliers are either exempted from the requirements of the test claim statutes and regulations or are subject to alternative and less expensive compliance alternatives because the activities were already required by a regime of federal statutes and regulations, which apply to most agricultural water suppliers within the state.¹

Additionally, to the extent that the test claim statute and regulations impose any new state-mandated activities, they do not impose costs mandated by the state because the Commission finds that urban water suppliers and agricultural water suppliers possess fee authority, sufficient as a matter of law to cover the costs of any new required activities. Therefore, the test claim statute and regulations do not impose costs mandated by the state pursuant to Government Code section 17556(d), and are not reimbursable under article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

I. Chronology

- 06/30/2011 Co-claimants, South Feather Water and Power Agency (South Feather), Paradise Irrigation District (Paradise), Biggs-West Gridley Water District (Biggs), and Richvale Irrigation District (Richvale) filed test claim 10-TC-12 with the Commission.²
- 10/07/2011 Department of Finance (Finance) requested an extension of time to file comments, which was approved.

¹ See Public Law 102-565 and the Reclamation Reform Act of 1982 and the specific exceptions and alternate compliance provisions in the test claim statutes for those subject to these federal requirements, as discussed in greater detail in the analysis below.

² Exhibit A, *Water Conservation Act Test Claim*, 10-TC-12.

12/06/2011 Department of Water Resources (DWR) requested an extension of time to file comments, which was approved.

02/01/2012 DWR requested an extension of time to file comments, which was approved.

03/30/2012 DWR requested an extension of time to file comments, which was approved.

05/30/2012 DWR requested an extension of time to file comments, which was approved.

08/02/2012 DWR requested an extension of time to file comments, which was approved.

10/02/2012 DWR requested an extension of time to file comments, which was approved.

12/03/2012 DWR requested an extension of time to file comments, which was approved.

12/07/2012 Finance requested an extension of time to file comments, which was approved.

02/04/2013 DWR requested an extension of time to file comments, which was approved.

02/06/2013 Finance requested an extension of time to file comments, which was approved.

02/28/2013 Richvale and Biggs filed test claim 12-TC-01 with the Commission.³

03/06/2013 The executive director consolidated the test claims for analysis and hearing, and renamed them *Water Conservation*.

03/29/2013 DWR requested an extension of time to file comments, which was approved.

06/07/2013 Finance submitted written comments on the consolidated test claims.⁴

06/07/2013 DWR submitted written comments on the consolidated test claims.⁵

07/09/2013 Claimants requested an extension of time to file rebuttal comments, which was approved.

08/07/2013 Claimants filed rebuttal comments.⁶

08/22/2013 Commission staff issued a request for additional information regarding the eligibility status of the claimants.⁷

09/19/2013 Finance submitted comments in response to staff's request.⁸

09/20/2013 The State Controller's Office (SCO) submitted a request for extension of time to comments, which was approved for good cause.

09/23/2013 DWR submitted comments in response to staff's request.⁹

³ Exhibit B, *Agricultural Water Measurement Test Claim, 12-TC-01*.

⁴ Exhibit C, Finance Comments on Consolidated Test Claims.

⁵ Exhibit D, DWR Comments on Consolidated Test Claims.

⁶ Exhibit E, Claimant Rebuttal Comments.

⁷ Exhibit F, Request for Additional Information.

⁸ Exhibit G, Finance Response to Commission Request for Comments.

09/23/2013 The claimants submitted comments in response to staff's request.¹⁰

10/07/2013 SCO submitted comments in response to staff's request.¹¹

11/12/2013 Commission staff issued a Notice of Pending Dismissal of 12-TC-01, and a Notice of Opportunity for a Local Agency, Subject to the Tax and Spend Limitations of Articles XIII A and B of the California Constitution and Subject to the Requirements of the Alleged Mandate to Take Over the Test Claim by a Substitution of Parties.¹²

11/22/2013 Co-claimants Richvale and Biggs filed an appeal of the executive director's decision to dismiss test claim 12-TC-01.¹³

11/25/2013 The executive director issued notice that the appeal would be heard on March 28, 2014.¹⁴

01/13/2014 Oakdale Irrigation District (Oakdale) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Dustin C. Cooper, of Minasian, Meith, Soares, Sexton & Cooper, LLP, as its representative.¹⁵

01/13/2014 Glenn-Colusa Irrigation District (Glenn-Colusa) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Andrew M. Hitchings and Alexis K. Stevens of Somach, Simmons & Dunn as its representative.¹⁶

01/15/2014 Commission staff issued a Notice of Substitution of Parties and Notice of Hearing which mooted the appeal.¹⁷

07/31/2014 Commission staff issued a draft proposed statement of decision.¹⁸

08/13/2014 South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, and Biggs West Gridley Water District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.

⁹ Exhibit H, DWR Response to Commission Request for Comments.

¹⁰ Exhibit I, Claimant Response to Commission Request for Comments.

¹¹ Exhibit J, SCO Response to Commission Request for Comments.

¹² Exhibit K, Notice of Pending Dismissal.

¹³ Exhibit L, Appeal of Executive Director's Decision.

¹⁴ Exhibit M, Appeal of Executive Director Decision and Notice of Hearing.

¹⁵ Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District.

¹⁶ Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

¹⁷ Exhibit P, Notice of Substitution of Parties and Notice of Hearing. Note that matters are only tentatively set for hearing until the draft staff analysis is issued which actually sets the matter for hearing pursuant to section 1187(b) of the Commission's regulations. Staff inadvertently omitted the word "tentative" in this notice.

¹⁸ Exhibit Q, Draft Proposed Decision.

- 08/14/2014 Glenn Colusa Irrigation District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.
- 10/16/2014 Claimant filed comments on the draft proposed decision.¹⁹
- 10/17/2014 California Special Districts Association (CSDA) filed comments on the draft proposed decision.²⁰
- 10/17/2014 Environmental Law Foundation (ELF) filed comments on the draft proposed decision.²¹
- 10/17/2014 DWR filed comments on the draft proposed decision.²²
- 10/22/2014 Northern California Water Association (NCWA) filed late comments on the draft proposed decision.²³
- 11/07/2014 Claimants filed late comments.²⁴

II. Background

These consolidated test claims allege that Water Code Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] enacted by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) (10-TC-12) impose reimbursable state-mandated increased costs resulting from activities required of urban water suppliers and agricultural water suppliers. The claimants also allege that the Agricultural Water Measurement regulations issued by DWR (12-TC-01), codified at California Code of Regulations, title 23, sections 597-597.4, impose additional reimbursable state-mandated increased costs on agricultural water suppliers only.

The Water Conservation Act of 2009, pled in test claim 10-TC-12, calls for a 20 percent reduction in urban per capita water use on or before December 31, 2020, and an interim reduction of at least 10 percent on or before December 31, 2015.²⁵ In order to achieve these reductions, the Act requires urban retail water suppliers, both publicly and privately owned, to develop urban water use targets and interim targets that cumulatively result in the desired 20 percent reduction by December 31, 2020.²⁶ Prior to adopting its urban water use targets, each supplier is required to conduct at least one public hearing to allow community input regarding the supplier's implementation plan to meet the desired reductions, and to consider the economic

¹⁹ Exhibit R, Claimant Comments on Draft Proposed Decision.

²⁰ Exhibit S, CSDA Comments on Draft Proposed Decision.

²¹ Exhibit T, Environmental Law Foundation Comments on Draft Proposed Decision.

²² Exhibit U, DWR Comments on Draft Proposed Decision.

²³ Exhibit V, NCWA Comments on Draft Proposed Decision.

²⁴ Exhibit W, Claimants Late Rebuttal Comments.

²⁵ Water Code section 10608.16 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

²⁶ Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

impacts of the implementation plan.²⁷ This hearing may be combined with the hearing required under prior law (Water Code 10631) for adoption of the urban water management plan (UWMP).²⁸ An urban retail water supplier is also required to include in its UWMP, which is required to be updated every five years in accordance with pre-existing Water Code section 10621, information describing the baseline per capita water use; interim and final urban water use targets;²⁹ and a report on the supplier's progress in meeting urban water use targets.³⁰

With respect to agricultural water suppliers, the Act requires implementation of specified critical efficient water management practices, including measuring the volume of water delivered to customers and adopting a volume-based pricing structure; and additional efficient water management practices that are locally cost effective and technically feasible.³¹ In addition, the Act requires agricultural water suppliers (with specified exceptions)³² to prepare and adopt, and every five years update, an agricultural water management plan (AWMP),³³ describing the service area, water sources and supplies, water uses within the service area, previous water management activities; and including a report on which efficient water management practices have been implemented or are planned to be implemented, and information documenting any determination that a specified efficient water management practice was not locally cost effective or technically feasible.³⁴

Prior to preparing and adopting or updating an AWMP, the Act requires an agricultural water supplier to notify the city or county within which the supplier provides water that it will be preparing or considering changes to the AWMP;³⁵ and to make the proposed plan available for

²⁷ Water Code section 10608.26 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

²⁸ Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

²⁹ Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁰ Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³¹ Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³² See Water Code sections 10608.8(d) (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [agricultural water suppliers that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617 are exempt from the requirements of Part 2.55 (Water Code sections 10608-10608.64)]; 10608.48(f); 10828 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [an agricultural water supplier may meet requirements of AWMPs by submitting its water conservation plan approved by United States Bureau of Reclamation]; 10827 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [members of Agricultural Water Management Council and submit water management plans to council pursuant to the Memorandum of Understanding may rely on those plans to satisfy AWMP requirements]; 10829 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [adoption of an urban water management plan or participation in an areawide, regional, watershed, or basinwide water management plan will satisfy the AWMP requirements].

³³ Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁴ Water Code sections 10608.48; 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁵ Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

public inspection and hold a noticed public hearing.³⁶ An agricultural water supplier is then required to implement the AWMP in accordance with the schedule set forth in the AWMP,³⁷ and to submit a copy of the AWMP to DWR and a number of specified local entities, and make the plan available on the internet, within 30 days of adoption.³⁸

Finally, to aid agricultural water suppliers in complying with their measurement requirements and developing a volume-based pricing structure as required by section 10608.48, DWR adopted in 2012 the Agricultural Water Measurement Regulations,³⁹ which are the subject of test claim 12-TC-01. These regulations provide a range of options for agricultural water suppliers to implement accurate measurement of the volume of water delivered to customers. The regulations provide for measurement at the delivery point or farm gate of an individual customer, or at a point upstream of the delivery point where necessary, and provide for specified accuracy standards for measurement devices employed by the supplier, whether existing or new, as well as field testing protocols and recordkeeping requirements, to ensure ongoing accuracy of volume measurements.

To provide some context for how the the test claim statute and implementing regulations fit into the state's water conservation planning efforts, a brief discussion of the history of water conservation law in California follows.

A. Prior California Conservation and Water Supply Planning Requirements.

1. Constitutional and Statutory Framework of Water Conservation.

Article X, section 2 of the California Constitution prohibits the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. It also declares that the conditions in the state require “that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.” Moreover, article X, section 2 provides that “[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and *such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.*”⁴⁰ Although article X, section 2 provides that it is self-executing; it also provides that the Legislature may enact statutes to advance its policy.

The Legislature has implemented these constitutional provisions in a number of enactments over the course of many years, which authorize water conservation programs by water suppliers, including metered pricing. For example:

³⁶ Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁷ Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁸ Water Code sections 10843; 10844 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁹ Code of Regulations, title 23, sections 597-597.4 (Register 2012, No. 28).

⁴⁰ Adopted June 8, 1976. Derivation, former article 14, section 3, added November 6, 1928 and amended November 5, 1974 [emphasis added].

- Water Code section 1009 provides that water conservation programs are an authorized water supply function for all municipal water providers in the state.⁴¹
- Water Code section 1011 furthers the water conservation policies of the state by providing that a water appropriator does not lose an appropriative water right because of water conservation programs.⁴²
- Water Code sections 520 -529.7 require water meters and recognize that metered water rates are an important conservation tool.⁴³
- Water Code section 375(b) provides that public water suppliers may encourage conservation through “rate structure design.” The bill amending the Water Code to add this authority was adopted during the height of a statewide drought. In an uncodified portion of the bill, the Legislature specifically acknowledged that conservation is an important part of the state’s water policy and that water conservation pricing is a best management practice.⁴⁴
- Water Code sections 370-374 provide additional, alternate authority (in addition to a water supplier’s general authority to set rates) for public entities to encourage conservation rate structure design consistent with the proportionality requirements of Proposition 218.⁴⁵
- Water Code section 10631(f)(1)(K) establishes water conservation pricing as a recognized water demand management measure for purposes of UWMPs, and other conservation measures including metering, leak detection and retrofits for pipes and plumbing fixtures.⁴⁶

In addition, the Legislature has long vested water districts with broad authority to manage water to furnish a sustained, reliable supply. For example:

⁴¹ Statutes 1976, chapter 709, p. 1725, section 1.

⁴² Added by statutes 1979, chapter 1112, p. 4047, section 2, amended by Statutes, 1982, chapter 876, p. 3223, section 4, Statutes 1996, chapter 408, section 1, and Statutes 1999, chapter 938, section 2.

⁴³ Added by Statutes 1991, chapter 407 and amended by Statutes 2004, chapter 884, section 3 and Statutes 2005, chapter 22. See especially, Water Code section 521 (b) and (c)).

⁴⁴ Statutes 1993, chapter 313, section 1.

⁴⁵ Statutes 2008, chapter 610 (AB 2882). See Exhibit X, Senate Floor Analysis AB 2882; Assembly Floor Analysis AB 2882.

⁴⁶ Water Code section 10631(f)(1)(K) (Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 712 (SB 553); Stats. 2001, ch. 643 (SB 610); Stats. 2001, ch. 644 (AB 901); Stats. 2002, ch. 664 (AB 3034); Stats. 2002, ch. 969 (SB 1384); Stats. 2004, ch. 688 (SB 318); Stats. 2006, ch. 538 (SB 1852)).

- Irrigation Districts have the power to take any act necessary to furnish sufficient water for beneficial uses and to control water.⁴⁷ They have general authority to fix and collect charges for any service of the district.⁴⁸
- County Water Districts have similar power to take any act necessary to furnish sufficient water and express authority to conserve.⁴⁹
- Municipal Water Districts also have broad power to control water for beneficial uses and express power to conserve.⁵⁰

2. Existing Requirements to Prepare, Adopt, and Update Urban Water Management Plans.

The Urban Water Management Act of 1983 required urban water suppliers to prepare and update an UWMP every five years.⁵¹ This Act has been amended numerous times between its original enactment in 1983 and the enactment of the test claim statute in 2009.⁵² The law pertaining to UWMPs in effect immediately prior to the enactment of the test claim statute consisted of sections 10610 through 10657 of the California Water Code, which detail the information that must be included in UWMPs, as well as who must file them.

According to the Act, as amended prior to the test claim statute, “[t]he conservation and efficient use of urban water supplies are of statewide concern; however, the planning for that use and the implementation of those plans can best be accomplished at the local level.”⁵³ The Legislature declared as state policy that:

- (a) The management of urban water demands and efficient use of water shall be actively pursued to protect both the people of the state and their water resources.
- (b) The management of urban water demands and efficient use of urban water supplies shall be a guiding criterion in public decisions.

⁴⁷ Water Code section 22075 added by Statutes 1943, chapter 372 and section 22078 added by Statutes 1953, chapter 719, p. 187, section 1.

⁴⁸ Water Code section 22280, as amended by statutes 2007, chapter 27, section 19.

⁴⁹ Water Code sections 31020 and 31021 added by Statutes 1949, chapter 274, p. 509, section 1.

⁵⁰ Water Code sections 71610 as amended by Statutes 1995, chapter 28 and 71610.5 as added by Statutes 1975, chapter 893, p. 1976, section 1.

⁵¹ Statutes 1983, chapter 1009 added Part 2.6 to Division 6 of the Water Code, commencing at section 10610.

⁵² Enacted, Statutes 1983, chapter 1009; Amended, Statutes 1990, chapter 355 (AB 2661); Statutes 1991-92, 1st Extraordinary Session, chapter 13 (AB 11); Statutes 1991, chapter 938 (AB 1869) Statutes 1993, chapter 589 (AB 2211); Statutes 1993, chapter 720 (AB 892); Statutes 1994, chapter 366 (AB 2853); Statutes 1995, chapter 28 (AB 1247); Statutes 1995, chapter 854 (SB 1011); Statutes 2000, chapter 712 (SB 553); Statutes 2001, chapter 643 (SB 610); Statutes 2001, chapter 644 (AB 901); Statutes 2002, chapter 664 (AB 3034); Statutes 2002, chapter 969 (SB 1384); Statutes 2004, chapter 688 (SB 318); Statutes 2006, chapter 538 (SB 1852); Statutes 2009, chapter 534 (AB 1465).

⁵³ Water Code section 10610.2 (Stats. 2002, ch. 664 (AB 3034)).

(c) Urban water suppliers shall be required to develop water management plans to actively pursue the efficient use of available supplies.⁵⁴

The Act specified that each urban water supplier that provides water for municipal purposes either directly or indirectly to more than 3,000 customers or supplies more than 3,000 acre feet of water annually shall prepare, update, and adopt its urban water management plan at least once every five years on or before December 31, in years ending in five and zero.⁵⁵

a. Contents of Plans

The required contents of an UWMP are provided in sections 10631 through 10635. These statutes are prior law and have not been pled in this test claim. As last amended by Statutes 2009, chapter 534 (AB 1465), section 10631 requires that an adopted UWMP contain information describing the service area of the supplier, reliability of supply, water uses over five year increments, water demand management measures currently being implemented or being considered or scheduled for implementation, and opportunities for development of desalinated water.⁵⁶ Section 10631 further provides that urban water suppliers that are members of the California Urban Water Conservation Council and submit annual reports in accordance with the “Memorandum of Understanding Regarding Urban Water Conservation in California,” may submit those annual reports to satisfy the requirements of section 10631(f) and (g), pertaining to current, proposed, and future demand management measures.⁵⁷

Section 10632 requires that an UWMP provide an urban water shortage contingency analysis, which includes actions to be taken in response to a supply shortage; an estimate of minimum supply available during the next three years; actions to be taken in the event of a “catastrophic interruption of water supplies,” such as a natural disaster; additional prohibitions employed during water shortages; penalties or charges for excessive use; an analysis of impacts on revenues and expenditures; a draft water shortage contingency resolution or ordinance; and a mechanism for determining actual reductions in water use.⁵⁸

Section 10633, as amended by Statutes 2002, chapter 261, specifies that the plan shall provide, to the extent available, information on recycled water and its potential for use as a water source in the service area of the urban water supplier. The preparation of the plan shall be coordinated with local water, wastewater, groundwater, and planning agencies that operate within the supplier's service area, and shall include: a description of wastewater collection and treatment systems; a description of the quantity of treated wastewater that meets recycled water standards; a description of recycled water currently used in the supplier's service area; a description and quantification of the potential uses of recycled water; projected use of recycled water over five year increments for the next 20 years; a description of actions that may be taken to encourage the

⁵⁴ Water Code section 10610.4 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

⁵⁵ Water Code sections 10617 (Stats. 1996, ch. 1023(SB 1497)); 10621(a) (Stats. 2007, ch. 64 (AB 1376)).

⁵⁶ Water Code section 10631 (Statutes 2009, chapter 534 (AB 1465)).

⁵⁷ Water Code section 10631(i) (Statutes 2009, chapter 534 (AB 1465)).

⁵⁸ Water Code section 10632 (Stats. 1995, ch. 854 (SB 1011)).

use of recycled water; and a plan for optimizing the use of recycled water in the supplier's service area.⁵⁹

As added by Statutes 2001, chapter 644, and continuously in law up to the adoption of the test claim statute, section 10634 requires the UWMP to include, to the extent practicable, information relating to the quality of existing sources of water available to the supplier over the same five-year increments as described in Section 10631(a); and to describe the manner in which water quality affects water management strategies and supply reliability.⁶⁰

And finally, section 10635, added by Statutes 1995, chapter 330, requires an urban water supplier to include in its UWMP an assessment of the reliability of its water service to customers during normal and dry years, projected over the next 20 years, in five year increments.⁶¹

b. Adoption and Implementation of Plans

Sections 10640 through 10645, as added by Statutes 1983, chapter 1009 and Statutes 1990, chapter 355, provide the requirements for adoption and implementation of UWMPs, including public notice and recordkeeping requirements associated with the adoption of each update of the UWMP.

Section 10640 provides that every urban water supplier required to prepare an UWMP pursuant to this part shall prepare its UWMP pursuant to Article 2 (commencing with Section 10630), and shall "periodically review the plan ... and any amendments or changes required as a result of that review shall be adopted pursuant to this article."⁶² Section 10641 provides that an urban water supplier required to prepare an UWMP may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water demand management methods and techniques.⁶³

Section 10642 provides that each urban water supplier shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the service area prior to and during the preparation of its UWMP. Prior to adopting an UWMP, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to section 6066 of the Government Code. A privately owned water supplier is required to provide a similar degree of notice, and the plan shall be adopted after the hearing either "as prepared or as modified..."⁶⁴

Section 10643 provides that an UWMP shall be implemented "in accordance with the schedule set forth in [the] plan."⁶⁵ As amended by Statutes 2007, chapter 628, section 10644 requires an

⁵⁹ Water Code section 10633 (Stats. 2002, ch. 261 (SB 1518)).

⁶⁰ Water Code section 10634 (Stats. 2001, ch. 644 (AB 901)).

⁶¹ Water Code section 10635 (Stats. 1995, ch. 330 (AB 1845)).

⁶² Water Code section 10640 (Stats. 1983, ch. 1009).

⁶³ Water Code section 10640 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

⁶⁴ Water Code section 10642 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552)).

⁶⁵ Water Code section 10643 (Stats. 1983, ch. 1009).

urban water supplier to submit to DWR, the State Library, and any city or county within which the supplier provides water supplies, a copy of its plan and copies of any changes or amendments to the plans no later than 30 days after adoption. Section 10644 also requires DWR to prepare and submit to the Legislature, on or before December 31, in the years ending in six and one, a report summarizing the status of the UWMPs adopted pursuant to this part. The report is required to identify the outstanding elements of the individual UWMPs. DWR is also required to provide a copy of the report to each urban water supplier that has submitted its UWMP to DWR.⁶⁶ And lastly, in accordance with section 10645, not later than 30 days after filing a copy of its UWMP with DWR, the urban water supplier and DWR shall make the plan available for public review during normal business hours.⁶⁷

c. Miscellaneous Provisions Pertaining to the UWMP Requirement

While sections 10631 through 10635 provide for the lengthy and technical content requirements of UWMPs, and sections 10640 through 10645 provide the requirements of a valid adoption of a UWMP, several remaining provisions of the Urban Water Management Planning Act provide for the satisfaction of the UWMP requirements by other means, and provide for the easing of certain other regulatory requirements and the recovery of costs.

- Section 10631, as amended by Statutes 2009, chapter 534 (AB 1465), provides that urban water suppliers that are members of the California Urban Water Conservation Council shall be deemed in compliance with the demand management provisions of the UWMP “by complying with all the provisions of the ‘Memorandum of Understanding Regarding Urban Water Conservation in California’...and by submitting the annual reports required by Section 6.2 of that memorandum.”⁶⁸ These suppliers, then, are not separately required to comply with sections 10631(f) and (g), which require a description and evaluation of the supplier’s “demand management measures” that are currently or could be implemented.⁶⁹
- Section 10652 streamlines the adoption of UWMPs by exempting plans from the California Environmental Quality Act (CEQA). However, section 10652 does not exempt any project (that might be contained in the plan) that would significantly affect water supplies for fish and wildlife.⁷⁰
- Section 10653 provides that the adoption of a plan shall satisfy any requirements of state law, regulation, or order, including those of the State Water Resources Control Board and the Public Utilities Commission, for the preparation of water

⁶⁶ Water Code section 10644 (Stats. 1983, ch. 1009; Stats. 1990, ch. 355 (AB 2661); Stats. 1992, ch. 711 (AB 2874); Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552); Stats. 2004, ch. 497 (AB 105); Stats. 2007, ch. 628 (AB 1420)).

⁶⁷ Water Code section 10645 (Stats. 1990, ch. 355 (AB 2661)).

⁶⁸ Water Code section 10631 (as amended, Stats. 2009, ch. 534 (AB 1465)).

⁶⁹ Water Code section 10631(f-g) (as amended, Stats. 2009, ch. 534 (AB 1465)).

⁷⁰ Water Code section 10652 (Stats. 1983, ch. 1009; Stats. 1991-1992, 1st Ex. Sess., ch. 13 (AB 11); Stats. 1995, ch. 854 (SB 1011)).

management plans or conservation plans; provided, that if the State Water Resources Control Board or the Public Utilities Commission requires additional information concerning water conservation to implement its existing authority, nothing in this part shall be deemed to limit the board or the commission in obtaining that information. In addition, section 10653 provides that “[t]he requirements of this part *shall be satisfied by any urban water demand management plan prepared to meet federal laws or regulations after the effective date of this part*, and which substantially meets the requirements of this part, or by any existing urban water management plan which includes the contents of a plan required under this part.”⁷¹ The plain language of section 10653 therefore exempts an urban retail water supplier that is already required to prepare a water demand management plan from any requirements of an UWMP added by the test claim statutes.

- Section 10654 provides expressly that an urban water supplier “may recover in its rates the costs incurred in preparing its plan and implementing the reasonable water conservation measures included in the plan.” Any best water management practice that is included in the plan that is identified in the “Memorandum of Understanding Regarding Urban Water Conservation in California” (discussed below) is deemed to be reasonable for the purposes of this section.⁷² Therefore, suppliers are expressly authorized to recover the costs of implementing “reasonable water conservation measures” or any “best water management practice...identified in [the MOU for Urban Water Conservation].”
3. Prior Requirements to Prepare, Adopt, and Update Agricultural Water Management Plans, Which Became Inoperative by their own Terms in 1993.

The Agricultural Water Management Planning Act was enacted in 1986 and became inoperative, by its own terms, in 1993.⁷³ The 1986 Act stated in its legislative findings and declarations that “[t]he Constitution requires that water in the state be used in a reasonable and beneficial way...” and that “[t]he conservation of agricultural water supplies are of great concern.” The findings and declarations further stated that “[a]gricultural water suppliers that receive water from the federal Central Valley Water Project are required by federal law to develop and implement water conservation plans,” as are “[a]gricultural water suppliers applying for a permit to appropriate water from the State Water Resources Control Board...” Therefore, the act stated that “it is the policy of the state as follows:”

- (a) The conservation of water shall be pursued actively to protect both the people of the state and their water resources.
- (b) The conservation of agricultural water supplies shall be an important criterion in public decisions on water.

⁷¹ Water Code section 10653 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)) [emphasis added].

⁷² Water Code section 10654 (Stats. 1983, ch. 1009; Stats. 1994, ch. 609 (SB 1017)).

⁷³ Statutes 1986, chapter 954 (AB1658). See Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

- (c) Agricultural water suppliers, who determine that a significant opportunity exists to conserve water or reduce the quantity of highly saline or toxic drainage water, shall be required to develop water management plans to achieve conservation of water.⁷⁴

Specifically, the 1986 Act provided that every agricultural water supplier serving water directly to customers “shall prepare an informational report based on information from the last three irrigation seasons on its water management and conservation practices...” That report “shall include a determination of whether the supplier has a significant opportunity to conserve water or reduce the quantity of highly saline or toxic drainage water through improved irrigation water management...” If a “significant opportunity exists” to conserve water or improve the quality of drainage water, the supplier “shall prepare and adopt an agricultural water management plan...” (AWMP).⁷⁵ The Act provided, however, that an agricultural water supplier “may satisfy the requirements of this part by participation in areawide, regional, watershed, or basinwide agricultural water management planning where those plans will reduce preparation costs and contribute to the achievement of conservation and efficient water use and where those plans satisfy the requirements of this part.” The requirements of an AWMP or an informational report, where required, included quantity and sources of water delivered to and by the supplier; other sources of water used within the service area, including groundwater; a general description of the delivery system and service area; total irrigated acreage within the service area; acreage of trees and vines within the service area; an identification of current water conservation practices being used, plans for implementation of water conservation practices, and conservation educational practices being used; and a determination of whether the supplier has a significant opportunity to save water by means of reduced evapotranspiration, evaporation, or reduction of flows to unusable water bodies, or to reduce the quantity of highly saline or toxic drainage water.⁷⁶ In addition, an AWMP “shall address all of the following:” quantity and source of surface and groundwater delivered to and by the supplier; a description of the water delivery system, the beneficial uses of the water supplied, conjunctive use programs, incidental and planned groundwater recharge, and the amounts of delivered water that are lost to evapotranspiration, evaporation, or surface flow or percolation; an identification of cost-effective and economically feasible measures for water conservation; an evaluation of other significant impacts; and a schedule to implement those water management practices that the supplier determines to be cost-effective and economically feasible.⁷⁷

The Act further provided that an agricultural water supplier required to prepare an AWMP “may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water conservation and management methods and techniques.”⁷⁸ And, “[p]rior to adopting a plan, the agricultural water supplier shall make the plan available for public inspection and shall hold a public hearing thereon.” This requirement

⁷⁴ Former Water Code section 10802 (Stats. 1986, ch. 954 (AB 1658)).

⁷⁵ Former Water Code section 10821 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁷⁶ Former Water Code section 10825 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁷⁷ Former Water Code section 10826 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁷⁸ Former Water Code section 10841 (as added, Stats. 1986, ch. 954 (AB 1658)).

applies also to privately owned water suppliers.⁷⁹ In addition, the Act states that an agricultural water supplier shall implement its AWMP in accordance with the schedule set forth in the plan, and “shall file with [DWR] a copy of its plan no later than 30 days after adoption.”⁸⁰ Finally, the 1986 Act provided for funds to be appropriated to prepare the informational reports and agricultural water management plans, as required, and provided that “[t]his part shall remain operative only until January 1, 1993, except that, if an agricultural water supplier fails to submit its information report or agricultural water management plan prior to January 1, 1993, this part shall remain operative with respect to that supplier until it has submitted its report or plan, or both.”⁸¹

As noted above, the AWMP requirements provided by the Agricultural Water Management Planning Act became inoperative as of January 1, 1993,⁸² and therefore do not constitute the law in effect immediately prior to the test claim statute, even though, as shown below, the test claim statute reenacted substantially similar plan requirements. However, the federal requirement to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the federal Central Valley Project Improvement Act (Public Law 102-565) or the federal Reclamation Reform Act of 1982, remained the law throughout and does constitute the law in effect immediately prior to the test claim statute, with respect to those suppliers subject to one or both federal requirements.⁸³

4. The Water Measurement Law, Statutes 1991, chapter 407, applicable to Urban and Agricultural Water Suppliers.

The Water Measurement Law (Water Code sections 510-535) requires standardized water management practices and water measurement, and is applicable to Urban and Agricultural Water Suppliers, as follows:⁸⁴

- Every water purveyor that provides potable water to 15 or more service connections or 25 or more yearlong residents must require meters as a condition of *new* water service.⁸⁵
- Urban water suppliers, except those that receive water from the federal Central Valley Project, must install meters on all municipal (i.e., residential and governmental) and industrial (i.e., commercial) service connections on or before January 1, 2025 and shall charge each customer that has a service connection for which a meter has been installed based on the actual volume of deliveries beginning on or before January 1, 2010 service. A water purveyor, including an

⁷⁹ Former Water Code section 10842(as added, Stats. 1986, ch. 954 (AB 1658)).

⁸⁰ Former Water Code sections 10843 and 10844 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁸¹ Former Water Code sections 10853; 10854; 10855 (as added, Stats. 1986, ch. 954 (AB 1658)).

⁸² Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

⁸³ See Water Code section 10828 (added, Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

⁸⁴ The Water Measurement Law was added by Statutes 1991, chapter 407.

⁸⁵ Section 525 as amended by statutes 2005, chapter 22.

urban water supplier, may recover the cost of the purchase, installation, and operation of a water meter from rates, fees, or charges.⁸⁶

- Urban water suppliers receiving water from the federal Central Valley Project (CVP) shall install water meters on all residential and non-agricultural commercial service connections constructed prior to 1992 on or before January 1, 2013 and charge customers for water based on the actual volume of deliveries, as measured by a water meter, beginning March 1, 2013, or according to the CVP water contract. Urban water suppliers that receive water from the CVP are also specifically authorized to “recover the cost of providing services related to the purchase, installation, and operation and maintenance of water meters from rates, fees or charges.”⁸⁷
- Agricultural water providers shall report annually to DWR summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis. However, the Water Measurement Law does not require implementation of water measurement programs or practices that are not locally cost effective.⁸⁸

The test claim statute, as noted above, requires agricultural water suppliers to measure the volume of water delivered to customers and to adopt a volume-based pricing structure. However, the test claim statute also contemplates a water supplier that is both an agricultural and an urban water supplier, by definition: section 10829 provides that an agricultural water supplier may satisfy the AWMP requirements by adopting an UWMP pursuant to Part 2.6 of Division 6 of the Water Code; and the definitions of “agricultural” and “urban retail” water suppliers in section 10608.12 are not, based on their plain language, mutually exclusive. The record on this test claim is not sufficient to determine how many, if any, agricultural water suppliers are also urban retail water suppliers,⁸⁹ and consequently would be required to install water meters on new and existing service connections in accordance with Water Code sections 525-527, and to charge customers based on the volume of water delivered. In addition, the record is not sufficient to determine whether and to what extent some agricultural water suppliers may already have implemented water measurement programs which were locally cost effective, in accordance with section 531.10. However, to the extent that an agricultural water supplier is also an urban water supplier, sections 525-527 may constitute a prior law requirement to accurately measure water delivered and charge customers based on volume, and the test claim statute may not impose new requirements or costs on some entities. And, to the extent that water measurement programs or practices were previously implemented pursuant to section 531.10, some of the activities required by the test claim statute and regulations may not be newly required, with respect to certain agricultural suppliers. These caveats and limitations are noted where relevant in the analysis below.

⁸⁶ Section 527 as amended by statutes 2005, chapter 22.

⁸⁷ Section 526 as amended by Statutes 2004, chapter 884.

⁸⁸ Section 531.10 as added by Statutes 2007, chapter 675.

⁸⁹ See Water Code section 10608.12, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) for definitions of “agricultural water supplier” and “urban retail water supplier.”

III. Positions of the Parties

A. Claimants' Positions:

The four original claimants together alleged a total of \$72,194.48 in mandated costs for fiscal year 2009-2010 (although Paradise maintains a different fiscal year than the remaining claimants). In addition, claimants project that program costs for fiscal year 2010-2011, and for 2011-2012, will be "higher," but claimants allege that they are unable to reasonably estimate the amount.

South Feather Water and Power Agency and Paradise Irrigation District

South Feather and Paradise allege that they are urban retail water suppliers, as defined in Water Code section 10608.12. As such, they allege that they are required to establish urban water use targets "by July 1, 2011 by selecting one of four methods to achieve the mandated water conservation." South Feather and Paradise further allege that they are "mandated to adopt expanded and more detailed urban water management plans in 2010 that include the baseline daily per capita water use, urban water use target, interim urban water use target, compliance daily per capita water use, along with the bases for determining estimates, including supporting data."⁹⁰ South Feather and Paradise allege that thereafter, UWMPs are to be updated "in every year ending in 5 and 0," and the 2015 plan "must describe the urban retail water supplier's progress towards [*sic*] achieving the 20% reduction by 2020."⁹¹ Finally, South Feather and Paradise allege that they are required to conduct at least one noticed public hearing to allow community input, consider economic impacts, and adopt a method for determining a water use baseline "from which to measure the 20% reduction."⁹²

Prior to the Act, South Feather and Paradise allege that there was no requirement to achieve a 20 percent per capita reduction in water use by 2020. They allege that they were required to adopt UWMPs prior to the Act, but not to include "the baseline per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with bases for determining those estimates, including supporting data."⁹³ And they allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts...or to adopt a method for determining an urban water use target."⁹⁴

Biggs-West Gridley Water District and Richvale Irrigation District

Richvale and Biggs allege that they are required to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate," in accordance with regulations adopted by DWR pursuant to the Act.⁹⁵ They further allege that they are required to adopt a pricing structure for water customers

⁹⁰ Exhibit A, 10-TC-12, page 3.

⁹¹ *Ibid.*

⁹² Exhibit A, 10-TC-12, page 4.

⁹³ Exhibit A, 10-TC-12, pages 7-8.

⁹⁴ Exhibit A, 10-TC-12, page 8.

⁹⁵ Exhibit A, 10-TC-12, page 4.

based on the quantity of water delivered, and that “[b]ecause Richvale and Biggs are local public agencies, the change in pricing structure would have to be authorized and approved by its [*sic*] customers through the Proposition 218 process.”⁹⁶

In addition, Richvale and Biggs allege that “[i]f ‘locally cost effective’ and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices,” as specified. They additionally allege that on or before December 31, 2012, they are required to prepare AWMPs that include a report on the implementation and planned implementation of efficient water management practices, and documentation supporting any determination made that certain conservation measures were held to be not locally cost effective or technically feasible.⁹⁷ Finally, Richvale and Biggs allege that prior to adoption of an AWMP, they are required to notice and hold a public hearing; and that after adoption the plan must be distributed to “various entities” and posted on the internet for public review.⁹⁸

Prior to the Act, Richvale and Biggs assert, agricultural water suppliers “were not required to have a pricing structure based, at least in part, on the quantity of water delivered.” In addition, prior to the Act, “there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible.” And, Richvale and Biggs allege that prior to the Act the number of agricultural water suppliers subject to the requirement to develop an AWMP was significantly fewer, and now the “contents of the plans” are “more encompassing than plans required under the former law.”⁹⁹ Richvale and Biggs allege that “[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing prior to adopting the plan, make copies of it available for public inspection, or to publish the time and place of the hearing once per week for two successive weeks in a newspaper of general circulation.”¹⁰⁰

As discussed below, in the early stages of Commission staff’s review and analysis of these consolidated test claims, it became apparent that Richvale and Biggs, the two claimants representing agricultural water suppliers, are not subject to the revenue limits of article XIII B, and do not collect or expend “proceeds of taxes,” within the meaning of articles XIII A and XIII B.¹⁰¹ After additional briefing and further review, it was concluded that Richvale and Biggs are indeed not eligible for reimbursement under article XIII B, section 6. The Commission’s executive director therefore issued a notice of pending dismissal and offered an opportunity for another eligible local claimant, subject to the tax and spend limitations of articles XIII A and XIII B, to take over the test claim.¹⁰² Richvale and Biggs filed an appeal of that decision, and maintain that they are eligible local government claimants pursuant to Government Code section 17518, and that the fees or assessments that the districts would be required to establish or increase to comply with the requirements of the test claim statute and regulations would be

⁹⁶ *Ibid.*

⁹⁷ Exhibit A, 10-TC-12, pages 4-6.

⁹⁸ Exhibit A, 10-TC-12, page 6.

⁹⁹ Exhibit A, 10-TC-12, page 8.

¹⁰⁰ Exhibit A, 10-TC-12, page 9.

¹⁰¹ Exhibit F, Commission Request for Additional Information, page 1.

¹⁰² Exhibit K, Notice of Pending Dismissal.

characterized as taxes under article XIII B, section 8, because such fees or assessments would exceed the reasonable costs of providing water services.¹⁰³ This decision addresses these issues.

Glenn-Colusa Irrigation District and Oakdale Irrigation District

Glenn-Colusa and Oakdale requested to be substituted in as parties to these consolidated test claims, in place of Richvale and Biggs.¹⁰⁴ Both Glenn-Colusa and Oakdale submitted declarations asserting that they receive an annual share of property tax revenue, and therefore are subject to articles XIII A and XIII B of the California Constitution. Both additionally allege that they incur at least \$1000 in increased costs as a result of the test claim statute and regulations, and that they are subject to the requirements of the test claim statutes and regulations as described in the test claim narrative.¹⁰⁵

Claimants' Collective Response to the Draft Proposed Decision

In comments on the draft proposed decision, the claimants focus primarily on the findings regarding the ineligibility of Richvale and Biggs to claim reimbursement based on the evidence in the record indicating that neither agency collects or expends tax revenues subject to the limitations of articles XIII A and XIII B. The claimants also address the related findings that all claimants have sufficient fee authority under law to cover the costs of the mandate, and thus the Commission cannot find costs mandated by the state, pursuant to section 17556(d).

Specifically, the claimants argue that “[f]ees and charges for sewer, water, or refuse collection services are excused from the formal election process, but not from the majority protest process.”¹⁰⁶ Therefore, claimants conclude that “[a]gencies that provide water, sewer, or refuse collection services, including Claimants, lack sufficient authority to unilaterally impose new or increased fees or charges in light of Proposition 218’s majority protest procedure.”¹⁰⁷

In addition, claimants note the Commission’s analysis in 07-TC-09, *Discharge of Stormwater Runoff*, and argue that the Commission should not “ignore a prior Commission decision that is directly on point...” The claimants assert that “as this Commission has already recognized...” Proposition 218 “created a legal barrier to establishing or increasing fees or charges...” and as a result claimants “can do no more than merely propose new or increased fees for customer approval and the customers have the authority to then accept or reject...” a fee increase.¹⁰⁸

The claimants assert that the reasoning of the draft proposed decision “would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218...”¹⁰⁹ and “would create a class of local agencies that are per se ineligible for reimbursement under this test

¹⁰³ Exhibit L, Appeal of Executive Director’s Decision.

¹⁰⁴ Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

¹⁰⁵ *Ibid.*

¹⁰⁶ Exhibit R, Claimant Comments on Draft Proposed Decision, page 10.

¹⁰⁷ Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

¹⁰⁸ Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

¹⁰⁹ Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."¹¹⁰ The claimant calls this a "sea change in Constitutional interpretation..."¹¹¹

The claimants argue, based on this interpretation of the effect of Proposition 218, that the draft proposed decision inappropriately excluded Richvale and Biggs from subvention, "because they do not currently collect or expend tax revenues."¹¹² The claimants argue that "this additional 'requirement' [is] based on an outdated case that predates Proposition 218 and on an inapplicable line of cases that apply only to redevelopment agencies, while ignoring the strong policy underlying the voters' approval of the subvention requirement."¹¹³ The claimants argue that after articles XIII C and XIII D, "assessments and property-related fees and charges have joined tax revenues as among local entities' 'increasingly limited revenue sources..."¹¹⁴

The claimants further argue that: "Agencies like Richvale and Biggs that need additional revenue to pay for new mandates but are subject to the limitations of Proposition 218 are faced with three problematic options: (a) do not implement the mandates in light of revenue limitations; (b) implement the mandates with existing revenue; or (c) propose a new or increased fee or charge, assessment, or special tax to implement the mandates."¹¹⁵ The claimants argue for the Commission to take action to expand the scope of reimbursement: "the subvention provision should be read in harmony with later Constitutional enactments and protect not just tax revenue, but assessment and fee revenue as well."¹¹⁶

Finally, in late comments, the claimants challenge DWR's reasoning, including the figures cited by the department, that due to the existence of a substantial number of private water suppliers, the test claim statutes do not impose a "program" within the meaning of article XIII B, section 6.¹¹⁷

B. State Agency Positions:

Department of Finance

Finance maintains that "the Act and Regulations do not impose a reimbursable mandate on local agencies within the meaning of Article XIII B, section 6."¹¹⁸ Finance asserts that each of the claimants is a special district authorized to charge a fee for delivery of water to its users, and therefore has the ability to cover the costs of any new required activities.¹¹⁹ Finance further

¹¹⁰ Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

¹¹¹ Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

¹¹² Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

¹¹³ Exhibit R, Claimant Comments on Draft Proposed Decision, page 16.

¹¹⁴ Exhibit R, Claimant Comments on Draft Proposed Decision, page 17.

¹¹⁵ Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

¹¹⁶ Exhibit R, Claimant Comments on Draft Proposed Decision, page 21.

¹¹⁷ Exhibit W, Claimant Late Comments, pages 1-4.

¹¹⁸ Exhibit C, Finance Comments, page 1.

¹¹⁹ Exhibit C, Finance Comments, page 1.

asserts that the conservation efforts required by the test claim statute and regulations will result in surplus water accruing to the claimant districts, which are authorized to sell water. Finance concludes that “each district will likely have the opportunity to cover all or a portion of costs related to implementation of the Act or Regulations with revenue from surplus water sales.”¹²⁰ Moreover, Finance argues that “special districts are only entitled to reimbursement if they are subject to the tax and spend limitations under articles XIII A and XIII B...*and only when the mandated costs in question can be recovered solely from the proceeds of taxes.*”¹²¹ Finance argues that the claimants “should be directed to provide information that will enable the Commission on State Mandates to determine if they are subject to tax and spending limitations.”¹²² Finance did not submit comments on the draft proposed decision.

State Controller’s Office

In response to Commission staff’s request for additional information regarding the uncertain eligibility of the test claimants, the SCO submitted written comments confirming that the “Butte County Auditor-Controller has confirmed for fiscal years 2010-2011, 2011-2012, and 2012-2013,” that South Feather and Paradise both received proceeds of taxes, but Richvale and Biggs did not.¹²³ However, the SCO also noted that none of the four claimants reported an appropriations limit for fiscal years 2010-2011, 2011-2012, and 2012-2013. The SCO stated that “Government Code section 7910 requires each local government entity to annually establish its appropriations limit by resolution of its governing board,” and that “Government Code section 12463 requires the annual appropriations limit to be reported in the financial transactions report submitted to the SCO.” However, the SCO noted that it “has the responsibility to review each report for reasonableness, yet we are not required to audit any of the data reported.” The SCO concluded, therefore, that “we are unable to determine which special district is subject to report an annual appropriations limit.” The SCO did not comment on the draft proposed decision.

Department of Water Resources

DWR argues, in comments on the consolidated test claims, first, that the Water Conservation Act of 2009 applies to public and private entities alike, and is therefore not a “program” within the meaning of article XIII B, section 6. In addition, DWR argues that the Act is not a “new program,” because it is “a refinement of urban and agricultural water conservation requirements that have been part of the law for years.” DWR further asserts that even if the Act “were an unfunded state mandate, it would not be reimbursable since the water suppliers have sufficient non-tax sources to offset any implementation costs.” And, DWR asserts that the test claim regulations on agricultural water measurement do not impose any requirements on water suppliers because “they are free to choose alternative measurement methods.” And finally, DWR argues that the Act does not impose any new programs or higher levels of service “because what is required is compliance with general and evolving water conservation standards based on

¹²⁰ Exhibit C, Finance Comments, page 2.

¹²¹ Exhibit C, Finance Comments, page 2 [emphasis in original].

¹²² Exhibit C, Finance Comments, page 2.

¹²³ Exhibit J, SCO Comments, pages 1-2.

the foundational reasonable and beneficial water use principle dating from before the 1928 amendment – Article X, section 2 – to California’s Constitution revising water use standards.”¹²⁴

In comments on the draft proposed decision, DWR “concur[s] with and fully supports the ultimate conclusion reached...”, but reiterates and expands upon its earlier comments with respect to whether the alleged test claim requirements constitute a new program or higher level of service that is uniquely imposed upon local government.¹²⁵ DWR argues that “a law that governs private and public entities alike is not a ‘program’ for purposes of article XIII B...”¹²⁶ DWR continues:

Claimants, in their Rebuttal Comments, ignore DWR’s reference to the language of the Water Conservation Act, which by its plain terms is made applicable to both public and private entities. Instead, Claimants seek to shift attention away from the nature of the activity and focus instead on the number of entities engaged in that activity. Claimants concede that the law and regulations adopted pursuant to that law do in fact apply to both private and public entities, but argue that because (according to their calculation) “only 7.67%” of urban retail water suppliers are private, the requirements of the Water Conservation Act ought to be treated as reimbursable “programs” because those requirements “fall overwhelmingly on local governmental agencies.”¹²⁷

DWR maintains that “there are, in fact, 72 private wholesale and retail suppliers out of a total of 369...so the proportion of private water suppliers is actually 16.3 percent.” And, “based on data submitted in the 2010 urban water management plans, it turns out that private retail water suppliers serve 19.7 percent of the population and account for 17.3 percent of water delivered.”¹²⁸

DWR acknowledges that there are more public than private water suppliers, but asserts that “[u]nder the Supreme Court’s test in *County of Los Angeles v. State of California* the question is not whether an activity is more likely to be undertaken by a governmental entity, but whether the activity implements a state policy and imposes unique requirements on local governments, but is one that does not apply generally to all residents and entities in the state.”¹²⁹ DWR explains that “generally,” in this context, is not synonymous with “commonly,” and therefore the prevalence of public water suppliers as to private is not relevant to the issue; rather, “generally” refers to

¹²⁴ Exhibit D, DWR Comments, page 2.

¹²⁵ Exhibit U, DWR Comments on Draft Proposed Decision, page 1.

¹²⁶ Exhibit U, DWR Comments on Draft Proposed Decision, page 2 [citing Exhibit D, DWR Comments, filed June 7, 2013; *Carmel Valley Fire Protection District v. State* (1987) 190 Cal.App.3d 521, 537].

¹²⁷ Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [quoting Exhibit E, Claimant’s Rebuttal Comments, pages 3-4].

¹²⁸ Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

¹²⁹ Exhibit U, DWR Comments on Draft Proposed Decision, page 3. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

laws of general application, meaning “those that apply to all persons or entities of a particular class.”¹³⁰ The Water Conservation Act, DWR maintains, “does just that.”¹³¹

In addition, DWR disputes that the provision of water services is a “classic governmental function,” as asserted by the claimants.¹³² The California Supreme Court has held that reimbursement should be limited to new “programs” that carry out the governmental function of providing services to the public.¹³³ DWR maintains that there is an important distinction between public purposes, and private or corporate purposes, and that that distinction should control in the analysis of a new program or higher level of service. In particular, DWR identifies the provision of utilities to municipal customers as a corporate activity, rather than a governmental purpose:

Of the myriad services provided by government, although some may be difficult to categorize, at either end of the spectrum the categories are fairly clear. At one end, such things as police and fire protection have long been recognized as true governmental functions, those that implicate the notion of the “government as sovereign.” At the other end, however, are public utilities such as power generation, and, of particular significance to this claim, municipal water districts.¹³⁴

DWR argues that “California law thus draws a distinction between the many utilitarian services that could as easily be (and often are) undertaken by the private sector, and those that implicate the unique authority vested in the state and its political subdivisions.” DWR continues: “Maintaining a police force, for instance, is easily understood as something fundamental to the government *as government*.” “On the other hand,” DWR reasons, “there is nothing intrinsically governmental about a government entity operating a utility and providing services such as electricity, natural gas, sewer, garbage collection, or water delivery.”¹³⁵

DWR thus “urges the Commission to give full consideration to the fact that the Water Conservation Act is a law of general application that applies to private as well as public water

¹³⁰ Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [citing *McDonald v. Conniff* (1893) 99 Cal.386, 391].

¹³¹ Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

¹³² Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing Exhibit E, Claimant Rebuttal Comments, page 4].

¹³³ Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 50].

¹³⁴ Exhibit U, DWR Comments on Draft Proposed Decision, page 5 [citing *Chappelle v. City of Concord* (1956) 144 Cal.App.2d 822, 825; *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Davoust v. City of Alameda* (1906) 149 Cal. 69, 72; *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 593; *Nourse v. City of Los Angeles* (1914) 25 Cal.App. 384, 385; *Mann Water & Power Co. v. Town of Sausalito* (1920) 49 Cal.App. 78, 79; *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 58; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

¹³⁵ Exhibit U, DWR Comments on Draft Proposed Decision, page 6.

suppliers alike.” And, DWR reiterates: “contrary to Claimants’ suggestion, water delivery, while clearly an important service, is not a classic “governmental function” in the constitutional sense.”¹³⁶

C. Interested Person Positions:¹³⁷

California Special Districts Association

CSDA asserts that “the Proposed Decision fails to appropriately analyze the provisions of Article XIII B Section 6...as amended by Proposition 1A in 2004...”¹³⁸ CSDA argues that the draft proposed decision “rather analyzes the original language of Article XIII B Section 6 adopted as Proposition 4 in 1978, before the adoption of Proposition 218 adding articles XIII C and XIII D to the Constitution and before the adoption of Proposition 1A amending Article XIII B Section 6.”¹³⁹

CSDA argues that the plain language of article XIII B, section 6, as amended by Proposition 1A, “indicates that the mandate provisions are applicable to all cities, counties, cities and counties, and special districts without restriction.”¹⁴⁰ CSDA further asserts that “[t]he plain language also mandates the state to appropriate the ‘full payment amount’ of costs incurred by local government in complying with state mandated programs, without any qualification as to the types of revenues utilized by local governments in paying the costs of such compliance.”¹⁴¹ CSDA reasons that “there are no words of limitation indicating that suspension of mandates is only applicable to those local government agencies which receive proceeds of taxes and expend those proceeds of taxes in complying with state mandated programs.” Therefore, absent “such limiting language, the holding of the Proposed Decision which limits eligibility for claiming reimbursement...to those local agencies receiving proceeds of taxes is contradicted by the mandate provisions of Proposition 1A, and is therefore incorrect as a matter of law.”¹⁴²

CSDA also argues that the voters’ intent and understanding in adopting Proposition 1A is controlling, and can be determined by examining the LAO analysis in the ballot pamphlet.¹⁴³ CSDA argues that “[t]he LAO analysis of Proposition 1A in the ballot pamphlet fails to mention any restriction or limitation on state mandates to be reimbursed or suspended, and such analysis is totally silent as to any requirement that reimbursable mandates be limited to those mandates imposed on local governments which receive and expend proceeds of taxes...” In fact, CSDA argues, the LAO analysis indicates that Proposition 1A “expand(s) the circumstances under

¹³⁶ Exhibit U, DWR Comments on Draft Proposed Decision, page 7.

¹³⁷ “Interested person” is defined in the Commission’s regulations to mean “any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission.” (Cal. Code Regs., tit. 2, § 1181.2(j).)

¹³⁸ Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

¹³⁹ Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

¹⁴⁰ Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

¹⁴¹ Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

¹⁴² Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

¹⁴³ Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

which the state is responsible for reimbursing cities, counties and special districts for complying with state mandated programs by including all programs for which the state even had partial financial responsibility before such transfer.”¹⁴⁴ CSDA maintains that “[t]herefore the voters who approved Proposition 1A by 82% of the popular vote had no understanding of this limitation on reimbursement of state mandates to local governments which is the basic holding of the Proposed Decision.”¹⁴⁵ CSDA relies on the language of the ballot pamphlet, which states: “if the state does not fund a mandate within any year, the state must eliminate local government’s duty to implement it for that same time period.”¹⁴⁶ CSDA concludes that “[t]he plain words of Proposition 1A support this voter intent to require the state to fully reimburse the costs incurred by all cities, counties, cities and counties and special districts in implementing any state program in which the complete or partial financial responsibility for that program has been transferred from the state to local government, not just those cities, counties, cities and counties, and special districts which receive proceeds of taxes.”¹⁴⁷

In addition, CSDA argues that the Commission’s analysis must read together and harmonize articles XIII A, XIII B, XIII C, and XIII D.¹⁴⁸ Specifically, CSDA argues that pursuant to article XIII C, added by Proposition 218, property-related fees are subject to “majority protest procedures” and “may not be expended for general governmental services... which are available to the public at large in substantially the same manner as they are to property owners...”¹⁴⁹ And, revenues from property-related fees “may not be used for any purpose other than that for which the fee was imposed;” and “may not exceed the costs required to provide the property related service.”¹⁵⁰ In addition, CSDA asserts that the amount of a property-related fee must not exceed the proportional cost of providing the service to each individual parcel subject to the fee.¹⁵¹ CSDA also notes that “Article XIII D includes similar provisions restricting the ability of local governments to raise and expend assessment revenue.”¹⁵² CSDA argues that “[a]nalyzed together, all of these restrictions on the raising and expenditure of property related fees and charges by local government agencies specified in Articles XIII C and D of the Constitution severely limit the ability of local government agencies to utilize revenue for property related fees and charges to fund the costs of state mandated programs.”¹⁵³ CSDA goes on to argue that “[t]hose restrictions are more onerous and stringent than the restrictions imposed on local government agencies in expending proceeds of taxes by virtue of the appropriations limit in

¹⁴⁴ Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

¹⁴⁵ Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

¹⁴⁶ Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

¹⁴⁷ Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

¹⁴⁸ Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

¹⁴⁹ Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

¹⁵⁰ Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

¹⁵¹ Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

¹⁵² Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

¹⁵³ Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

Article XIII B.”¹⁵⁴ CSDA concludes that “[t]he Proposed Decision should be modified to recognize these restrictions imposed by Articles XIII C and D.”¹⁵⁵

Environmental Law Foundation Position

ELF states, in its comments, that it agrees with the draft proposed decision, however, “[t]o aid the Commission in developing its final decision, we would like to present an additional ground upon which the Commission could rely in denying the test claim...”¹⁵⁶ ELF asserts that “the Commission should find that charges for irrigation water are not ‘property-related fees’ for the purposes of Article XIII D of the California Constitution.”¹⁵⁷ Specifically, ELF agrees that the test claim statutes are exempt from the voter-approval requirements of article XIII D, section 6(c);¹⁵⁸ however, ELF also argues that “charges for irrigation water are not ‘property-related fees’ at all.” ELF reasons: “As a result, raising them does not trigger the substantive or procedural requirements contained in Article XIII D, and the claimant districts may increase them free of any constitutional obstacle.”¹⁵⁹

ELF continues: “Article XIII D, § 3 restricts local governments’ ability to levy a new ‘assessment, fee, or charge’ without complying with the substantive and procedural requirements of section 4 (assessments) and section 6 (property-related fees).” However, ELF asserts that “Section 2 of Article XIII D makes Proposition 218’s relatively limited reach abundantly clear.”¹⁶⁰ ELF notes that section 2 defines a fee or charge as “any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.”¹⁶¹ ELF therefore reasons that “[f]ees that are not ‘imposed upon a parcel’ or that are not imposed upon a ‘person as an incident of property ownership’ or that are not a ‘user fee or charge for a property related service’ are not subject to Article XIII D.”¹⁶² ELF notes that in *Apartment Association of Los Angeles County v. City of Los Angeles*¹⁶³ the court held that an inspection fee imposed upon landlords was not imposed upon them as property owners, but as business owners and, therefore the fee was not subject to article XIII D.¹⁶⁴ The court, ELF

¹⁵⁴ Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

¹⁵⁵ Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

¹⁵⁶ Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

¹⁵⁷ Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

¹⁵⁸ Exhibit T, ELF Comments on Draft Proposed Decision, page 3 [citing Exhibit Q, Draft Proposed Decision, page 80].

¹⁵⁹ Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

¹⁶⁰ Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

¹⁶¹ California Constitution, article XIII D, section 2; Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

¹⁶² Exhibit T, ELF Comments on Draft Proposed Decision, pages 3-4.

¹⁶³ (2001) 24 Cal.4th 830.

¹⁶⁴ Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

explains, found that this type of fee was “not ‘property related’ because it was dependent on the property’s use – it was not imposed on the property simply as an incident of ownership.”¹⁶⁵

ELF goes on to note that “no case has squarely addressed the issue...” but the courts have recognized that not all water service charges are necessarily subject to article XIII D. In *Pajaro Valley Water Management Agency v. Amrhein*,¹⁶⁶ the court held that a groundwater augmentation charge was a property-related fee, but “it rested that conclusion on the fact that the majority of users were residential users, not large-scale irrigators.”¹⁶⁷ And, ELF notes, other cases have found that domestic water use is “necessary for ‘normal ownership and use of property.’”¹⁶⁸ ELF concludes that these cases, and others, “present no obstacle to the conclusion that irrigation water is not a property-related service.”¹⁶⁹ ELF concludes that fees for irrigation water are not “property-related” but a business-related fee, and that therefore the Commission should deny this test claim.¹⁷⁰

Northern California Water Association Position

In late comments on the draft proposed decision, NCWA seeks to “highlight and emphasize how onerous and expensive these new state mandates are in the Sacramento Valley.”¹⁷¹ NCWA argues that “[t]hese statewide benefits, achieved through implementation of incredibly expensive mandates, ought to be funded by the state and not borne exclusively by the impacted local agencies’ landowners.”¹⁷² NCWA continues: “The draft proposed decision, in an effort to circumvent the clear requirements to reimburse for these types of state mandates, has attempted to avoid reimbursement by exerting exclusions that are not appropriate for the facts before the Commission.”¹⁷³ NCWA denies that any “exemptions” apply to the test claim statutes, and “urge[s] the Commission to modify the draft proposed decision to reimburse these and other similarly affected water suppliers.”¹⁷⁴

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

¹⁶⁵ Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

¹⁶⁶ (2007) 150 Cal.App.4th 1364.

¹⁶⁷ Exhibit T, ELF Comments on Draft Proposed Decision, pages 4-5.

¹⁶⁸ Exhibit T, ELF Comments on Draft Proposed Decision, page 5 [citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427; *Bighorn Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205].

¹⁶⁹ Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

¹⁷⁰ Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

¹⁷¹ Exhibit V, NCWA Comments on Draft Proposed Decision, page 1.

¹⁷² Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

¹⁷³ Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

¹⁷⁴ Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:

- (1) Legislative mandates requested by the local agency affected.
- (2) Legislation defining a new crime or changing an existing definition of a crime.
- (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”¹⁷⁵ Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”¹⁷⁶

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.¹⁷⁷
2. The mandated activity either:
 - a. Carries out the governmental function of providing a service to the public; or
 - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.¹⁷⁸
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.¹⁷⁹
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not

¹⁷⁵ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

¹⁷⁶ *County of Los Angeles v. State of California (County of Los Angeles I)* (1987) 43 Cal.3d 46, 56.

¹⁷⁷ *San Diego Unified School Dist. v. Commission on State Mandates (San Diego Unified School Dist.)* (2004) 33 Cal.4th 859, 874.

¹⁷⁸ *Id.* at 874-875 (reaffirming the test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56).

¹⁷⁹ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

reimbursable if an exception identified in Government Code section 17556 applies to the activity.¹⁸⁰

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.¹⁸¹ The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.¹⁸² In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹⁸³

The parties raise the following issues in their comments:

- The test claim statute and executive order do not impose a new program or higher level of service that is subject to article XIII B, section 6 because the Water Conservation Law and implementing regulations apply to both public and private water suppliers alike, and do not impose requirements uniquely upon local government.
- The test claim statute and executive order do not impose a new program or higher level of service because the provision of water and other utilities is an activity that could be, and often is, undertaken by private enterprise, and is therefore not a quintessentially governmental service in the manner that police and fire protection are generally accepted to be.
- The test claim does not result in costs mandated by the state for agricultural water suppliers because fees or charges for the provision of irrigation water are not “property-related” fees or charges subject to the limitations of articles XIII C and XIII D.

As described below, the Commission denies this claim on the grounds that most of the code sections and regulations pled do not impose new mandated activities, and all affected claimants have sufficient fee authority as a matter of law to cover the costs of any new requirements. Therefore, this decision does not make findings on the additional potential grounds for denial raised in comments on the draft proposed decision summarized above.

A. South Feather Water and Power Agency, Paradise Irrigation District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District are Subject to the Revenue Limitations of Article XIII B, and are Therefore Eligible for Reimbursement Pursuant to Article XIII B, Section 6.

1. To be eligible for reimbursement, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B.

¹⁸⁰ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

¹⁸¹ *County of San Diego, supra*, 15 Cal.4th 68, 109.

¹⁸² *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.

¹⁸³ *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. “Articles XIII A and XIII B work in tandem, together restricting California governments’ power both to levy and to spend taxes for public purposes.”¹⁸⁴

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that “the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property,” and that the one percent (1%) tax was to be collected by counties and “apportioned according to law to the districts within the counties...”¹⁸⁵ In addition to limiting the property tax, section 4 also restricts a local government’s ability to impose special taxes by requiring a two-thirds approval by voters.¹⁸⁶

Article XIII B was adopted by the voters as Proposition 4 less than 18 months after the addition of article XIII A to the state Constitution, and was billed as “the next logical step to Proposition 13.”¹⁸⁷ While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, “the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the ‘proceeds of taxes.’”¹⁸⁸

Article XIII B established an “appropriations limit,” or spending limit for each “entity of local government” beginning in fiscal year 1980-1981.¹⁸⁹ Specifically, the appropriations limit provides as follows:

The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.¹⁹⁰

No “appropriations subject to limitation” may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.¹⁹¹ Article XIII B does not limit the ability to expend government funds collected from *all sources*; the appropriations limit is based on “appropriations subject to limitation,” which means, pursuant to article XIII B, section 8, “any authorization to

¹⁸⁴ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 (*County of Fresno*).

¹⁸⁵ California Constitution, article XIII A, section 1 (effective June 7, 1978).

¹⁸⁶ California Constitution, article XIII A, section 4 (effective June 7, 1978).

¹⁸⁷ *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 (*County of Placer*).

¹⁸⁸ *Ibid.*

¹⁸⁹ California Constitution, article XIII B, section 8(h) (added, Nov. 7, 1979).

¹⁹⁰ California Constitution, article XIII B, section 1 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

¹⁹¹ California Constitution, article XIII B, section 2 (added, Nov. 7, 1979).

expend during a fiscal year the *proceeds of taxes* levied by or for that entity.”¹⁹² Appropriations subject to limitation do not include “local agency loan funds or indebtedness funds”; “investment (or authorizations to invest) funds...of an entity of local government in accounts at banks...or in liquid securities”;¹⁹³ “[a]ppropriations for debt service”; “[a]ppropriations required to comply with mandates of the courts or the federal government”; and “[a]ppropriations of any special district which existed on January 1, 1978 and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 [and one half] cents per \$100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes.”¹⁹⁴

Proposition 4 also added article XIII B, section 6 to require the state to reimburse local governments for any additional expenditures that might be mandated by the state, and which would rely solely on revenues subject to the appropriations limit. The California Supreme Court, in *County of Fresno v. State of California*,¹⁹⁵ explained:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.¹⁹⁶

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Bell Community Redevelopment Agency v. Woolsey*, the Second District Court of Appeal concluded that a redevelopment agency’s power to issue bonds, and to repay those bonds with its tax increment, was not subject to the spending limit of article XIII B. The court reasoned that to construe tax increment payments as appropriations subject to limitation “would be directly contrary to the mandate of section 7,” which provides that “[n]othing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with

¹⁹² California Constitution, article XIII B, section 8 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990) [emphasis added].

¹⁹³ California Constitution, article XIII B, section 8.

¹⁹⁴ California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

¹⁹⁵ *County of Fresno, supra*, (1991) 53 Cal.3d 482.

¹⁹⁶ *Id.*, at p. 487. Emphasis in original.

respect to existing or future bonded indebtedness.”¹⁹⁷ In addition, the court found that article XVI, section 16, addressing the funding of redevelopment agencies, was inconsistent with the limitations of article XIII B:

Article XVI, section 16, provides that tax increment revenues “may be irrevocably pledged” to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit [*sic*], it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds.¹⁹⁸

The court therefore concluded that redevelopment agencies could not reasonably be subject to article XIII B, and therefore upheld Health and Safety Code section 33678, and ordered that the writ issue to compel Woolsey to publish the notice.

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,¹⁹⁹ the court held that redevelopment agencies were not eligible to claim reimbursement because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B.

Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any “proceeds of taxes.” Nor do they raise, through tax increment financing, “general revenues for the local entity.” The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...

For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6... [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies’ collection of tax revenues.²⁰⁰

¹⁹⁷ (1985) 169 Cal.App.3d 24, at p. 31 [quoting article XIII B, section 7].

¹⁹⁸ *Id.*, at p. 31.

¹⁹⁹ (1997) 55 Cal.App.4th 976.

²⁰⁰ *Redevelopment Agency of San Marcos, supra*, 55 Cal.App.4th at pp. 986-987 [internal citations omitted].

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates*, affirmed the reasoning of the *San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.²⁰¹

Therefore, pursuant to the plain language of article XIII B, section 9 and the decisions in *County of Fresno, supra*, *Redevelopment Agency of San Marcos, supra*, and *City of El Monte, supra*, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

Nevertheless, claimants argue that *County of Fresno* and the redevelopment agency cases do not apply in this case. Specifically, claimants argue that *County of Fresno, supra*, predates Proposition 218, which added articles XIII C and XIII D to the California Constitution, and is factually distinguishable from this test claim because the test claim statute at issue in *County of Fresno* specifically authorized user fees to pay for the mandated activities. With respect to the redevelopment cases (*Bell Community Redevelopment Agency, Redevelopment Agency of San Marcos, and City of El Monte*), the claimants argue that the courts' findings rely on Health and Safety Code section 33678, which specifically excepts the revenues of redevelopment agencies from the scope of revenue-limited appropriations under article XIII B.²⁰² In addition, the claimants argue that the above reasoning "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218..." and "would create a class of local agencies that are per se ineligible for reimbursement under this test claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."²⁰³ In addition, both the claimants and CSDA suggest that the Commission broaden the scope of reimbursement eligibility under article XIII B, section 6, beyond that articulated by the courts, and beyond the plain language of articles XIII A and XIII B.²⁰⁴ The claimants and CSDA urge the Commission to consider the restrictions placed on special districts' authority to impose assessments, fees, or charges by articles XIII C and XIII D to be part of the "increasingly limited revenues sources" that subvention under section 6 was intended to protect. The claimants and CSDA would have the Commission broadly interpret and extend the subvention requirement and treat fee authority subject to proposition 218 as proceeds of taxes, "to advance the goal of 'preclud[ing] the state from shifting financial responsibility for carrying out governmental functions onto local entities that [are] ill equipped to handle the task."²⁰⁵

²⁰¹ (2000) 83 Cal.App.4th 266, 281-282 (*El Monte*).

²⁰² Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18.

²⁰³ Exhibit R, Claimant Comments on Draft Proposed Decision, pages 14-15.

²⁰⁴ See Exhibit R, Claimant Comments on Draft Proposed Decision, page 21; Exhibit S, CSDA Comments on Draft Proposed Decision, pages 10-12 [Arguing that the restrictions of articles XIII C and XIII D are more onerous than the revenue limits of article XIII B, and the Commission should "recognize these restrictions..." and "Articles XIII A, B, C, and D should be read together and harmonized..."].

²⁰⁵ Exhibit R, Claimant Comments on Draft Proposed Decision, page 21 [quoting *County of Fresno, supra* 53 Cal.3d, at p. 487.].

The claimant's comments do not alter the above analysis. The factual distinction that claimants allege between this test claim and *County of Fresno* is not dispositive.²⁰⁶ Specific fee authority provided by the test claim statute is not necessary: so long as a local government's statutory fee authority can be legally applied to alleged activities mandated by the test claim statute, there are no *costs mandated by the state* within the meaning of Government Code section 17514 and article XIII B, section 6, to the extent of that fee authority.²⁰⁷ If the local entity is not compelled to rely on *appropriations subject to limitation* to comply with the alleged mandate, no reimbursement is required.²⁰⁸

The claimant's comments addressing the redevelopment cases are similarly unpersuasive. Those cases are discussed above not as analogues for the types of special districts represented in this test claim, but only to demonstrate that *not all local government entities* are subject to articles XIII A and XIII B, and that an agency that is not bound by article XIII B cannot assert an entitlement to reimbursement under section 6.²⁰⁹

Moreover, enterprise districts, and indeed any local government entity funded exclusively through user fees, charges, or assessments, *are* per se ineligible for mandate reimbursement. This is so because only a mandate to expend revenues that are subject to the appropriations limit, as defined and expounded upon by the courts,²¹⁰ can entitle a local government entity to mandate reimbursement. In other words, a local agency that is funded solely by user fees or charges, (or tax increment revenues, as discussed above), or appropriations for debt service, or any combination of revenues "other than the proceeds of taxes" is an agency that is not subject to the appropriations limit, and therefore not entitled to subvention.²¹¹

This interpretation is supported by decades of mandates precedent and is consistent with the purpose of article XIII B. As discussed above, "Section 6 was included in article XIII B in recognition that article XIII A...severely restricted the *taxing* powers of local governments."²¹² Article XIII B "was not intended to reach beyond taxation..." and "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue..."²¹³ The issue, then, is

²⁰⁶ Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18. *County of Fresno, supra*, 53 Cal.3d at p. 485.

²⁰⁷ See also, *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 812 ["Claimants can choose not to required these fees, but not at the state's expense."]

²⁰⁸ See *Redevelopment Agency of San Marcos, supra*, 55 Cal.App.4th at p. 987 ["No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes."].

²⁰⁹ *City of El Monte, supra*, (2000) 83 Cal.App.4th 266, 281-282 [citing *Redevelopment Agency of San Marcos, supra*, (1997) 55 Cal.App.4th 976].

²¹⁰ See *Placer v. Corin* (1980) 113 Cal.App.3d 443; *Bell Community Redevelopment Agency, supra* (1985) 169 Cal.App.3d 24; *County of Fresno, supra* (1991) 53 Cal.3d 482; *Redevelopment Agency of San Marcos, supra*, (1997) 55 Cal.App.4th 976.

²¹¹ California Constitution, article XIII B, section 9 (Adopted Nov. 6, 1979; Amended June 5, 1990).

²¹² See *County of Fresno, supra*, 53 Cal.3d at p. 487 [emphasis added].

²¹³ *Ibid.*

not *how many* different sources of revenue a local entity has at its disposal, as suggested by claimants;²¹⁴ it is whether and to what extent those sources of revenue (and the appropriations to be made) are *limited* by articles XIII A and XIII B. Based on the foregoing, nothing in claimants' comments alters the above analysis.

The Commission also disagrees with the interpretation offered by CSDA. CSDA argues in its comments that Proposition 1A, adopted in 2004, made changes to article XIII B, section 6, which must be considered by the Commission, and that the voters' intent and understanding when adopting Proposition 1A should weigh heavily on the Commission's interpretation of the amended text.²¹⁵ However, the amendments made by Proposition 1A require the Legislature to either pay or suspend a mandate for local agencies, and expand the definition of a new program or higher level of service. The plain language of Proposition 1A does not address which entities are eligible to claim reimbursement, and does not require reimbursement for all special districts, including those that do not receive property tax revenue and are not subject to the appropriations limitation of article XIII B.²¹⁶ CSDA's comments do not alter the above analysis.

Based on the foregoing, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

2. Biggs-West Gridley Water District and Richvale Irrigation District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, Oakdale Irrigation District and Glenn-Colusa Irrigation District are subject to the taxing and spending limitations, have been substituted in as claimants for both of the consolidated test claims, and are eligible for reimbursement under article XIII B, section 6 of the California Constitution.

10-TC-12 was originally filed by four co-claimants: South Feather, Paradise, Biggs, and Richvale.²¹⁷ 12-TC-01 was filed by Richvale and Biggs only,²¹⁸ and the two test claims were consolidated for analysis and hearing and renamed *Water Conservation*. Based on the analysis herein, the Commission finds that Richvale and Biggs are ineligible to claim reimbursement under article XIII B, section 6, and test claim 12-TC-01 would have to be dismissed for want of an eligible claimant.²¹⁹ However, Oakdale and Glenn-Colusa have requested to be substituted in on both test claims in the place of the ineligible claimants.²²⁰ The analysis below will therefore address the eligibility of each of the six co-claimants, and will show that South Feather, Paradise,

²¹⁴ Exhibit R, Claimant Comments on Draft Proposed Decision, pages 20-21.

²¹⁵ See, e.g., Exhibit S, CSDA Comments on Draft Proposed Decision, page 7.

²¹⁶ See California Constitution, article XIII B, section 6 (b-c).

²¹⁷ Exhibit A, Test Claim 10-TC-12.

²¹⁸ Exhibit B, Test Claim 12-TC-01.

²¹⁹ See Exhibit K, Notice of Pending Dismissal.

²²⁰ Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

Oakdale, and Glenn-Colusa are all eligible to claim reimbursement under article XIII B, section 6, and therefore the Commission maintains jurisdiction over both of the consolidated test claims.

a. *Biggs-West Gridley Water District and Richvale Irrigation District are not eligible to claim reimbursement under article XIII B, section 6.*

The Districts have acknowledged that “Richvale and Biggs do not receive property tax revenue.”²²¹ With respect to Richvale, that statement is consistent with the original test claim filing, in which Richvale stated that it “does not receive an annual share of property tax revenue.”²²² However, Biggs had earlier stated in a declaration by Karen Peters, the District’s Executive Administrator, that “Biggs receives an annual share of property tax revenue,” and for “Fiscal Year 2011 the amount of property tax revenue is expected to be approximately \$64,000.”²²³ Biggs has since determined that the Peters declaration was in error, and a more recent declaration from Eugene Massa, the District’s General Manager, states that “[t]hat revenue estimate actually reflects Biggs’ *assessment*, equating to \$2 per acre within Biggs’ boundaries.” Mr. Massa goes on to state that “Biggs does not currently receive any share of ad valorem *property tax* revenue.”^{224,225}

Even though Richvale and Biggs acknowledge that they receive no property tax revenue, they argue that they and “other similarly situated public agencies should not be deemed ineligible for subvention due to a historical quirk that resulted in those agencies not receiving a share of ad valorem property taxes.”²²⁶ The “historical quirk” to which Richvale and Biggs refer, it is assumed, is the fact that Richvale and Biggs either did not exist or did not share in ad valorem property tax revenue as of the 1977-78 fiscal year, which would render at least some portion of

²²¹ Exhibit I, Claimant Response to Request for Additional Information, page 1.

²²² Exhibit A, South Feather Water and Power Test Claim, page 22.

²²³ Exhibit A, 10-TC-12, page 30.

²²⁴ Exhibit I, Claimant Response to Request for Additional Information, page 393 [emphasis added].

²²⁵ See also Exhibit X, Special Districts Annual Report 2010-2011, pages 184; 389; 1051 [The Special Districts Annual Report for 2010-2011 is consistent with Richvale’s statement that it does not receive property tax revenue. Table 8 indicates no property tax receipts, and Table 1 does not indicate an appropriations limit. Biggs did not submit the necessary information to the SCO, and therefore does not appear in Tables 1 or 8 of the 2010-2011 Special Districts Annual Report. Based on that report, and the admissions of the Districts, a notice of dismissal was issued on November 12, 2013 for test claim 12-TC-01, for which Richvale and Biggs were the only named claimants. In response to the Notice of Pending Dismissal, the Districts submitted an Appeal of Dismissal, in which they argue that Proposition 218 undermines a local agency’s fee authority, and that the Districts are eligible for reimbursement “for the reasons already explained in the Districts’ ‘Claimants’ Response to Request for Additional Information 10-TC-12 and 12-TC-01.’” (Exhibit K, Notice of Pending Dismissal; Exhibit L, Appeal of Executive Director’s Decision)].

²²⁶ Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

their revenues subject to the appropriations limit, in accordance with article XIII B, section 9.²²⁷ They argue that all public agencies are ill-equipped to cover the costs of new mandates, whether they are subject to the tax and spend limits of articles XIII A and XIII B, or the fee and assessment restrictions of articles XIII C and XIII D.²²⁸ In addition, Richvale and Biggs assert that to the extent they do have authority to raise revenues other than taxes, any increased fees or assessments necessary to cover the costs of the required activities would, by definition, be classified as proceeds of taxes under article XIII B, section 8.²²⁹

The Districts' reasoning is both circular and fundamentally unsound. Article XIII B, section 8 provides that "proceeds of taxes" includes "all tax revenues and the proceeds to an entity of government from (1) regulatory licenses, user charges, and user fees *to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service*, and (2) the investment of tax revenues."²³⁰ The districts argue, therefore, that "proceeds of taxes" includes not only revenues directly derived from taxes, "but also revenues exceeding the costs to fund the services provided by the agency." The Districts argue that Richvale and Biggs are unable, under Proposition 218, to impose new fees as a matter of law, and must reallocate existing fees, which constitute "proceeds of taxes" under article XIII B, section 8. But Proposition 218 added article XIII D to expressly provide that fees or charges "*shall not be extended, imposed, or increased*" if revenues derived from the fee or charge exceed the funds needed to provide the property-related service; and "shall not be used for any purpose other than that for which the fee or charge was imposed."²³¹ Therefore, Proposition 218 imposes an absolute bar to raising fees beyond those necessary to provide the property-related service, or "reallocating" fees for a purpose other than that for which the fee or charge was imposed.

Moreover, Richvale and Biggs' reasoning that such fees *would automatically and by definition* constitute proceeds of taxes under article XIII B, section 8, rests on the initial presumption that such fees or charges would "exceed" those necessary to provide the service. In other words, the Districts presume that the costs of the mandate are unrelated to, or exceed, the costs of providing water service to the districts' users.²³² On the contrary, any fees or charges, whether *new or existing*, imposed by Richvale and Biggs are imposed for the purpose of providing irrigation water. The alleged mandated activities imposed upon irrigation districts by the test claim statute and regulations are required for those districts to *continue* providing irrigation water. Therefore, utilizing revenues from fees or charges to comply with the alleged new requirements is not

²²⁷ Section 9 states that appropriations subject to limitation do not include: "Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 1/2 cents per \$100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."

²²⁸ Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

²²⁹ Exhibit I, Claimant Response to Request for Additional Information, page 3.

²³⁰ Exhibit I, Claimant Response to Request for Additional Information, page 3 [citing California Constitution, article XIII B, section 8 (emphasis added)].

²³¹ Article XIII D, section 6(b) (added November 5, 1996, by Proposition 218).

²³² Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

“divert[ing] existing revenues from their authorized purposes...”²³³ Rather, the increased or reallocated fees are merely being used to ensure that claimants can continue to provide water service consistently with all applicable legal requirements. Claimants’ assertion that an increase or reallocation of fees alters the legal significance of such fees pursuant to article XIII B, section 8 is not supported by the law or the record.

Simply put, Richvale and Biggs do not impose or collect taxes²³⁴ and the Commission cannot say, as a matter of law, that fees increased or imposed to comply with the alleged mandate would constitute proceeds of taxes, within the meaning of article XIII B, section 8. Unless or until a court determines that article XIII B, section 8 can be applied in this manner, the Commission must presume that only those local government entities that collect and expend proceeds of taxes, within the meaning of article XIII A, are subject to the spending limits of article XIII B, including section 6.

Based on the foregoing, the Commission finds that Richvale Irrigation District and Biggs-West Gridley Water District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible to claim reimbursement under article XIII B, section 6.

b. South Feather Water and Power Agency and Paradise Irrigation District are eligible to claim reimbursement under article XIII B, section 6.

Claimants state that “South Feather and Paradise receive property tax revenue,” and “are in the process of establishing their appropriations limits for their current fiscal years.”²³⁵

Declarations attached to claimants’ response state that both South Feather and Paradise are in the process of determining and adopting an appropriations limit. Kevin Phillips, Finance Manager of Paradise, stated that during his tenure, “I have not calculated or otherwise established Paradise’s appropriation limit as set forth in Proposition 4.” Mr. Phillips further states that “[a]t the request of Paradise’s legal counsel, I have begun working to establish Paradise’s appropriation limit and intend...to ask Paradise’s Board of Directors to adopt a resolution...for its current fiscal year.”²³⁶ Similarly, Steve Wong, Finance Division Manager of South Feather, states that he has not “calculated or otherwise established South Feather’s appropriation limit” during his employment with South Feather. Mr. Wong further states that “[a]t the request of South Feather’s legal counsel, I have begun working to establish South Feather’s appropriation limit and intend, after the requisite public review period, to ask South Feather’s Board of Directors to adopt a resolution establishing South Feather’s appropriation limit for its current fiscal year.”²³⁷

²³³ See Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

²³⁴ Note that special districts generally have statutory authorization to impose special taxes, but only with two-thirds voter approval (See article XIII A, section 4). However, there is no evidence in the record indicating that Richvale or Biggs currently collects or expends special taxes.

²³⁵ Exhibit I, Claimant Response to Request for Additional Information, pages 1-2.

²³⁶ See Exhibit I, Claimant Response to Request for Additional Information, page 394.

²³⁷ See Exhibit I, Claimant Response to Request for Additional Information, page 427.

Based on the foregoing, the Commission finds that both South Feather and Paradise are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

3. Oakdale Irrigation District and Glenn-Colusa Irrigation District are eligible to claim reimbursement under article XIII B, section 6 and are thus substituted in as claimants in the consolidated test claims in place of Biggs-West Gridley Water District and Richvale Irrigation District.

Pursuant to the Notice of Pending Dismissal, Oakdale submitted a request to be substituted in as a party on 10-TC-12 and 12-TC-01 on January 13, 2014. Oakdale states that it is subject to the tax and spend limitations of articles XIII A and XIII B, and that it is an agricultural water supplier “subject to the mandates imposed by the Agricultural Water Measurement Regulations...and the Water Conservation Act of 2009.”²³⁸ The declaration of Steve Knell, Oakdale’s General Manager, attached to the Request for Substitution, states that Oakdale “receives an annual share of ad valorem property tax revenue from Stanislaus and San Joaquin counties.” The declaration further states that the District “received \$5,701,730 in property taxes for 2011-2013 and expects to receive approximately \$1.9 million in 2014.”

The Special Districts Annual Reports for 2010-2011 and 2011-2012 do not indicate an appropriations limit for Oakdale in Table 1,²³⁹ but they do indicate that Oakdale received property tax revenue in Table 8 for 2010-2011 and 2011-2012.²⁴⁰

Similarly, Glenn-Colusa submitted a request to be substituted in as a party on both test claims. Glenn-Colusa asserted in its request that it “is subject to the tax and spend limitations of Articles XIII A and XIII B of the California Constitution,” and is an agricultural water supplier, subject to “the mandates imposed by the Water Conservation Act of 2009...and the Agricultural Water Measurement Regulations.”²⁴¹ In declarations attached to the Request for Substitution, Thaddeus Bettner, General Manager of Glenn-Colusa, asserts that the District “received \$520,420 in property taxes in 2013 and expects to receive \$528,300 in 2014.”²⁴²

Table 8 of the Special Districts Annual Report indicates that Glenn-Colusa collected property taxes in 2010-2011 and 2011-2012,²⁴³ but Table 1 does not indicate an appropriations limit for the district.²⁴⁴

²³⁸ Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District, page 2.

²³⁹ Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 159 and 157, respectively.

²⁴⁰ Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 381 and 379, respectively.

²⁴¹ Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, pages 1-2.

²⁴² Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, page 7.

²⁴³ Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 357 and 355, respectively.

²⁴⁴ Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 104 and 101, respectively.

Based on the evidence in the record, including the declarations of the General Managers of Oakdale and Glenn-Colusa, as well as the information reported to the SCO in the Special Districts Annual Reports for fiscal years 2010-2011 and 2011-2012, both the substitute claimants collect some amount of property tax revenue. In turn, because property tax revenue is subject to the appropriations limit, both claimants also expend revenues subject to the appropriations limit, in accordance with article XIII B. A local government entity that is subject to both articles XIII A and XIII B is eligible for subvention under article XIII B, section 6, and is an eligible claimant before the Commission.

The Commission concludes that both Oakdale and Glenn-Colusa are subject to article XIII B as a matter of law, because they have authority to collect and expend property tax revenue.

Based on the foregoing, the Commission finds that Oakdale and Glenn-Colusa are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

B. Some of the Test Claim Statutes and Regulations Impose New Requirements on Urban Retail Water Suppliers.

Test claim 10-TC-12 alleged all of Part 2.55 of Division 6 of the Water Code, which consists of sections 10608 through 10608.64. The following analysis addresses only those sections of Part 2.55 containing mandatory language, and those sections specifically alleged in the test claim narrative. Sections 10608.22, 10608.28, 10608.36, 10608.43, 10608.44, 10608.50, 10608.56, 10608.60, and 10608.64 are not analyzed below, because those sections were not specifically alleged to impose increased costs mandated by the state, and because they do not impose new requirements on local government.

1. Water Code sections 10608, 10608.4(d), 10608.12(a; p), and 10608.16(a), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Water Code section 10608 states the Legislature's findings and declarations, including: "Water is a public resource that the California Constitution protects against waste and unreasonable use..." and "Reduced water use through conservation provides significant energy and environmental benefits, and can help protect water quality, improve streamflows, and reduce greenhouse gas emissions." Subdivision (g), specifically invoked by the claimants,²⁴⁵ states that "[t]he Governor has called for a 20 percent per capita reduction in urban water use statewide by 2020."²⁴⁶ The plain language of this section establishes a goal, but does not, itself, impose any new requirements on local government.

Water Code section 10608.4 as added, states the "intent of the legislature," including, as highlighted by the claimants,²⁴⁷ to "[e]stablish a method or methods for urban retail water suppliers to determine targets for achieving increased water use efficiency by the year 2020, in

²⁴⁵ Exhibit A, Test Claim 10-TC-12, page 3.

²⁴⁶ Water Code section 10608(a; d; g) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁴⁷ Exhibit A, Test Claim 10-TC-12, page 3.

accordance with the Governor's goal of a 20 percent reduction."²⁴⁸ The plain language of this section expresses legislative intent, and does not impose any new activities on local government

Water Code section 10608.16(a), as added, states that "[t]he state shall achieve a 20 percent reduction in urban per capita water use in California on or before December 31, 2020." In addition, section 10608.16(b) provides that the state "shall make incremental progress towards the state target specified in subdivision (a) by reducing urban per capita water use by at least 10 percent on or before December 31, 2015."²⁴⁹ The plain language of this section is directed to the State generally, and does not impose any new mandated activities on local government.

Water Code section 10608.12 provides that "the following definitions govern the construction of this part:" An "urban retail water supplier" is defined as "a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes."²⁵⁰ The claimants allege that the Water Conservation Act imposes unfunded state mandates on urban retail water suppliers, and that South Feather and Paradise "are 'urban retail water suppliers,' as defined."²⁵¹ Likewise, under section 10608.12, an "agricultural water supplier" is defined as "a water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water."²⁵² The claimants allege that this definition "expanded the definition of what constitutes an agricultural water supplier," and thus required a greater number of entities to adopt AWMPs and perform other activities under the Water Code.²⁵³ However, whatever new activities may be required by the test claim statutes, the plain language of amended section 10608.12 does not impose any new requirements on urban retail water suppliers or agricultural water suppliers; section 10608.12 merely prescribes the applicability and scope of the other requirements of the test claim statutes.

Based on the foregoing, the Commission finds that sections 10608, 10608.4, 10608.12, and 10608.16, pled as added, do not impose any new requirements on local government, and are therefore denied.

2. Water Code sections 10608.20(a; b; c; and j), 10608.24, and 10608.40, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) impose new required activities on urban water suppliers.

Prior law required the preparation of an urban water management plan, and required urban water suppliers to update the plan every five years. The test claim statutes add additional information related to conservation goals to that required to be included in a supplier's UWMP, and authorize an extension of time from December 31, 2010 to July 1, 2011 for the adoption of the next UWMP. As added by the test claim statute, section 10608.20 provides, in pertinent part:

²⁴⁸ Water Code section 10608.4 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁴⁹ Water Code section 10608.16(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁰ Water Code section 10608.12(p) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵¹ Exhibit A, 10-TC-12, page 2.

²⁵² Water Code section 10608.12(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵³ Exhibit A, 10-TC-12, page 8.

(a)(1) Each urban retail water supplier shall develop urban water use targets and an interim urban water use target by July 1, 2011. Urban retail water suppliers may elect to determine and report progress toward achieving these targets on an individual or regional basis, as provided in subdivision (a) of Section 10608.28, and may determine the targets on a fiscal year or calendar year basis.

(2) It is the intent of the Legislature that the urban water use targets described in subdivision (a) cumulatively result in a 20-percent reduction from the baseline daily per capita water use by December 31, 2020.

(b) An urban retail water supplier shall adopt one of the following methods for determining its urban water use target pursuant to subdivision (a):

(1) Eighty percent of the urban retail water supplier's baseline per capita daily water use.

(2) The per capita daily water use that is estimated using the sum of the following performance standards:

(A) For indoor residential water use, 55 gallons per capita daily water use as a provisional standard. Upon completion of the department's 2016 report to the Legislature pursuant to Section 10608.42, this standard may be adjusted by the Legislature by statute.

(B) For landscape irrigated through dedicated or residential meters or connections, water efficiency equivalent to the standards of the Model Water Efficient Landscape Ordinance set forth in Chapter 2.7 (commencing with Section 490) of Division 2 of Title 23 of the California Code of Regulations, as in effect the later of the year of the landscape's installation or 1992. An urban retail water supplier using the approach specified in this subparagraph shall use satellite imagery, site visits, or other best available technology to develop an accurate estimate of landscaped areas.

(C) For commercial, industrial, and institutional uses, a 10-percent reduction in water use from the baseline commercial, industrial, and institutional water use by 2020.

(3) Ninety-five percent of the applicable state hydrologic region target, as set forth in the state's draft 20x2020 Water Conservation Plan (dated April 30, 2009). If the service area of an urban water supplier includes more than one hydrologic region, the supplier shall apportion its service area to each region based on population or area.

(4) A method that shall be identified and developed by the department, through a public process, and reported to the Legislature no later than December 31, 2010...²⁵⁴

In addition, section 10608.20(e) provides that an urban retail water supplier "shall include in its urban water management plan due in 2010...the baseline daily per capita water use, urban water

²⁵⁴ Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining estimates, including references to supporting data.”²⁵⁵

And, section 10608.20(j) provides that an urban retail water supplier “shall be granted an extension to July 1, 2011...” to adopt a complying water management plan, and that an urban retail water supplier that adopts an urban water management plan due in 2010 “that does not use the methodologies developed by the department pursuant to subdivision (h) shall amend the plan by July 1, 2011 to comply with this part.”²⁵⁶

Section 10608.40 provides that an urban retail water supplier shall also “report to [DWR] on their progress in meeting their urban water use targets as part of their [UWMPs] submitted pursuant to Section 10631.”²⁵⁷

Section 10608.24 provides that each urban retail water supplier “shall meet its interim urban water use target by December 31, 2015,” and “shall meet its [final] urban water use target by December 31, 2020.”²⁵⁸

As discussed above, prior law required the adoption of an UWMP, which, pursuant to section 10631, included a detailed description and analysis of water supplies within the service area, including reliability of supply in normal, dry, and multiple dry years, and a description and evaluation of water demand management measures currently being implemented and scheduled for implementation.²⁵⁹ Pursuant to existing section 10621, that plan was required to be updated “once every five years...in years ending in five and zero.”²⁶⁰ And, existing section 10631(e) also required identification and quantification of past, current and projected water use over a five-year period including, but not necessarily limited to, all of the following uses:

- (A) Single-family residential.
- (B) Multifamily.
- (C) Commercial.
- (D) Industrial.
- (E) Institutional and governmental.
- (F) Landscape.
- (G) Sales to other agencies.
- (H) Saline water intrusion barriers, groundwater recharge, or conjunctive use, or any combination thereof.

²⁵⁵ Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁶ Water Code section 10608.20(j) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁷ Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁸ Water Code section 10608.24(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁵⁹ Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

²⁶⁰ Water Code section 10621 (Stats. 2007, ch. 64 (AB 1376)).

(I) Agricultural.²⁶¹

However, nothing in prior law required the adoption of urban water use targets, baseline information on a per capita basis (as opposed to on a type of use basis), interim and final water use targets, assessment of present and proposed measures to achieve the targeted reductions, or a report on the supplier's progress toward meeting the reductions.

Based on the foregoing, the Commission finds that Water Code sections 10608.20, 10608.24, and 10608.40, as added by the test claim statute, impose new requirements on urban retail water suppliers, as follows:

- Develop urban water use targets and an interim urban water use targets by July 1, 2011.²⁶²
- Adopt one of the methods specified in section 10608.20(b) for determining an urban water use target.²⁶³
- Include in its urban water management plan due in 2010 the baseline daily per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining those estimates, including references to supporting data.²⁶⁴
- Report to DWR on their progress in meeting urban water use targets as part of their UWMPs.²⁶⁵
- Amend its urban water management plan, by July 1, 2011, to allow use of technical methodologies developed by the department pursuant to subdivisions (b) and (h) of section 10608.20.²⁶⁶
- Meet interim urban water use target by December 31, 2015.²⁶⁷
- Meet final urban water use target by December 31, 2020.²⁶⁸

The activities required to meet the interim and final urban water use targets are intended to vary significantly among local governments based upon differences in climate, population density, levels of per capita water use according to plant water needs, levels of commercial, industrial, and institutional water use, and the amount of hardening that has occurred as a result of prior conservation measures implemented in different regions

²⁶¹ Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

²⁶² Water Code section 10608.20(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶³ Water Code section 10608.20(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁴ Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁵ Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁶ Water Code section 10608.20(i) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁷ Water Code section 10608.24(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁶⁸ Water Code section 10608.24(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

throughout the state. Local variations, therefore, are not expressly stated in the test claim statutes.

3. Water Code section 10608.26, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), requires urban water suppliers to conduct at least one public hearing to allow community input regarding an urban retail water supplier's implementation plan.

Section 10608.26 provides that “[i]n complying with this part,” an urban retail water supplier shall conduct at least one public hearing “to accomplish all of the following:” (1) allow community input regarding the urban retail water supplier’s implementation plan; (2) consider the economic impacts of the urban retail water supplier’s implementation plan; and (3) adopt one of the four methods provided in section 10608.20(b) for determining its urban water use target.²⁶⁹

The claimants assert that “prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts of the implementing the 20% reduction [*sic*], or to adopt a method for determining an urban water use target.”²⁷⁰

Section 10642, added by Statutes 1983, chapter 1009, required a public hearing prior to *adopting an UWMP*, as follows:

Prior to adopting a plan, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to Section 6066 of the Government Code...²⁷¹

However, section 10608.26 requires a public hearing for purposes of allowing public input regarding an implementation plan, considering the economic impacts of an implementation plan, or adopting a method for determining the urban water supplier’s water use targets, as required by section 10608.20(b). DWR, the agency with responsibility for implementing the Water Conservation Act, has interpreted these two requirements as only requiring one hearing.²⁷² As the implementing agency, DWRs interpretation of the Act is entitled to great weight.²⁷³

Based on the foregoing, the Commission finds that section 10608.26 imposes a new and additional requirement on urban retail water suppliers, as follows:

²⁶⁹ Water Code section 10608.26(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁷⁰ Exhibit A, 10-TC-12, page 8 [citing Water Code section 10608.26(a)(1-3)].

²⁷¹ Water Code section 10642 (Stats. 1983, ch. 1009) [citing Government Code section 6066 (Stats. 1959, ch. 954), which provides for publication once per week for two successive weeks in a newspaper of general circulation].

²⁷² Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

²⁷³ *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11.

Include in the public hearing on the adoption of the UWMP an opportunity for community input regarding the urban retail water supplier's implementation plan; consideration of the economic impacts of the implementation plan; and the adoption of a method, pursuant to section 10608.20(b), for determining urban water use targets.²⁷⁴

4. Water Code section 10608.42, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new requirements on local government.

Section 10608.42 provides:

The department shall review the 2015 urban water management plans and report to the Legislature by December 31, 2016, on progress towards achieving a 20-percent reduction in urban water use by December 31, 2020. The report shall include recommendations on changes to water efficiency standards or urban water use targets in order to achieve the 20-percent reduction and to reflect updated efficiency information and technology changes.²⁷⁵

The claimants allege that section 10608.42 requires an UWMP, adopted by an urban retail water supplier, to "describe the urban retail water supplier's progress toward achieving the 20% reduction by 2020."²⁷⁶ However, the plain language of this section is directed to DWR, and does not, itself, impose any new activities or requirements on local government.

Based on the foregoing, the Commission finds that section 10608.42 does not impose any new requirements on local government, and is therefore denied.

5. Water Code sections 10608.56 and 10608.8, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Section 10806.56 provides that "[o]n and after July 1, 2016, an urban retail water supplier is not eligible for a water grant or loan awarded or administered by the state unless the supplier complies with this part."²⁷⁷ The plain language of this section does not impose any new requirements on local government; the section only states the consequence of failing to comply with all other requirements of the Act.

Section 10608.8 provides that "[b]ecause an urban agency is not required to meet its urban water use target until 2020 pursuant to subdivision (b) of Section 10608.24, an urban retail water supplier's failure to meet those targets shall not establish a violation of law for purposes of any state administrative or judicial proceeding prior to January 1, 2021."²⁷⁸ The plain language of

²⁷⁴ Water Code section 10608.26 ((Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)). See also Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

²⁷⁵ Water Code section 10608.42 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁷⁶ Exhibit A, 10-TC-12, page 3.

²⁷⁷ Water Code section 10608.56 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁷⁸ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

this section does not impose any new requirements on local government; rather, the section states that no violation of law shall occur until after the date that urban water use targets are supposed to be met.

The claimants allege that Water Code section 10608.56 imposes reimbursable state-mandated costs, alleging that “[f]ailure to comply with the aforementioned mandates by South Feather and Paradise will result, on and after July 1, 2016, in ineligibility for water grants or loans awarded or administered by the State of California.” In addition, the claimants allege that “a failure to meet the 20% target shall be a violation of law on and after January 1, 2021,” citing Water Code section 10608.8.²⁷⁹ The plain language of sections 10608.8 and 10608.56, as described above, do not impose any new activities or tasks on local government; the provisions that the claimants allege only state the consequences of failing to comply with all other requirements of the Act.

Based on the foregoing, the Commission finds that sections 10806.56 and 10806.8 do not impose any new requirements on local government, and are therefore denied.

C. Some of the Test Claim Statutes and Regulations Impose New Requirements on Non-exempt Agricultural Water Suppliers.

Chapter 4 of Part 2.55 of Division 6 of the Water Code consists of a single code section that addresses water conservation requirements for agricultural water suppliers: section 10608.48. The remaining provisions of the test claim statute addressing agricultural water suppliers were added in Part 2.8 of Division 6 of the Water Code, consisting of sections 10800-10853, and address agricultural water management planning requirements. Sections 10608.8 and 10828 provide for exemptions from the requirements of Part 2.55 and Part 2.8, respectively, under certain circumstances, which are addressed where relevant below.

1. Water Code section 10608.48(a-c), as amended by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), imposes new requirements on some agricultural water suppliers to implement efficient water management practices, including measurement and a pricing structure based in part on quantity of water delivered; and to implement up to fourteen other efficient water management practices, if locally cost effective and technically feasible.

Section 10608.48 provides for the implementation by agricultural water suppliers of specified critical efficient water management practices, including measurement and volume-based pricing; and *additional* efficient water management practices, where locally cost effective and technically feasible, as follows:

- (a) On or before July 31, 2012, an agricultural water supplier shall implement efficient water management practices pursuant to subdivisions (b) and (c).
- (b) Agricultural water suppliers shall implement *all of the following critical efficient management practices*:
 - (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).

²⁷⁹ Exhibit A, 10-TC-12, page 4.

- (2) Adopt a pricing structure for water customers based at least in part on quantity delivered.
- (c) Agricultural water suppliers shall implement *additional efficient management practices*, including, but not limited to, practices to accomplish all of the following, *if the measures are locally cost effective and technically feasible*:
 - (1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.
 - (2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.
 - (3) Facilitate the financing of capital improvements for on-farm irrigation systems.
 - (4) Implement an incentive pricing structure that promotes one or more of the following goals:
 - (A) More efficient water use at the farm level.
 - (B) Conjunctive use of groundwater.
 - (C) Appropriate increase of groundwater recharge.
 - (D) Reduction in problem drainage.
 - (E) Improved management of environmental resources.
 - (F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.
 - (5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.
 - (6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.
 - (7) Construct and operate supplier spill and tailwater recovery systems.
 - (8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.
 - (9) Automate canal control structures.
 - (10) Facilitate or promote customer pump testing and evaluation.
 - (11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.
 - (12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:
 - (A) On-farm irrigation and drainage system evaluations.

- (B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.
 - (C) Surface water, groundwater, and drainage water quantity and quality data.
 - (D) Agricultural water management educational programs and materials for farmers, staff, and the public.
- (13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.
- (14) Evaluate and improve the efficiencies of the supplier's pumps.²⁸⁰

The claimants allege that section 10608.48 requires agricultural water suppliers (Oakdale and Glenn-Colusa) to “measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate.” In addition, they allege, agricultural water suppliers are required to “adopt a pricing structure for water customers based on the quantity of water delivered.” The claimants further allege that “[i]f ‘locally cost effective’ and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices” specified in section 10608.48(c).²⁸¹

The claimants argue that prior to the test claim statute, agricultural water suppliers “were not required to have a pricing structure based, at least in part, on the quantity of water delivered,” and were not required to measure the volume of water delivered if it was not locally cost effective to do so. The claimants assert that “[w]hile subdivision (a) of Water Code section 531.10 was a preexisting obligation, subdivision (b) of that same section gave an exception to the farm-gate measurement requirement if the measurement devices were not locally cost effective.” The claimants conclude that now “[t]he Act requires compliance with subdivision (a) regardless of whether it is locally cost effective.”²⁸² In addition, the claimants assert that prior to the Act, “there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible.”²⁸³

Section 531.10 of the Water Measurement Law, as added by Statutes 2007, chapter 675 provides, in its entirety:

- (a) An agricultural water supplier shall submit an annual report to the department that summarizes aggregated farm-gate delivery data, on a monthly or bimonthly basis, using best professional practices.
- (b) Nothing in this article shall be construed to require the implementation of water measurement programs or practices that are not locally cost effective.

²⁸⁰ Water Code section 10608.48(a-c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)) [emphasis added].

²⁸¹ Exhibit A, Test Claim 10-TC-12, page 4.

²⁸² Exhibit A, 10-TC-12, page 8.

²⁸³ Exhibit A, 10-TC-12, page 8.

(c) It is the intent of the Legislature that the requirements of this section shall complement and not affect the scope of authority granted to the department or the board by provisions of law other than this article.

The plain language of section 531.10 required agricultural water suppliers to submit an annual report to DWR summarizing aggregated data on water delivered to individual agricultural customers using best professional practices, but only if water measurement programs or practices were locally cost effective.²⁸⁴ Therefore, to the extent that water measurement programs or practices *were* locally cost effective, such activities were required to comply with prior law. Section 10608.48(b), in turn, does not impose a *new* requirement to “[m]easure the volume of water delivered to customers with sufficient accuracy to comply with [section 531.10(a),]” if such water measurement activities were already performed. However, section 10608.48(b) also requires an agricultural water supplier, *regardless of local cost-effectiveness*, to “[m]easure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 *and to implement paragraph (2),*” which requires suppliers to implement a pricing structure based at least in part on volume of water delivered. Therefore, section 10608.48(b) imposes a new requirement to the extent that prior law activities were not sufficient to also implement a pricing structure based at least in part on quantity of water delivered.

Moreover, Water Code section 10608.8 provides that “[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement” (QSA), as defined in Statutes 2002, chapter 617, section 1, for as long as the QSA remains in effect.²⁸⁵ The local agency parties to the QSA include the San Diego County Water Authority, Coachella Valley Water District, Imperial Irrigation District, and Metropolitan Water District of Southern California.²⁸⁶ As a result, by the plain language of Water Code section 10608.8 those entities are exempt and are not mandated by the state to comply with the requirements of Part 2.55 of Division 6 of the Water Code, including section 10608.48.

Based on the foregoing, the Commission finds that section 10608.48 imposes new requirements on agricultural water suppliers, except those that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617, section 1, for as long as QSA remains in effect, as follows:

- Measure the volume of water delivered to customers with sufficient accuracy to (1) comply with subdivision (a) of Water Code section 531.10, which previously imposed the requirement, with specified exceptions, for agricultural water suppliers to submit an annual report summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis, using best professional practices; and (2) implement a pricing structure for water customers based at least in part on quantity of water delivered.²⁸⁷

²⁸⁴ Water Code section 531.10 (Stats. 2007, Ch. 675 (AB 1404)).

²⁸⁵ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

²⁸⁶ Exhibit X, Quantification Settlement Agreement, dated October 10, 2003.

²⁸⁷ Water Code section 10608.48(b)(1) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

*This activity is only newly required if measurement of farm-gate delivery data was not previously performed by the agricultural water supplier pursuant to a determination under section 531.10(b) that such measurement programs or practices were not locally cost effective, or if measurement data was not sufficient to implement a pricing structure based at least in part on quantity of water delivered.*²⁸⁸

- Implement a pricing structure for water customers based at least in part on quantity of water delivered.²⁸⁹
- *If the measures are locally cost effective and technically feasible*, implement additional efficient management practices, including, but not limited to, practices to accomplish all of the following:
 - (1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.
 - (2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.
 - (3) Facilitate the financing of capital improvements for on-farm irrigation systems.
 - (4) Implement an incentive pricing structure that promotes one or more of the following goals:
 - (A) More efficient water use at the farm level.
 - (B) Conjunctive use of groundwater.
 - (C) Appropriate increase of groundwater recharge.
 - (D) Reduction in problem drainage.
 - (E) Improved management of environmental resources.
 - (F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.
 - (5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.
 - (6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

²⁸⁸ Water Code section 531.10(a-b) previously required reporting annually to the Department of Water Resources aggregated farm-gate delivery data, summarized on a monthly or bi-monthly basis, unless such measurement programs or practices were not locally cost effective. If an agricultural water supplier had not determined that such practices were not locally cost effective, then the prior law, Section 531.10(a) would have required measurement, and the activity is not therefore new.

²⁸⁹ Water Code section 10608.48(b)(2) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- (7) Construct and operate supplier spill and tailwater recovery systems.
 - (8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.
 - (9) Automate canal control structures.
 - (10) Facilitate or promote customer pump testing and evaluation.
 - (11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.
 - (12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:
 - (A) On-farm irrigation and drainage system evaluations.
 - (B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.
 - (C) Surface water, groundwater, and drainage water quantity and quality data.
 - (D) Agricultural water management educational programs and materials for farmers, staff, and the public.
 - (13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.
 - (14) Evaluate and improve the efficiencies of the supplier's pumps.²⁹⁰
2. Water Code sections 10608.48(d-f) and 10820-10829, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers, as defined pursuant to section 10608.12, to prepare and adopt on or before December 31, 2012, and to update on or before December 31, 2015, and every five years thereafter, an agricultural water management plan, as specified. However, many agricultural water suppliers, including all participants in the Central Valley Project and United States Bureau of Reclamation water contracts, are exempt from the requirement to *prepare and adopt* an agricultural water management plan pursuant to 10826, because they were already required by existing federal law to prepare a water conservation plan, which they may submit to satisfy this requirement.

As noted above, the test claim statute repealed and added Part 2.8 of Division 6 of the Water Code, commencing with section 10800. While a number of the activities alleged in these consolidated test claims were required by the prior provisions of the Water Code that were repealed and replaced by the test claim statute, those provisions were by their own terms no longer operative immediately prior to the effective date of the test claim statute. Former Water Code section 10855, as added by Statutes 1986, chapter 954, provided that “[t]his part shall

²⁹⁰ Water Code section 10608.48(c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

remain operative only until January 1, 1993...” Therefore, the provisions added by the test claim statute, which became effective on February 3, 2010, impose new requirements or activities.²⁹¹

Section 10820, as added, provides that all agricultural water suppliers *shall prepare and adopt* an AWMP on or before December 31, 2012, and shall update that plan on December 31, 2015, and on or before December 31 every five years thereafter.²⁹²

Section 10826, as added, provides that the plan “shall do all of the following:”

(a) Describe the agricultural water supplier and the service area, including all of the following:

- (1) Size of the service area.
- (2) Location of the service area and its water management facilities.
- (3) Terrain and soils.
- (4) Climate.
- (5) Operating rules and regulations.
- (6) Water delivery measurements or calculations.
- (7) Water rate schedules and billing.
- (8) Water shortage allocation policies.

(b) Describe the quantity and quality of water resources of the agricultural water supplier, including all of the following:

- (1) Surface water supply.
- (2) Groundwater supply.
- (3) Other water supplies.
- (4) Source water quality monitoring practices.
- (5) Water uses within the agricultural water supplier’s service area, including all of the following:
 - (A) Agricultural.
 - (B) Environmental.
 - (C) Recreational.
 - (D) Municipal and industrial.
 - (E) Groundwater recharge.
 - (F) Transfers and exchanges.

²⁹¹ Bills introduced in an extraordinary session take effect 91 days after the final adjournment of that extraordinary session. (Cal. Const. Art. IV, Sec. 8(c)(1).) The 7th Extraordinary Session concluded on November 4, 2009. Thus, the effective date of SB X7 7 is February 3, 2010.

²⁹² Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- (G) Other water uses.
- (6) Drainage from the water supplier's service area.
- (7) Water accounting, including all of the following:
 - (A) Quantifying the water supplier's water supplies.
 - (B) Tabulating water uses.
 - (C) Overall water budget.
- (8) Water supply reliability.
- (c) Include an analysis, based on available information, of the effect of climate change on future water supplies.
- (d) Describe previous water management activities.
- (e) Include in the plan the water use efficiency information required pursuant to Section 10608.48.²⁹³

Meanwhile, section 10608.48(d) provides that agricultural water suppliers "shall include in the agricultural water management plans required pursuant to [section 10820] a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report, and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future."²⁹⁴

Furthermore, section 10608.48 provides that if a supplier "determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination."²⁹⁵ And, the section further provides that "[t]he data shall be reported using a standardized form developed pursuant to Section 10608.52."²⁹⁶

In addition, section 10828 provides that:

- (a) Agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, *may submit those water conservation plans to satisfy the requirements of Section 10826, if both of the following apply:*
 - (1) The agricultural water supplier has adopted and submitted the water conservation plan to the United States Bureau of Reclamation within the previous four years.
 - (2) The United States Bureau of Reclamation has accepted the water conservation plan as adequate.

²⁹³ Water Code section 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁴ Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁵ Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁶ *Ibid.*

(b) This part does not require agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, to prepare and adopt water conservation plans according to a schedule that is different from that required by the United States Bureau of Reclamation.²⁹⁷

And, section 10829 provides that an agricultural water supplier may satisfy the requirements “of this part” by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.²⁹⁸

Based on the plain language of section 10828, those local agencies who are CVP or USBR contractors may submit a copy of their water conservation plan already submitted to USBR in satisfaction of the requirements of section 10826 (which provides for the contents of an AWMP). In addition, section 10828(b) provides that CVP or USBR contractors are not required to adhere to the “schedule” for preparing and adopting AWMPs, as provided in section 10820, above. Therefore, the requirements of section 10820, to prepare and adopt an AWMP on or before December 31, 2012, and to update the AWMP on or before December 31, 2015 and every five years thereafter, do not apply to CVP or USBR contractors, who may instead rely on the schedule for updating and readopting their water conservation plans.

Both Glenn-Colusa and Oakdale are contractors with the United States Bureau of Reclamation (USBR) and as a result are required by federal law to prepare water conservation plans. Glenn-Colusa and Oakdale are also CVP contractors, as are dozens of other local agencies.²⁹⁹

As noted above, Water Code section 10608.8 provides that “[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement” (QSA), as defined in Statutes 2002, chapter 617, section 1 for as long as QSA remains in effect.³⁰⁰ Therefore, a supplier that is a party to the QSA is not mandated by the state to include the water use efficiency reporting requirements in the plan pursuant to section 10680.48.

Additionally, section 10608.48(f) provides that an agricultural water supplier “may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to the United States Bureau of Reclamation that meets the requirements described in Section 10828.”³⁰¹ Therefore, the requirements to include in a supplier’s AWMP a report on efficient water management practices and documentation on those practices determined not to be cost effective or technically feasible, pursuant to section 10608.48(d-e), do not apply to CVP or

²⁹⁷ Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁸ Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

²⁹⁹ Exhibit X, Bureau of Reclamation, Mid-Pacific Region, Central Valley Project (CVP) Water Contractors, dated March 4, 2014.

³⁰⁰ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁰¹ Water Code section 10608.48(e; f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

USBR contractors that prepare and submit water conservation plans to USBR.³⁰² The *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, issued by DWR, “encourages” suppliers to file certain “documentation as an attachment with the USBR-accepted water management/conservation plan.”³⁰³ However, the plain language of section 10608.48(f) states that a supplier may satisfy the requirements of section 10608.48(d) and (e) by submitting to DWR its water conservation plan prepared for USBR. And, section 10828, as shown above, exempts CVP and USBR contractors from the requirement to prepare an AWMP in the first instance. Finally, pursuant to section 10829, the requirement to adopt an AWMP in the first instance does not apply if the supplier adopts a UWMP, or participates in regional water management planning.

Based on the foregoing, the Commission finds that newly added sections 10820 and 10826, and 10608.48(d-f), impose the following new requirements on agricultural water suppliers, except for suppliers that adopt a UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and CVP and USBR contractors:

- On or before December 31, 2012, prepare and adopt an agricultural water management plan in accordance with section 10826.³⁰⁴
- On or before December 31, 2015, and every five years thereafter, update the agricultural water management plan, in accordance with section 10820 et seq.³⁰⁵
- If a supplier becomes an agricultural water supplier, as defined, after December 31, 2012, that agricultural water supplier shall prepare and adopt an agricultural water management plan within one year after the date that it has become an agricultural water supplier.³⁰⁶
- Include in the agricultural water management plans required pursuant to Water Code section 10800 et seq. a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report,

³⁰² Water Code section 10608.48(f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁰³ Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 11, “The agricultural water suppliers that submit a plan to USBR may meet the requirements of section 10608.48 (d) and (e) [report of EWMPs implemented, planned for implementation, and estimate of efficiency improvements, as well as documentation for not locally cost effective EWMPs] by submitting the USBR-accepted plan to DWR. “DWR encourages CVPIA/RRR water suppliers to also provide a report on water use efficiency information (required by section 10608.48(d);see Section 3.7 of this Guidebook).” Emphasis added.

³⁰⁴ Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁰⁵ Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁰⁶ Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future.³⁰⁷

*In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.*³⁰⁸

- If an agricultural water supplier determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination.³⁰⁹

*In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.*³¹⁰

- Report the data using a standardized form developed pursuant to Water Code section 10608.52.³¹¹

*An agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.*³¹²

3. Section 10608.48(g-i), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new activities on local government.

Section 10608.48(g) provides that on or before December 31, 2013, DWR shall submit to the Legislature a report on agricultural efficient water management practices that have been implemented or are planned to be implemented, and an assessment of those practices and their effects on agricultural operations. Section 10608.48(h) states that DWR “may update the efficient water management practices required pursuant to [section 10608.48(c)],” but only after conducting public hearings. Section 10608.48(i) provides that DWR “shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement” of section 10608.48(b).

The plain language of these sections section 10608.48(g-i) is directed to DWR, and does not impose any activities or requirements on local government.

4. Sections 10821, 10841, 10842, 10843, and 10844, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers.

³⁰⁷ Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁰⁸ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³⁰⁹ Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁰ Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³¹¹ Water Code section 10608.48(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹² Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

Water Code section 10821, as added, provides that an agricultural water supplier required to prepare an AWMP pursuant to this part, “shall notify each city or county within which the supplier provides water supplies that the agricultural water supplier will be preparing the plan or reviewing the plan and considering amendments or changes to the plan.”³¹³

In addition, newly added section 10841 requires that the plan be made available for public inspection and that a public hearing shall be held as follows:

Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned agricultural water supplier pursuant to Section 6066 of the Government Code. A privately owned agricultural water supplier shall provide an equivalent notice within its service area and shall provide a reasonably equivalent opportunity that would otherwise be afforded through a public hearing process for interested parties to provide input on the plan...³¹⁴

Section 10842 provides that an agricultural water supplier shall implement its AWMP “in accordance with the schedule set forth in its plan.”³¹⁵

Following adoption of an AWMP, section 10843 requires an agricultural water supplier to submit a copy of its AWMP, no later than 30 days after adoption, to DWR and to the following affected or interested entities:

- (2) Any city, county, or city and county within which the agricultural water supplier provides water supplies.
- (3) Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.
- (4) Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
- (5) Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
- (6) The California State Library.
- (7) Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.³¹⁶

Finally, newly added section 10844 requires an agricultural water supplier to make its water management plan available for public review via the internet, as follows:

³¹³ Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁴ Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁵ Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁶ Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- (a) Not later than 30 days after the date of adopting its plan, the agricultural water supplier shall make the plan available for public review on the agricultural water supplier's Internet Web site.
- (b) An agricultural water supplier that does not have an Internet Web site shall submit to [DWR], not later than 30 days after the date of adopting its plan, a copy of the adopted plan in an electronic format. [DWR] shall make the plan available for public review on [its] Internet Web site.³¹⁷

The prior provisions of the Water Code pertaining to the adoption and implementation of AWMPs, as explained above, were inoperative by their own terms as of January 1, 1993.³¹⁸ Therefore, the requirements to hold a public hearing, to implement the plan in accordance with the schedule, to submit copies to DWR and other specified local entities, and to make the plan available by either posting the plan on the supplier's web site, or by sending an electronic copy to DWR for posting on its web site, are new activities with respect to prior law.

However, section 10828, as discussed above, provides that USBR or CVP contractors may satisfy the requirements of section 10826 by submitting their water conservation plans adopted within the previous four years pursuant to the Central Valley Improvement Act or the Reclamation Reform Act of 1982.³¹⁹ This section does not expressly exempt CVP or USBR contractors from all requirements of Part 2.8, but only from the content requirements of the plan itself, and the requirement to adopt according to the "schedule" set forth in section 10820, as discussed above. Accordingly, DWR's *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 [AWMP]* provides:

All agricultural water suppliers required to prepare new agricultural water management/conservation plans must prepare and complete their plan in accordance with Water Code Part 2.8, Article 1 and Article 3 requirements for notification, public participation, adoption, and submittal (refer to Section 3.1 for details). *The federal review process may incorporate many requirements specified in Part 2.8, Articles 1 and 3; as such the federal process may meet the requirements of Part 2.8, otherwise, the agricultural water supplier would have to complete those requirements in Part 2.8, Articles 1 and 3 that are not already a part of the federal review process.*³²⁰

Article 1 of Part 2.8 includes section 10821, which requires an agricultural water supplier to notify the city or county that it will be preparing an AWMP. Therefore, to the extent that the "federal process" of adopting a water conservation plan for USBR or CVP also requires notice to the city or county, this activity is not newly required. Article 3 of Part 2.8 includes sections 10840-10845, pertaining to the adoption and implementation of AWMPs. Those requirements include, as discussed above, noticing and holding a public hearing; implementing the plan in

³¹⁷ Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³¹⁸ See former Water Code sections 10840-10845; 10855 (Stats. 1986, ch. 954).

³¹⁹ Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁰ Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 94 [emphasis added].

accordance with the schedule set forth in the plan; submitting a copy of the AWMP to specified state and local entities within 30 days after adoption; and making the AWMP available on the supplier's website, or submitting the AWMP for posting on DWR's website. To the extent that the "federal process" satisfies those requirements, they are not newly required by the test claim statutes.

In addition, as noted above, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.³²¹ That exception would include all of the notice and hearing requirements identified below.

Based on the foregoing, the Commission finds that Water Code sections 10821, 10841, 10842, 10843, and 10844 impose new requirements on agricultural water suppliers, except those that adopt an UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and except to the extent that suppliers that are USBR or CVP contractors have water conservation plans that satisfy the AWMP adoption requirements, as follows:

- Notify the city or county within which the agricultural supplier provides water supplies that it will be preparing the AWMP or reviewing the AWMP and considering amendments or changes.³²²
- Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan.³²³
- Prior to the hearing, notice of the time and place of hearing shall be published in a newspaper within the jurisdiction of the publicly owned agricultural water supplier once a week for two successive weeks, as specified in Government Code 6066.³²⁴
- Implement the AWMP in accordance with the schedule set forth in the AWMP.³²⁵
- An agricultural water supplier shall submit to the following entities a copy of its plan no later than 30 days after the adoption of the plan. Copies of amendments or changes to the plans shall be submitted to the entities identified within 30 days after the adoption of the amendments or changes.
 - DWR.
 - Any city, county, or city and county within which the agricultural water supplier provides water supplies.
 - Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.

³²¹ Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²² Water Code section 10821(Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²³ Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁴ Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁵ Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
- Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
- The California State Library.
- Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.³²⁶
- An agricultural water supplier shall make its agricultural water management plan available for public review on its web site not later than 30 days after adopting the plan, or for an agricultural water supplier that does not have a web site, submit an electronic copy to the Department of Water Resources not later than 30 days after adoption, and the Department shall make the plan available for public review on its web site.³²⁷

5. Agricultural Water Measurement Regulations, California Code of Regulations, Title 23, Division 6, sections 597 through 597.4, Register 2012, Number 28.

California Code of Regulations, title 23, section 597 provides that under authority included in Water Code section 10608.48(i), DWR is required to adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirements of section 10609.48(b).³²⁸ The plain language of this section does not impose any new activities or requirements on local government.

Section 597.1 provides that an agricultural water supplier providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article, and a supplier providing water to 10,000 or more irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article unless sufficient funding is provided pursuant to Water Code section 10853. A supplier providing water to 25,000 irrigated acres or more, excluding acres that receive only recycled water, is subject to this article. A supplier providing water to wildlife refuges or habitat lands, as specified, is subject to this article. A *wholesale* agricultural water supplier is subject to this article at the location at which control of the water is transferred to the receiving water supplier, but the wholesale supplier is not required to measure the ultimate deliveries to customers. A canal authority or other entity that conveys water through facilities owned by a federal agency is not subject to this article. An agricultural water supplier that is a party to the QSA, as defined in Statutes 2002, chapter 617, section 1, is not subject to this article. And finally, DWR is not subject to this article.³²⁹ None of the above-described provisions of section 597.1 impose any new requirements or activities on local government.

³²⁶ Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁷ Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³²⁸ Code of Regulations, title 23, section 597 (Register 2012, No. 28).

³²⁹ Code of Regulations, title 23, section 597.1 (Register 2012, No. 28).

Section 597.2 provides definitions of “accuracy,” “agricultural water supplier,” “approved by an engineer,” “best professional practices,” “customer,” “delivery point,” “existing measurement device,” “farm-gate,” “irrigated acres,” “manufactured device,” “measurement device,” “new or replacement measurement device,” “recycled water,” and “type of device.”³³⁰ Based on the plain language of 597.2, the definitions provided in section 597.2 do not impose any new requirements or activities on local government.

Section 597.3 requires an agricultural water supplier to measure surface water and groundwater that it delivers to its customers and provides a range of options to comply with section 10608.48(i), as follows:

An agricultural water supplier subject to this article shall measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards in this section. The supplier may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section. Measurement device accuracy and operation shall be certified, tested, inspected and/or analyzed as described in §597.4 of this article.

(a) Measurement Options at the Delivery Point or Farm-gate of a Single Customer

An agricultural water supplier shall measure water delivered at the delivery point or farm-gate of a single customer using one of the following measurement options. The stated numerical accuracy for each measurement option is for the volume delivered. If a device measures a value other than volume, for example, flow rate, velocity or water elevation, the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume as described in §597.4(e).

- (1) An existing measurement device shall be certified to be accurate to within +12% by volume,
and,
- (2) A new or replacement measurement device shall be certified to be accurate to within:
 - (A) ±5% by volume in the laboratory if using a laboratory certification;
 - (B) ±10% by volume in the field if using a non-laboratory certification.

(b) Measurement Options at a Location Upstream of the Delivery Points or Farm-gates of Multiple Customers

- (1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer's delivery points meet either of the following conditions:

³³⁰ Code of Regulations, title 23, section 597.2 (Register 2012, No. 28).

- (A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device.
 - (B) An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at a single farm-gate, accuracy standards of measurement options in §597.3(a) cannot be met by installing a measurement device or devices (manufactured or on-site built or in-house built devices with or without additional components such as gauging rod, water level control structure at the farm-gate, etc.). If conditions change such that the accuracy standards of measurement options in §597.3(a) at the farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, a schedule, budget and finance plan to demonstrate progress to measure water at the farm-gate in compliance with §597.3(a) of this article.
- (2) An agricultural water supplier choosing an option under paragraph (b)(1) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:
- (A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those points.
 - (B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the water level or flow conditions described in §597.3(b)(1)(B) exist at individual customer's delivery points downstream of the point of measurement as approved by an engineer.
 - (C) The agricultural water supplier shall document all of the following criteria about the methodology it uses to apportion the volume of water delivered to the individual downstream customers:
 - (i) How it accounts for differences in water use among the individual customers based on but not limited to the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system, and;
 - (ii) That it is sufficient for establishing a pricing structure based at least in part on the volume delivered, and;

- (iii) That it was approved by the agricultural water supplier's governing board or body.³³¹

Thus, one option under these regulations, in order to measure the volume of water delivered, as required by section 10608.48, is measurement “at the delivery point or farm-gate of a single customer” using an existing measurement device certified to be accurate to within 12 percent by volume, or a new measurement device certified to be accurate within 5 percent if certified in a laboratory or within 10 percent if certified in the field. Another option is to measure upstream of a delivery point or farm gate if the supplier does not have legal access to the delivery point for an individual customer, or if the standards of measurement cannot be met due to large fluctuations in flow rate or velocity during the delivery season. If this option is chosen, appropriate documentation explaining the option must be provided, as described above.

The claimants allege that section 597.3 requires agricultural water suppliers to measure at a delivery point or farm gate “by either (1) using an existing measurement device, certified to be accurate within $\pm 12\%$ by volume or (2) a new or replacement measurement device, certified to be accurate within $\pm 5\%$ by volume in the laboratory if using a laboratory certification or $\pm 10\%$ by volume in the field if using a non-laboratory certification.” In addition, the claimants allege that the regulations provide for “limited exceptions” if the supplier is unable to measure at the farm-gate, which allow, in certain circumstances, for upstream measurement.³³² The claimants assert that prior to these regulations, “there was no requirement to measure water delivered to the farm-gate of *each* single customer, with limited exception.”³³³

DWR argues that these regulations merely provide options, and are not therefore a mandate. Specifically, DWR asserts that “[n]o local government is required to comply with those regulations.” DWR asserts that “the regulations exist as a resource for agricultural water suppliers who wish to comply with certain requirements...described in the 2009 Water Law.” DWR concludes that “[the regulations] are optional, and the suppliers are free to comply with the law in other ways.”³³⁴

Section 10608.48(i) provides that DWR “shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement” to comply with the measurement requirements of subdivision (b).³³⁵ The phrase “may use or implement” suggests that the regulations provide a choice for agricultural water suppliers, rather than a mandate.

However, Section 10608.48(b) states that agricultural water suppliers “shall implement all of the following critical efficient management practices...(1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to [adopt a pricing structure based in part on quantity of water delivered].”³³⁶ Moreover, the plain language of section 597.3 of the regulations, as cited above, states that an agricultural water

³³¹ Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

³³² Exhibit B, 12-TC-01, page 4.

³³³ Exhibit B, 12-TC-01, page 6.

³³⁴ Exhibit D, DWR Comments, page 11.

³³⁵ Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

³³⁶ *Ibid.*

supplier “shall measure surface water and groundwater that it delivers to customers pursuant to the accuracy standards in this section.” The language states that the supplier “may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section.”³³⁷ There is no express provision for choosing a measurement option or combination of options not listed in section 597.3. Although an agricultural water supplier may pick which one of the regulatory options to comply with, it “shall” pick one of them based on the plain language of section 597.3. As a result, most agricultural water suppliers are required to implement one of the measurement options provided by 597.3. As discussed above though, there are several water suppliers exempt from this requirement, including parties to the QSA, suppliers providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, and suppliers providing water to more than 10,000 irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, unless sufficient funding is provided pursuant to Water Code section 10853. Thus, section 597.3 requires the following for those agencies which are not exempt:

- Measure water delivered at the delivery point or farm-gate of a single customer using one of the following options.
 - An existing measurement device certified to be accurate to within $\pm 12\%$ by volume.
 - A new or replacement measurement device certified to be accurate to within:
 - $\pm 5\%$ by volume in the laboratory if using a laboratory certification;
 - $\pm 10\%$ by volume in the field if using a non-laboratory certification.

If a device measures a value other than volume (e.g., flow rate, velocity or water elevation) the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume.³³⁸

- Measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers if:
 - The supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device; or
 - An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season, accuracy standards of measurement cannot be met by installing a measurement device or devices.³³⁹
- And, when a supplier chooses to measure water delivered at an upstream location:

³³⁷ Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

³³⁸ Code of Regulations, title 23, section 597.3(a) (Register 2012, No. 28).

³³⁹ Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

- Provide, where applicable, documentation to demonstrate the lack of legal access at delivery points of individual or groups of customers downstream of the point of measurement; or documentation of the water measurement device unavailability and that water level or flow conditions exist that prohibit meeting accuracy standards, as approved by an engineer.
- Document the following about its apportionment of water delivered to individual customers:
 - How the supplier accounts for differences in water use among individual customers based on the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system;
 - That it is sufficient for establishing a pricing structure based at least in part on the volume of water delivered; and
 - That it was approved by the agricultural water supplier's governing board or body.³⁴⁰

Section 597.4, also alleged in this consolidated test claim, requires that measurement devices be certified and documented as follows:

(a) Initial Certification of Device Accuracy

The accuracy of an existing, new or replacement measurement device or type of device, as required in §597.3, shall be initially certified and documented as follows:

- (1) For existing measurement devices, the device accuracy required in section 597.3(a) shall be initially certified and documented by either:
 - (A) Field-testing that is completed on a random and statistically representative sample of the existing measurement devices as described in §597.4(b)(1) and §597.4(b)(2). Field-testing shall be performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer.
 - Or,
 - (B) Field-inspections and analysis completed for every existing measurement device as described in §597.4(b)(3). Field-inspections and analysis shall be performed by trained individuals in the use of field inspection and analysis, and documented in a report approved by an engineer.
- (2) For new or replacement measurement devices, the device accuracy required in sections 597.3 (a)(2) shall be initially certified and documented by either:

³⁴⁰ Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

- (A) Laboratory Certification prior to installation of a measurement device as documented by the manufacturer or an entity, institution or individual that tested the device following industry-established protocols such as the National Institute for Standards and Testing (NIST) traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device.

Or,

- (B) Non-Laboratory Certification after the installation of a measurement device in the field, as documented by either:
 - (i) An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devices for each type of device installed at specified locations.

Or,

- (ii) A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.

(b) Protocols for Field-Testing and Field-Inspection and Analysis of Existing Devices

- (1) Field-testing shall be performed for a sample of existing measurement devices according to manufacturer's recommendations or design specifications and following best professional practices. It is recommended that the sample size be no less than 10% of existing devices, with a minimum of 5, and not to exceed 100 individual devices for any particular device type. Alternatively, the supplier may develop its own sampling plan using an accepted statistical methodology.
- (2) If during the field-testing of existing measurement devices, more than one quarter of the samples for any particular device type do not meet the criteria pursuant to §597.3(a), the agricultural water supplier shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed an additional 100 individual devices for the particular device type. This second round of field-testing and corrective actions shall be completed within three years of the initial field-testing.
- (3) Field-inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards

of §597.3(a) and operation and maintenance protocols meet best professional practices.

(c) Records Retention

Records documenting compliance with the requirements in §597.3 and §597.4 shall be maintained by the agricultural water supplier for ten years or two Agricultural Water Management Plan cycles.

(d) Performance Requirements

- (1) All measurement devices shall be correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.
- (2) If an installed measurement device no longer meets the accuracy requirements of §597.3(a) based on either field-testing or field-inspections and analysis as defined in sections 597.4 (a) and (b) for either the initial accuracy certification or during operations and maintenance, then the agricultural water supplier shall take appropriate corrective action, including but not limited to, repair or replacement to achieve the requirements of this article.

(e) Reporting in Agricultural Water Management Plans

Agricultural water suppliers shall report the following information in their Agricultural Water Management Plan(s):

- (1) Documentation as required to demonstrate compliance with §597.3 (b), as outlined in section §597.3(b)(2), and §597.4(b)(2).
- (2) A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.
- (3) If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:
 - (A) For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: $\text{Volume} = \text{flow rate} \times \text{duration of delivery}$.
 - (B) For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is

derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.

- (C) For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).
- (4) If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.

Thus, the plain language of section 597.4 requires agricultural water suppliers to certify and document the initial accuracy of “existing, new or replacement measurement device[s],” as specified.³⁴¹ In addition, section 597.4 provides that field-testing “shall be performed” following “best professional practices,” and either sampling “no less than 10% of existing devices,” as recommended by the department, or developing a “sampling plan using an accepted statistical methodology.” Then, if field testing results in more than a quarter of any particular devices failing the accuracy criteria described in section 597.3(a), above, the supplier “shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices...”³⁴² In addition, section 597.4 provides that records documenting compliance “shall be maintained...for ten years or two Agricultural Water Management Plan cycles.”³⁴³ Section 597.4 further provides that “all measurement devices shall be correctly installed, maintained, operated, inspected, and monitored,” and if a device no longer meets the accuracy requirements of section 597.3, the supplier “shall take appropriate corrective action,” including repair or replacement, if necessary.³⁴⁴ And finally, section 597.4 requires agricultural water suppliers to report additional information regarding their compliance and “best professional practices” for water measurement in their agricultural water measurement plan.³⁴⁵

As noted above, some agricultural water suppliers may have been required pursuant to section 531.10 to measure farm-gate water deliveries.³⁴⁶ To the extent that those measurement programs or practices satisfy the requirements of these regulations, the regulations do not impose new activities.³⁴⁷ In addition, for any agricultural water supplier that is also an urban water supplier,

³⁴¹ Code of Regulations, title 23, section 597.4(a) (Register 2012, No. 28).

³⁴² Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

³⁴³ Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

³⁴⁴ Code of Regulations, title 23, section 597.4(d) (Register 2012, No. 28).

³⁴⁵ Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

³⁴⁶ Water Code section 531.10 (Stats. 2007, ch. 675 (AB 1404)).

³⁴⁷ See discussion above addressing section 10608.48(a-c).

existing sections 525 through 527 required those entities to install water meters on new and existing service connections, as specified.³⁴⁸ To the extent that any such water meter on an agricultural service connection satisfies the measurement requirements of these regulations, the regulations do not impose any new activities or requirements.

Based on the foregoing, the Commission finds that section 597.4 imposes new requirements on agricultural water suppliers not exempt from the water measurement requirements, and not already required by existing law to take part in the programs or practices of water measurement, discussed above, that would satisfy the accuracy standards of these regulations, as follows:

- Certify the initial accuracy of existing measurement devices by either:
 - Field-testing that is completed on a random and statistically representative sample of the existing measurement devices, performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer; or
 - Field inspections and analysis for every existing measurement device, performed by individuals trained in the use of field inspection and analysis, and documented in a report approved by an engineer.³⁴⁹
- Certify the initial accuracy of new or replacement measurement devices by either:
 - Laboratory certification prior to installation of the device as documented by the manufacturer or an entity, institution, or individual that tested the device following industry-established protocols such as the National Institute of Standards and Testing traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device; or
 - Non-laboratory certification after installation of a measurement device in the field, documented by either:
 - An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devices for each type of device installed at specified locations; or
 - A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.³⁵⁰
- Ensure that field-testing is performed as follows:

³⁴⁸ Section 525 as amended by statutes 2005, chapter 22; Section 527 as amended by statutes 2005, chapter 22; Section 526 as amended by Statutes 2004, chapter 884.

³⁴⁹ Code of Regulations, title 23, section 597.4(a)(1) (Register 2012, No. 28).

³⁵⁰ Code of Regulations, title 23, section 597.4(a)(2) (Register 2012, No. 28).

- Field-testing shall be performed for a sample of existing measurement devices according to the manufacturer's recommendations or design specifications and following best professional practices.
- If more than one quarter of the samples for any particular device type do not meet the accuracy criteria specified in section 597.3(a), the supplier shall provide in its Agricultural Water Management Plan a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed 100 additional devices for the particular device type, and shall complete the second round of field-testing and corrective actions within three years of the initial field-testing.
- Field inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards specified in section 597.3(a) and that operation and maintenance protocols meet best professional practices.³⁵¹
- Maintain records documenting compliance with the requirements of sections 597.3 and 597.4 for ten years or two Agricultural Water Management Plan cycles.³⁵²
- Ensure that all measurement devices are correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.³⁵³
- If an installed measurement device no longer meets the accuracy requirements of section 597.3(a) based on either field-testing or field-inspections and analysis for either the initial accuracy certification or during operations and maintenance, take appropriate corrective action, including but not limited to, repair or replacement of the device.³⁵⁴
- Report the information listed below in its Agricultural Water Management Plan(s) :
 - Documentation, as required, to demonstrate that an agricultural water supplier that chooses to measure upstream of a delivery point or farm-gate for a customer or group of customers has complied justified the reason to do so, and has taken appropriate steps to ensure that measurements can be allocated to the customer or group of customers sufficiently to support a pricing structure based at least in part on quantity of water delivered.

³⁵¹ Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

³⁵² Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

³⁵³ Code of Regulations, title 23, section 597.4(d)(1) (Register 2012, No. 28).

³⁵⁴ Code of Regulations, title 23, section 597.4(d)(2) (Register 2012, No. 28).

- A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.
- If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:
 - For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: $\text{Volume} = \text{flow rate} \times \text{duration of delivery}$.
 - For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is derived by the following formula: $\text{Volume} = \text{velocity} \times \text{cross-section flow area} \times \text{duration of delivery}$.
 - For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).
- If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.³⁵⁵

D. The Test Claim Statutes and Regulations do not Result in Increased Costs Mandated by the State, Because the Claimants Possess Fee Authority Sufficient as a Matter of Law to Cover the Costs of any New Mandated Activities.

As the preceding analysis indicates, many of the requirements of the test claim statutes are not new, at least with respect to *some* urban or agricultural water suppliers, because suppliers were previously required to perform substantially the same activities under prior law. Additionally, many of the alleged test claim statutes do not impose any requirements at all, based on the plain language. However, even if the new requirements identified above could be argued to mandate a new program or higher level of service, the Commission finds that the costs incurred to comply

³⁵⁵ Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

with those requirements are not costs mandated by the state, within the meaning of article XIII B, section 6 and Government Code section 17514, because all affected entities have fee authority, sufficient as a matter of law to cover the costs of any mandated activities.

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state, as defined in section 17514, if the local government claimant “has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California*.³⁵⁶ The Court, in holding that the term “costs” in article XIII B, section 6 excludes expenses recoverable from sources other than taxes, stated:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.³⁵⁷

Accordingly, in *Connell v. Superior Court of Sacramento County*,³⁵⁸ the Santa Margarita Water District, among others, was denied reimbursement based on its authority to impose fees on water users. The water districts submitted evidence that funding the mandated costs with fees was not practical: “rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water.”³⁵⁹ The court concluded that “[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs.” Water Code section 35470 authorized the levy of fees to “correspond to the cost and value of the service,” and “to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose.”³⁶⁰ The court held that the Districts had not demonstrated “that anything in Water Code section 35470 limits the authority of the Districts to levy fees ‘sufficient’ to cover their costs,”

³⁵⁶ *County of Fresno v. State of California, supra*, 53 Cal.3d 482.

³⁵⁷ *Id.*, at p. 487 [emphasis added].

³⁵⁸ (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382.

³⁵⁹ *Id.*, at p. 399.

³⁶⁰ *Ibid.*

and that therefore “the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry.”³⁶¹

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the SCO was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts’ authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court noted that the concept underlying Government Code sections 17514 and 17556(d) is that “[t]o the extent a local agency or school district ‘has the authority’ to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.”³⁶² The court further noted that, “this basic principle flows from common sense as well.” The court reasoned: “As the Controller succinctly puts it, ‘Claimants can choose not to require these fees, but not at the state’s expense.’”³⁶³

1. The claimants have statutory authority to levy fees or charges for the provision of water.

Both Finance and DWR asserted, in comments on the test claim, that the test claim statutes are not reimbursable pursuant to section 17556(d). Finance argued that the claimants are “statutorily authorized to charge a fee for the delivery of water,” and thus “each of these water agencies has the ability to cover any potential initial and ongoing costs related to the Act and Regulations with fee revenue.”³⁶⁴ DWR asserted that “Senate Bill 1017, which amended the [Urban Water Management Act] in 1994,” provides authority for an urban water supplier “to recover the costs of preparing its [urban water management plan] and implementing the reasonable water conservation measures included in the plan in its water rates.”³⁶⁵

For the following reasons, the Commission finds that the claimants have statutory authority to establish and increase fees or assessments for the provision of water services.

Water Code section 35470 provides generally that “[a]ny [water] district formed on or after July 30, 1917, may, in lieu in whole or in part of raising money for district purposes by assessment, make water available to the holders of title to land or the occupants thereon, and may fix and collect charges therefor.” Section 35470 further provides that “[t]he charges may vary in different months and in different localities of the district to correspond to the cost and value of the service, and the district may use so much of the proceeds of the charges as may be necessary to defray the ordinary operation or maintenance expenses of the district and for any other lawful purpose.”³⁶⁶ In addition, section 50911 provides that an irrigation district may “[a]dopt a schedule of rates to be charged by the district for furnishing water for the irrigation of district lands.”³⁶⁷

³⁶¹ *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

³⁶² *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

³⁶³ *Ibid.*

³⁶⁴ Exhibit C, Finance Comments on Test Claim, page 1.

³⁶⁵ Exhibit D, DWR Comments on Test Claim, pages 8-9 [citing Water Code section 10654].

³⁶⁶ Water Code section 35470 (Stats. 2007, ch. 27 (SB 444)) [emphasis added].

³⁶⁷ Water Code section 50911 (Stats. 2007, ch. 27 (SB 444)).

More specifically, and pertaining to the requirements of the test claim statutes, Water Code section 10654 permits an urban water supplier to “recover in its rates” for the costs incurred in preparing and implementing water conservation measures.³⁶⁸ And, section 10608.48 expressly requires agricultural water suppliers to “[a]dopt a pricing structure for water customers based at least in part on quantity delivered.”³⁶⁹ This provision indicates that the Legislature intended user fees to be an essential component of the water conservation practices called for by the Act. And finally, Water Code section 10608.32, as added *within the test claim statute*, provides that all costs incurred pursuant to this part may be recoverable in rates subject to review and approval by the Public Utilities Commission.³⁷⁰

Based on the foregoing, the Commission finds that both agricultural and urban water suppliers have statutory authority to impose or increase fees to cover the costs of new state-mandated activities.

2. Nothing in Proposition 218, case law, or any prior Commission Decision, alters the analysis of the claimants’ statutory fee authority.

The claimants argue that both Finance and DWR cite *Connell v. Superior Court* and “ignore the most recent rulings on the subject of Proposition 218 where their exact arguments were considered and overruled by the Commission in *Discharge of Stormwater Runoff*, 07-TC-09.” The claimants argue that “under Proposition 218, Claimants’ customers could reject the Board’s action to establish or increase fees or assessments, yet Claimants would still be obligated to implement the mandates.”³⁷¹ In comments on the draft proposed decision, the claimants reiterate, more urgently:

The Commission should not accept its staff’s invitation to ignore a prior Commission decision that is directly on point, and which was based on a plain reading of the California Constitution, all in order to reject the test claim here. To do so would undermine the Commission’s credibility, eviscerate the Commission’s Constitutional duty to reimburse agencies for new state mandates, and have far-reaching negative effects.³⁷²

For the following reasons, the claimant’s argument is unsound. In *Connell v. Superior Court*, *supra* the court held that “[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs,” and that the economic viability of the necessary rate increases “was irrelevant and injected improper factual questions into the inquiry.”³⁷³ *Connell* did not address the possible impact of Proposition 218 on the districts’ fee authority, because the districts did not “contend that the services at issue...are among the ‘many services’

³⁶⁸ Water Code section 10654 (Stats. 1994, ch. 609 (SB 1017)).

³⁶⁹ Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁷⁰ Water Code section 10608.32 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

³⁷¹ Exhibit E, Claimant Rebuttal Comments, pages 11-12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

³⁷² Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

³⁷³ *Connell*, *supra*, (1997) 59 Cal.App.4th at p. 401.

impacted by Proposition 218.”³⁷⁴ The claimants here argue that *Connell* is no longer good authority, because Proposition 218 has changed the landscape of special districts’ legal authority to impose fees or charges.

Proposition 218, adopted by the voters in 1996, also known as the “Right to Vote on Taxes Act,” declared its purpose to protect taxpayers “by limiting the methods by which local governments exact revenue from taxpayers without their consent.” Proposition 218 added articles XIII C and XIII D to the Constitution,³⁷⁵ article XIII C addresses assessments, while article XIII D addresses user fees and charges. The claimants allege that article XIII D, section 6, specifically, imposes a legal or constitutional hurdle to imposing or increasing fees, which undermines any analysis of statutory fee authority under Government Code section 17556(d).

The requirements of article XIII D, section 6 to which claimants refer provide as follows:

Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. *If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*

[¶...¶]

(c) Voter Approval for New or Increased Fees and Charges. *Except for fees or charges for sewer, water, and refuse collection services*, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures

³⁷⁴ 59 Cal.App.4th at p. 403.

³⁷⁵ Exhibit X, Text of Proposition 218.

similar to those for increases in assessments in the conduct of elections under this subdivision.³⁷⁶

The claimants have acknowledged that they have fee authority, absent the restrictions of articles XIII C and XIII D: “Claimants do not deny that, before the passage Proposition 218, the Water Code would have provided Claimants sufficient authority, pursuant to their governing bodies’ discretion, to unilaterally establish or increase fees or charges for the provision of water services.”³⁷⁷ After Proposition 218, the claimants argue they are now “authorized to do no more than *propose* a fee increase that can be rejected” by majority protest.³⁷⁸ Furthermore, the claimants maintain that the Commission’s decision in *Discharge of Stormwater Runoff* recognized the limitations imposed by article XIII D, section 6, and the effect on local governments’ fee authority: “[f]inding *Connell* inapposite, the Commission observed that ‘The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one.’”³⁷⁹

However, claimants’ reliance on the Commission’s prior action is misplaced, and claimants’ assertions about the effect of Proposition 218 on the law of *Connell* are overstated. Commission decisions are not precedential, and in any event the current test claim is distinguishable from the analysis in *Discharge of Stormwater Runoff*. The Commission, in *Discharge of Stormwater Runoff*, deviated from the rule of *Connell*, and found that Proposition 218, as *applied to the claimants and the mandated activities in that test claim*, constituted a legal and constitutional barrier to increasing fees. The test claim was brought by the County of San Diego and a number of cities, and alleged various mandated activities and costs related to reducing stormwater pollution.³⁸⁰ The Commission found that although the County and the Cities had a generalized fee authority based on regulatory and police powers,³⁸¹ “[w]ith some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996.”³⁸² The Commission reasoned that “it is possible that the local agency’s voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate,”³⁸³ and that “[a]bsent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d).”³⁸⁴ Thus, the

³⁷⁶ California Constitution, article XIII D, section 6 (added, November 5, 1996, by Proposition 218) [emphasis added].

³⁷⁷ Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

³⁷⁸ Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

³⁷⁹ Exhibit E, Claimant Rebuttal Comments, page 12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

³⁸⁰ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 1.

³⁸¹ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 103.

³⁸² Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 105.

³⁸³ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 106.

³⁸⁴ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107.

Commission concluded that “[t]he voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one.”³⁸⁵

Here, Proposition 218 does not impose a legal and constitutional hurdle, because fees for the provision of water services are expressly exempt from the voter approval requirements of Proposition 218.³⁸⁶ The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines “water” as “any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water.”³⁸⁷ Thus, an urban or agricultural water supplier that undertakes measures to ensure the conservation of water, to produce more water, and enhance the quality and reliability of its supply, is providing water service, within the meaning of the Omnibus Act. The statutory and regulatory metering and other conservation practices required of the claimants therefore describe “water service.” Unlike the test claimants in *Discharge of Stormwater Runoff* (cities and counties), the services for which fees or charges would be increased are expressly exempt from the voter approval requirements in article XIII D, section 6(c), and the decision and reasoning of the Commission in *Discharge of Stormwater Runoff* is not relevant. Therefore, the Commission’s earlier decision is distinguishable on the very same ground that renders *Connell* significantly poignant. The claimants cannot rely on the unwillingness of voters to raise fees, because the fees in question fall, based on the plain language of the Constitution, outside voter-approval requirement of article XIII D, section 6(c).

Claimants acknowledge that fees for water service “are excused from the formal election requirement under article XIII D section 6(c), [but] the majority protest provision in subdivision (a)(2) still applies and constitutes a legal barrier to Claimants’ fee authority.”³⁸⁸ Claimants therefore argue that they “find themselves required to implement and pay for the newly mandated activities, yet are authorized to do no more than *propose* a fee increase that can be rejected by a simple majority of affected customers.”³⁸⁹

However, the so-called “majority protest provision,” which claimants allege constitutes a legal barrier to claimants’ fee authority, presents either a mixed question of fact and law, which has not been demonstrated based on the evidence in the record, or a legal issue that is incumbent on the courts first to resolve. In order for the Commission to make findings that the claimants’ fee authority has been diminished, or negated, pursuant to article XIII D, section 6(a), the claimants would have to provide evidence that they tried and failed to impose or increase the necessary fees,³⁹⁰ or provide evidence that a court determined that Proposition 218 represents a

³⁸⁵ Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107 [citing *Connell v. Superior Court*, *supra*, 59 Cal.App.4th 382, at p. 401].

³⁸⁶ See California Constitution, article XIII D, section 6(c).

³⁸⁷ Government Code section 53750(m) (Stats. 2002, ch. 395).

³⁸⁸ Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

³⁸⁹ Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

³⁹⁰ If a claimant were to provide evidence that it had tried and failed to impose or increase fees, that evidence could constitute costs “first incurred,” within the meaning of Government Code section 17551, and a claimant otherwise barred from reimbursement under section 17556(d) could thus potentially demonstrate that it had incurred costs mandated by the state, as defined in

constitutional hurdle to fee authority as a matter of law. The Commission cannot now say, as a matter of law, that the claimants' fee authority is insufficient based on the speculative and uncertain threat of a "written protests against the proposed fee or charge [being] presented by a majority of owners of the identified parcels..."³⁹¹

Based on the foregoing analysis, the Commission cannot find costs mandated by the state, within the meaning of Government Code section 17514, because the claimants have sufficient fee authority, as a matter of law, to establish or increase fees or charges to cover the costs of any new required activities.

V. Conclusion

Based on the foregoing analysis, the Commission finds that the Water Conservation Act of 2009, enacted as Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), and the Agricultural Water Measurement Regulations issued by the Department of Water Resources, found at Code of Regulations, title 23, section 597 et seq., do not impose a reimbursable state-mandated program on urban retail water suppliers or agricultural water suppliers within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission therefore denies this test claim.

section 17514. The Commission does not make findings on this issue, but merely observes the potentiality.

³⁹¹ See article XIII D, section 6(a)(2).

COMMISSION ON STATE MANDATES

980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov



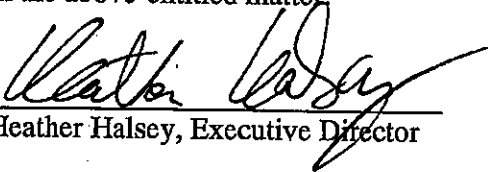
RE: Decision

Water Conservation, 10-TC-12 and 12-TC-01.

Water Conservation Act of 2009 et al.

South Feather Water and Power Agency, Paradise Irrigation District,
Oakdale Irrigation District, and Glenn-Colusa Irrigation District, Claimants

On December 5, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.


Heather Halsey, Executive Director

Dated: December 12, 2014

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 9, 2017, I served the:

Claimant Rebuttal Comments and Response to the Notice of Incomplete Joint Test Claim Filing

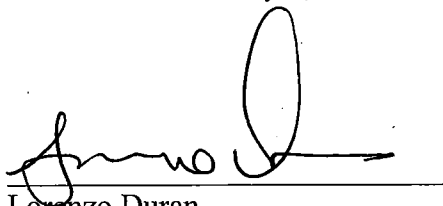
California Regional Water Quality Control Board, San Diego Region,

Order No. R9-2009-0002, 10-TC-11

County of Orange, Orange County Flood Control District, Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, 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 January 9, 2017 at Sacramento, California.



Lorenzo Duran
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/4/17

Claim Number: 10-TC-11

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

Claimants: City of Dana Point
City of Laguna Hills
City of Laguna Niguel
City of Lake Forest
City of Mission Viejo
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.)

Nasser Abbaszadeh, Director of Public Works/City Engineer, *City of Laguna Niguel*
30111 Crown Valley Parkway, Laguna Niguel, CA 92677
Phone: (949) 362-4377
Nabbaszadeh@cityoflagunaniguel.org

Hossein Ajideh, *City of San Juan Capistrano*
32400 Paseo Adelanto, San Juan Capistrano, CA 92675
Phone: (949) 234-4413
HAjideh@sanjuancapistrano.org

Joe Ames, *City of Mission Viejo*
200 Civic Center, Mission Viejo, CA 92691
Phone: (949) 470-8419
james@cityofmissionviejo.org

Rebecca Andrews, Associate, *Best Best & Krieger, LLP*
655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300
Rebecca.Andrews@bbklaw.com

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 322-7522
SAquino@sco.ca.gov

Harmeet Barkschat, *Mandate Resource Services, LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Ryan Baron, Of Counsel, *Best Best & Krieger LLP*
18101 Von Karman Avenue, Suite 1000, Irvine, CA 92612
Phone: (949) 263-6568
ryan.baron@bbklaw.com

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Shanda Beltran, General Counsel, *Building Industry Legal Defense Foundation*
Building Association of Southern California, 17744 Sky Park Circle, Suite 170, Irvine, CA 92614
Phone: (949) 553-9500
sbeltran@biasc.org

Cindy Black, City Clerk, *City of St. Helena*
1480 Main Street, St. Helena, CA 94574
Phone: (707) 968-2742
cityclerk@cityofsthenela.org

Danielle Brandon, Budget Analyst, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
danielle.brandon@dof.ca.gov

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916) 595-2646
Bburgess@mgtamer.com

David Burhenn, *Burhenn & Gest, LLP*
624 S. Grand Ave., Suite 2200, Los Angeles, CA 90017
Phone: (213) 629-8788
dburhenn@burhenngest.com

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

Daniel Carrigg, Deputy Executive Director/Legislative Director, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8222
Dcarrigg@cacities.org

Deborah Carson, Stormwater/Solid Waste Program Manager (Contract), *City of Rancho Santa*

Margarita

22112 El Paseo, Rancho Santa Margarita, CA 92688
Phone: (949) 635-1800
dcarson@cityofrsm.org

Bruce Channing, City Manager, *City of Laguna Hills*

24035 El Toro Road, Laguna Hills, CA 92653
Phone: (949) 707-2611
bchanning@lagunahillsca.gov

Annette Chinn, *Cost Recovery Systems, Inc.*

705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinnrcs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legal Analyst's Office*

925 L Street, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Michael Coleman, *Coleman Advisory Services*

2217 Isle Royale Lane, Davis, CA 95616
Phone: (530) 758-3952
coleman@munil.com

Chris Crompton, Deputy Director of Public Works, *Orange County Public Works*

Orange County Environmental Resources, 2301 North Glassell Street, Orange, CA 92865
Phone: (714) 955-0630
chris.crompton@ocpw.ocgov.com

William Curley, *Lozano Smith*

515 S. Figuera Street, Los Angeles, CA 90071
Phone: (213) 929-1066
wcurley@lozanosmith.com

Marieta Delfin, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-4320
mdelfin@sco.ca.gov

Mark Denny, Director of Public Works and Community Services, *City of Dana Point*

33282 Golden Lantern, Dana Point, CA 92629
Phone: (949) 248-3582
mdenny@danapoint.org

Terry Dixon, *City of Laguna Niguel*

30111 Crown Valley Parkway, Laguna Niguel, CA 92677
Phone: (949) 362-4300
tdixon@cityoflagunaniguel.org

James Eggart, *Woodruff, Spradlin & Smart*

555 Anton Boulevard, #1200, Costa Mesa, CA 92626
Phone: (714) 415-1062
JEggart@wss-law.com

Donna Ferebee, *Department of Finance*

915 L Street, Suite 1280, Sacramento, CA 95814

Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Rod Foster, City Manager, *City of Laguna Niguel*
30111 Crown Valley Parkway, Laguna Niguel, CA 92677
Phone: (949) 362-4300
Rfoster@cityoflagunaniguel.org

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Howard Gest, *Burhenn & Gest, LLP*
624 South Grand Avenue, Suite 2200, Los Angeles, CA 90402
Phone: (213) 629-8787
hgest@burhenngest.com

Dillon Gibbons, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
dillong@csda.net

David Gibson, *San Diego Regional Water Quality Control Board*
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340
Phone: (858) 467-2952
dgibson@waterboards.ca.gov

Catherine George Hagan, Senior Staff Counsel, *State Water Resources Control Board*
c/o San Diego Regional Water Quality Control Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108
Phone: (619) 521-3012
catherine.hagan@waterboards.ca.gov

Shawn Hagerty, Partner, *Best Best & Krieger, LLP*
San Diego Office, 655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300
Shawn.Hagerty@bbkllaw.com

Mary Halterman, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Mary.Halterman@dof.ca.gov

Sunny Han, Project Manager, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5907
Sunny.han@surfcity-hb.org

Dorothy Holzem, Legislative Representative, *California State Association of Counties*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
dholzem@counties.org

Justyn Howard, Program Budget Manager, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-1546
justyn.howard@dof.ca.gov

Thomas Howard, Executive Director, *State Water Resources Control Board*
P.O. Box 2815, Sacramento, CA 95812-2815
Phone: (916) 341-5599
thoward@waterboards.ca.gov

Mark Ibele, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Mark.Ibele@sen.ca.gov

Edward Jewik, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-8564
ejewik@auditor.lacounty.gov

Jeremy Jungreis, Attorney, *Rutan & Tucker, LLP*
611 Anton Boulevard, 14th Floor, Costa Mesa, CA 92626
Phone: (714) 338-1882
jjungreis@rutan.com

Jill Kanemasu, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-9891
jkanemasu@sco.ca.gov

Anne Kato, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
akato@sco.ca.gov

Anita Kerezsi, *AK & Company*
3531 Kersey Lane, Sacramento, CA 95864
Phone: (916) 972-1666
akcompany@um.att.com

Mike Killebrew, Acting City Manager, *City of Dana Point*
33282 Golden Lantern, Dana Point, CA 92629-1805
Phone: (949) 248-3554
mkillebrew@danapoint.org

Jay Lal, *State Controller's Office (B-08)*
Division of Accounting & Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0256
JLal@sco.ca.gov

Michael Lauffer, Chief Counsel, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
mlauffer@waterboards.ca.gov

Iain MacMillan, Attorney, *Lozano Smith*
515 S Figueroa St, Suite 750, Los Angeles, CA 90071
Phone: (213) 929-1066
imacmillan@lozanosmith.com

Hortensia Mato, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660

Phone: (949) 644-3000
hmato@newportbeachca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Meredith Miller, Director of SB90 Services, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670
Phone: (972) 490-9990
meredithcmiller@maximus.com

Andre Monette, Partner, *Best Best & Krieger, LLP*
Claimant Representative
2000 Pennsylvania NW, Suite 5300, Washington, DC 20006
Phone: (202) 785-0600
andre.monette@bbklaw.com

Richard Montevideo, *Rutan & Tucker, LLP*
611 Anton Blvd., Suite 1400, Costa Mesa, CA 92626
Phone: (714) 641-5100
rmontevideo@rutan.com

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Adriana Nunez, Staff Counsel, *State Water Resources Control Board*
P.O. Box 100, Sacramento, CA 95812
Phone: (916) 322-3313
Adriana.nunez@waterboards.ca.gov

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Nancy Palmer, Environmental Services Manager, *City of Laguna Niguel*
30111 Crown Valley Parkway, Laguna Niguel, CA 92677
Phone: (949) 362-4384
Npalmer@cityoflagunaniguel.org

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@atc.sbcounty.gov

Mark Rewolinski, *MAXIMUS*
808 Moorefield Park Drive, Suite 205, Richmond, VA 23236

Phone: (949) 440-0845
markrewolinski@maximus.com

David Rice, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 341-5161
davidrice@waterboards.ca.gov

Nick Romo, Policy Analyst, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8254
nromo@cacities.org

Omar Sandoval, *Woodruff, Spradlin & Smart*
555 Anton Boulevard, #1200, Costa Mesa, CA 92626
Phone: (714) 415-1049
osandoval@wss-law.com

Richard Schlesinger, *City of Mission Viejo*
200 Civic Center, Mission Viejo, CA 92691
Phone: (949) 470-3079
rschlesinger@cityofmissionviejo.org

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 327-6490
carla.shelton@csm.ca.gov

Shane Silsby, Director of Public Works, *County of Orange*
300 North Flower Street, Santa Ana, CA 92703
Phone: (714) 667-9700
shane.silsby@ocpw.ocgov.com

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 443-411
jolene_tollenaar@mgtamer.com

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Tom Wheeler, *City of Lake Forest*

25550 Commercentre Dr., Suite 100, Lake Forest, CA 92630
Phone: (949) 461-3480
twheeler@lakeforestca.gov

Jennifer Whiting, Assistant Legislative Director, *League of California Cities*
1400 K Street, Suite 400, Sacramento , CA 95814
Phone: (916) 658-8249
jwhiting@cacities.org

Patrick Whitnell, General Counsel, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8281
pwhitnell@cacities.org

Dennis Wilberg, City Manager, *City of Mission Viejo*
200 Civic Center, Mission Viejo, CA 92691
Phone: (949) 470-3051
dwilberg@cityofmissionviejo.org

Julia Woo, Deputy County Counsel, *County of Orange*
Claimant Representative
333 West Santa Ana Blvd, Santa Ana, CA 92702-1379
Phone: (714) 834-3300
Julia.woo@coco.ocgov.com

Robert Woodings, Director of Public Works, *City of Lake Forest*
25550 Commercenter Dr, Suite 100, Lake Forest, CA 92630
Phone: (949) 461-3480
rwoodings@lakeforestca.gov

Hasmik Yaghobyan, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-9653
hyaghobyan@auditor.lacounty.gov

Lisa Zawaski, Senior Water Quality Engineer, *City of Dana Point*
Dana Point City Hall, 33282 Golden Lantern Street, Public Works Suite 212, Dana Point, CA 92629
Phone: (949) 248-3584
lzawaski@danapoint.org