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RECEIVED
January 6, 2017
Commission on
State Mandates

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January 6, 2017

VIA DROPBOX

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

Re: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, 10-TC-11
Response of Joint Test Claimants to Notice of Incomplete Joint Test Claim Filing

Dear Ms. Halsey:

I have been designated as Claimant Representative by all test claimants in the above-referenced Joint Test Claim and am therefore responding on behalf of Joint Test Claimants County of Orange ("County") and the Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo and San Juan Capistrano (the "Joint Test Claimants") to the Notice of Incomplete Joint Test Claim Filing of November 18, 2016 ("Notice Letter"), which stated that the original joint test claim filing was incomplete on several grounds.[1]

The Joint Test Claimants were originally informed that their test claim was deemed complete as of July 13, 2011. The Notice Letter, issued more than five years later, required the Joint Test Claimants to expend significant efforts, including locating old financial records and preparing new declarations, test claim forms and revisions to the Narrative Statement. The Joint Test Claimants were thus forced to incur significant, unforeseeable costs to address the issues raised in the Notice Letter or risk having the joint test claim either denied as untimely or rejected for other reasons stated in the Notice

[1] Please note that my designation as Claimant Representative supersedes the designation of Julia C. Woo, Esq., Deputy County Counsel, County of Orange, recently made by four Joint Test Claimants.

Letter. As previously set forth in our letter of December 2, and for the reasons stated therein, which are incorporated herein by reference, the Joint Test Claimants respectfully dispute the basis for the Notice Letter, on grounds of law and equity, and therefore reserve their right to contest the alleged deficiencies identified in the Notice Letter before the Commission.[2]

Notwithstanding such reservation, and subject to it, the Joint Test Claimants submit with this letter the following new or revised documents:

(a) New Test Claim Forms;
(b) A revised Section 5 Narrative Statement; and
(c) New Section 6 Declarations.

As requested in the Notice Letter, the Joint Test Claimants are not re-attaching any of the supporting documentation, including exhibits.

The Notice Letter indicated that to cure the alleged deficiencies in the original test claim, the Joint Test Claimants were to provide:

1. "Evidence of the date and amount of costs *first* incurred as a result of the alleged new activities required under the Order."

2. "A revised test claim form from each co-claimant."

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[2]More specifically, Joint Test Claimants assert for the record that the Commission cannot make a determination that the test claim is now incomplete when Commission staff notified Joint Test Claimants on July 13, 2011 that the filing was complete pursuant to 2 CCR § 1183(g). Pursuant to that regulation, within 10 days after the filing of the test claim on June 30, 2011, the Commission was required to notify "the claimant if the test claim was complete or incomplete and send a copy of these regulations unless a correct copy was previously provided." The specific items for which a test claim may be deemed incomplete are the same items the Commission noted in its November 18 letter. The Joint Test Claimants submit that by failing to notify the claimants of the specific bases formulating the Commission's November 18 incompleteness determination within the regulatory 10 day period, coupled with the Commission's prior determination that the filing was complete, the Commission has waived its authority to challenge the completeness of the filing. The Joint Test Claimants further submit that the doctrine of estoppel would also bar the Commission from requiring Joint Test Claimants to substantively supplement the Joint Test Claim with new evidence and documentation concerning events occurring some 6 to 7 years ago when the claimants were in a superior position to correct any alleged deficiencies in the filing. Moreover, to the extent that the Commission is relying on regulations adopted after the date the Test Claim was filed (June 30, 2011) and the date the Commission issued its Notice of Complete Test Claim Filing (July 13, 2011), the Joint Test Claimants respectfully object.

3. "Revised written narratives and declarations that provide a detailed description of the costs that are modified by the alleged mandate including the *actual* increased costs incurred by each co-claimant during the fiscal year for which the joint test claim was filed as well as the actual or estimated annual costs that will be incurred by each co-claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the joint test claim was filed. In addition, please provide the statewide cost estimate (in this case the "statewide cost" is the cost for all of the local agency co-permittees, whether named or not, for the alleged new program or higher level of service imposed by the permit at issue) for increased costs to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the join test claim was filed."

Notice Letter, page 6 (emphasis in original).

In response to item 1, the Joint Test Claimants have included evidence of the date of costs first incurred in the Declarations (see paragraphs 6 and 7) and also in relevant sections of the Section 5 Narrative Statement. This information establishes that costs were first incurred for the Joint Test Claimants in FY 2009-10 or FY 2010-11, and thus, the timeliness of the Joint Test Claim filing is well established. *See* Cal. Code Regs., tit. 2, 1183.1(c) ("For purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred."). Additionally, information is provided in each Declaration as to the amount of the costs incurred in response to the mandates in the Permit.

In response to item 2, and notwithstanding the addition of 2 CCR 1183.1 (b) in 2014, which necessitated designation of one claimant representative for "joint" test claimants, the Joint Test Claimants are herewith filing new test claim forms signed in the case of the County, by the Auditor-Controller and in the case of the cities by their respective City Managers. The names, addresses and contact information for these individuals are also set forth in Section 2 of the forms. Additionally, as noted above, I am designated as the Claimant Representative for all Joint Test Claimants in Section 3 of each of the forms.

In response to item 3, as already noted, both the Declarations and the Section 5 Narrative Statement (in revised sections following the description of each mandated activity) state the actual costs incurred in the relevant fiscal years covered by the Joint Test Claim. Also, costs representing the Joint Test Claimants' best estimate of total statewide costs associated with the Joint Test Claim are set forth in the Section 5 Narrative Statement and are further supported by the Declarations. We also note that while the decision of the Supreme Court in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749 is relevant to the discussion of the Los Angeles County test claim in the Narrative Statement, the decision is not discussed therein.

Instead, the Joint Test Claimants refer the Commission to their supplemental brief filed on October 21, 2016 and to the supplemental brief filed October 28, 2016 by the City of Dana Point.

The Joint Test Claimants wish to thank you for your courtesy in extending the deadline for the submission of this response and also for the further explanations provided in your letter of December 8. While the Joint Test Claimants are responding by the January 6 deadline, the Joint Test Claimants respectfully submit that this deadline is not jurisdictional, both because the regulatory authority cited in the Notice Letter applies only to the initial determination of test claim completeness and because the Executive Director has discretion to extend the 30-day time period within which to cure a returned test claim and still allow the test claimant to preserve the original claim filing date.

Nevertheless, we believe that the information and evidence submitted herewith fully addresses the issues identified in the Notice Letter. If there are any further concerns or issues regarding these matters, we request a prompt response from your staff concerning them.

Thank you for your consideration of these matters.

Very truly yours,

David W. Burhenn

DB:dwb

1. TEST CLAIM TITLE

California RWQCB, San Diego Region, Order No. R9-2009-0002, 10-TC-11

2. CLAIMANT INFORMATION

County of Orange
Name of Local Agency or School District

Eric H. Woolery, C.P.A.
Claimant Contact

Auditor-Controller
Title

12 Civic Center Plaza, Room #200
Street Address

Santa Ana, CA 92702
City, State, Zip

714-834-2450
Telephone Number

714-834-2569
Fax Number

howard.thomas@ocpw.ocgov.com
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name

Partner
Title

Burhenn & Gest LLP
Organization

624 S. Grande Avenue, Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

☑ *Copies of all statutes and executive orders cited are attached.*

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

5. Written Narrative: pages _____ to _____.
6. Declarations: pages _____ to _____.
7. Documentation: pages _____ to _____.

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

5. WRITTEN NARRATIVE

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

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

(A) A detailed description of the new activities and costs that arise from the mandate.

(B) A detailed description of existing activities and costs that are modified by the mandate.

(C) The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.

(D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(F) Identification of all of the following funding sources available for this program:
- (i) Dedicated state funds
- (ii) Dedicated federal funds
- (iii) Other nonlocal agency funds
- (iv) The local agency's general purpose funds
- (v) Fee authority to offset costs

(G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.

(H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

6. DECLARATIONS

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

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

(B) identify all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs;

(C) describe new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program);

(D) If applicable, describe the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of Section17574(c).

(E) are signed under penalty of perjury, based on the declarant's personal knowledge, information or belief, by persons who are authorized and competent to do so.

7. DOCUMENTATION

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

(A) the test claim statute that includes the bill number alleged to impose or impact a mandate; and/or

(B) the executive order, identified by its effective date, alleged to impose or impact a mandate; and

(C) relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate; and

(D) administrative decisions and court decisions cited in the narrative. Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement; and

(E) statutes, chapters of original legislatively determined mandate and any amendments.

8. CLAIM CERTIFICATION

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

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

Eric H. Woolery, C.P.A.
Print or Type Name of Authorized Local Agency or School District Official

E H. Woolery
Signature of Authorized Local Agency or School District Official

Auditor-Controller
Print or Type Title

01/03/2017
Date

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

1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, 10-TC-11

2. CLAIMANT INFORMATION

City of Dana Point
Name of Local Agency or School District

Mike Killebrew
Claimant Contact

Acting City Manager
Title

33282 Golden Lantern
Street Address

Dana Point, CA 92629
City, State, Zip

949-248-3513
Telephone Number

949-248-9052
Fax Number

mkillebrew@danapoint.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn, Esq.
Claimant Representative Name

Partner
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave. Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

☐ *Copies of all statutes and executive orders cited are attached.*

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

5. Written Narrative: pages 5-1 to _____.
6. Declarations: pages 6-1 to _____.
7. Documentation: pages 7-1 to _____.

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

5. WRITTEN NARRATIVE

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

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

(A) A detailed description of the new activities and costs that arise from the mandate.

(B) A detailed description of existing activities and costs that are modified by the mandate.

(C) The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.

(D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(F) Identification of all of the following funding sources available for this program:
- (i) Dedicated state funds
- (ii) Dedicated federal funds
- (iii) Other nonlocal agency funds
- (iv) The local agency's general purpose funds
- (v) Fee authority to offset costs

(G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.

(H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

6. DECLARATIONS

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

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

(B) identify all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs;

(C) describe new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program);

(D) If applicable, describe the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of Section17574(c).

(E) are signed under penalty of perjury, based on the declarant's personal knowledge, information or belief, by persons who are authorized and competent to do so.

7. DOCUMENTATION

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

(A) the test claim statute that includes the bill number alleged to impose or impact a mandate; and/or

(B) the executive order, identified by its effective date, alleged to impose or impact a mandate; and

(C) relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate; and

(D) administrative decisions and court decisions cited in the narrative. Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement; and

(E) statutes, chapters of original legislatively determined mandate and any amendments.

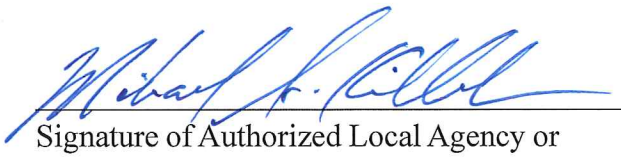
8. CLAIM CERTIFICATION

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

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

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

Acting City Manager
Print or Type Title


Signature of Authorized Local Agency or School District Official

January 3, 2017
Date

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

1. TEST CLAIM TITLE

California Regional Water Control Board,San Diego Region, No. R9-2009-0002, 10-TC-11

2. CLAIMANT INFORMATION

City of Laguna Hills
Name of Local Agency or School District

Bruce E. Channing
Claimant Contact

City Manager
Title

24035 El Toro Road
Street Address

Laguna Hills, CA 92653
City, State, Zip

949-707-2611
Telephone Number

949-707-2614
Fax Number

bchanning@lagunahillsca.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn, Esq.
Claimant Representative Name

Partner
Title

Burhenn & Gest, LLP
Organization

624 S. Grand Ave., Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
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dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date:

Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

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(H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

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

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Bruce E. Channing
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

12/27/16
Date

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

1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002 10-TC-11

2. CLAIMANT INFORMATION

City of Laguna Niguel
Name of Local Agency or School District

Rod Foster
Claimant Contact

City Manager
Title

30111 Crown Valley Parkway
Street Address

Laguna Niguel, CA 92677
City, State, Zip

(949) 362-4300
Telephone Number

(949) 362-4340
Fax Number

rfoster@cityoflagunaniguel.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn, Esq.
Claimant Representative Name

Partner
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave., Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

(213) 629-8788
Telephone Number

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(G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.

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(D) If applicable, describe the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of Section17574(c).

(E) are signed under penalty of perjury, based on the declarant's personal knowledge, information or belief, by persons who are authorized and competent to do so.

7. DOCUMENTATION

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

(A) the test claim statute that includes the bill number alleged to impose or impact a mandate; and/or

(B) the executive order, identified by its effective date, alleged to impose or impact a mandate; and

(C) relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate; and

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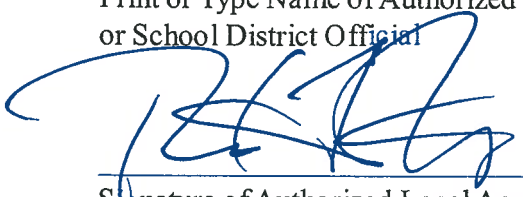
8. CLAIM CERTIFICATION

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

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

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

City Manager
Print or Type Title



Signature of Authorized Local Agency or School District Official

January 5, 2016
Date

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

1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No.

2. CLAIMANT INFORMATION

City of Lake Forest
Name of Local Agency or School District

Robert Dunek
Claimant Contact

City Manager
Title

25550 Commercentre Drive, Suite 100
Street Address

Lake Forest, CA 92630
City, State, Zip

(949) 461-3410
Telephone Number

(949) 461-3511
Fax Number

RDunek@lakeforestca.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn, Esq.
Claimant Representative Name

Partner
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave. Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

☑ *Copies of all statutes and executive orders cited are attached.*

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

5. Written Narrative: pages _____ to _____.
6. Declarations: pages _____ to _____.
7. Documentation: pages _____ to _____.

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- (i) Dedicated state funds
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- (iv) The local agency's general purpose funds
- (v) Fee authority to offset costs

(G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.

(H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

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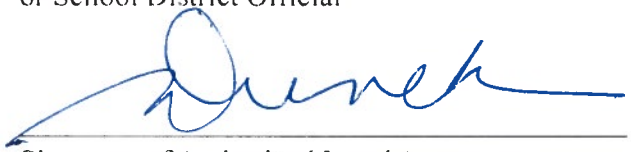

Signature of Authorized Local Agency or School District Official

12/15/2016

Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No. [redacted]

2. CLAIMANT INFORMATION

City of Mission Viejo
Name of Local Agency or School District

Dennis Wilberg
Claimant Contact

City Manager
Title

200 Civic Center
Street Address

Mission Viejo, CA 92691
City, State, Zip

949-470-3051
Telephone Number

949-859-1386
Fax Number

dwilberg@cityofmissionviejo.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

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California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

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

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

January 4, 2017
Date

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1. TEST CLAIM TITLE

California Regional Water Quality Control Board, San Diego Region, Order No. [redacted]

2. CLAIMANT INFORMATION

City of San Juan Capistrano
Name of Local Agency or School District

Benjamin Siegel
Claimant Contact

City Manager
Title

32400 Paseo Adelanto
Street Address

San Juan Capistrano, CA 92675
City, State, Zip

949-493-1171
Telephone Number

949-488-3874
Fax Number

BSiegel@sanjuancapistrano.org
E-Mail Address

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David W. Burhenn, Esq.
Claimant Representative Name

Partner
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave. Suite 2200
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Los Angeles, CA 90017
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Benjamin Siegel
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

12-8-16
Date

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

SECTION FIVE

NARRATIVE STATEMENT

IN SUPPORT OF JOINT TEST CLAIMS IN RE SAN DIEGO RWQCB ORDER NO. R9-2009-0002 NPDES NO. CAS0108740

TEST CLAIM 10-TC-11

TABLE OF CONTENTS

NARRATIVE STATEMENT IN SUPPORT OF TEST CLAIM

I. INTRODUCTION

On December 16, 2009, the California Water Quality Control Board, San Diego Region ("San Diego RWQCB" or "Regional Board") issued Order No. R9-2009-0002, National Pollutant Discharge Elimination System ("NPDES") NPDES No. CAS0108740 (hereinafter the "2009 Permit" or "Permit") regulating discharges from the municipal separate storm sewer systems ("MS4s") in south Orange County, California.[1] The 2009 Permit reissued NPDES Permit No. CAS0108740, which was first adopted by the Regional Board on July 16, 1990 (Order No. 90-38), and then reissued on August 8, 1996 (Order No. 96-03) and February 13, 2002 (Order No. R9-2002-01). The County of Orange, Orange County Flood Control District and the cities in Orange County within the jurisdiction of the San Diego RWQCB are all permittees under the 2009 Permit ("Copermittees").

The 2009 Permit contains a number of unfunded State mandates for which the Permittees[2] are entitled to reimbursement under Article XIII B section 6 of the California Constitution. This Test Claim identifies the activities that are unfunded mandates and sets forth the basis for reimbursement for such activities. These new unfunded programs and activities are described in detail below, but are generally described as follows:

A. New requirements involving "Non-Storm Water Discharges" as set forth in Section B of the 2009 Permit.

B. New Total Maximum Daily Loads and Water Quality Based Effluent Limitation requirements as set forth in Section I of the 2009 Permit.

C. New requirements involving implementation of non-storm water dry weather numeric action levels ("NAL") as set forth in Section C of the 2009 Permit.

D. New requirements involving implementation of storm water numeric action levels ("SAL") as set forth in Section D of the 2009 Permit.

E. New "Low Impact Development" ("LID") and "Hydromodification" requirements including a Hydromodification Management Plan ("HMP") as set forth in Sections F.1.d and F.1.h of the 2009 Permit.

F. New reporting requirements including an annual assessment of the effectiveness of the Jurisdictional Runoff Management Program and a work plan demonstrating

---

[1] A copy of the 2009 Permit is included under Section 7 - Documentation to these Test Claims.

[2] The Permittees are the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, San Juan Capistrano, the County of Orange, and the Orange County Flood Control District.

a responsive and adaptive approach for the use of resources as set forth in Section J of the 2009 Permit.

G. New reporting requirements related to the Watershed Workplan report as set forth in Section K.1.b of the 2009 Permit.

H. 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 2009 Permit.

I. New requirements mandating the use of geographical information system (GIS) maps.

J. New retrofitting requirements involving developing and implementing a retrofitting program for existing development as set forth in Section F.3.d of the 2009 Permit.

K. New BMP maintenance tracking requirements in Section F.1.f of the 2009 Permit.

A. STATEMENT OF INTEREST OF JOINT TEST CLAIMANTS

This test claim is being filed by the County of Orange ("County") and the Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo and San Juan Capistrano (collectively, "Joint Test Claimants"). The Joint Test Claimants are filing this Test Claim jointly and, pursuant to 2 Cal. Code Reg. § 1183.1(g), attest to the following:

1. The Joint Test Claimants allege state-mandated costs resulting from the same Executive Order, i.e., the 2009 Permit;

2. The Joint Test Claimants agree on all issues of the Test Claim;

3. The Joint Test Claimants have designated one contact person to act as a resource for information regarding the test claim in Section 3 of their Test Claim Forms; and

4. All Test Claim forms have been executed by either the Auditor-Controller (on behalf of the County) or by City Managers (or equivalent personnel) of the city Joint Test Claimants.

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

The Joint Test Claimants further state that, as set forth below and in the attached Section 6 Declarations filed herewith in support, the actual and/or estimated costs from the state mandates set forth in this Test Claim exceed $1,000 for each of the Joint Test Claimants. This Narrative Statement sets forth specific amounts expended by the Joint Test Claimants as determined from the perusal of pertinent records and as disclosed in the Section 6 Declarations filed herewith, including in the Declaration (Second) of Chris Crompton. The Joint Test Claimants respectfully reserve the right to modify such amounts when or if additional information is received.

C. THE TEST CLAIM IS TIMELY FILED

As set forth in the Declarations attached in Section 6, Paragraphs 6(a)-(i) and 7, the Joint Test Claimants first began incurring increased costs under the 2009 Permit in Fiscal Year (FY) 2009-10, which commenced on July 1, 2009.

The 2009 Permit was adopted by the San Diego RWQCB on December 16, 2009, within FY 2009-10. This is a fact which may be administratively noticed by the Commission, pursuant to Evidence Code §452(c) (records of executive bodies, such as the RWQCB). Thus, any costs incurred pursuant to such executive order (the 2009 Permit) could not have been incurred prior to that date. Nevertheless, as set forth above, the Joint Test Claimants are presenting evidence of the date of first incurrence of costs within FY 2009-10. The Commission's regulations provide that a test claim must be filed with the Commission "not later than 12 months following the effective date of a statute or executive order, or within 12 months of first incurring increased costs as a result of a statute or executive order, whichever is later. For purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant." Because the Joint Test Claimants first incurred such costs during FY 2009-10 and this Test Claim was filed on June 30, 2011, prior to the end of FY 2010-11, the Test Claim is, under the Commission's regulations, timely filed.[3]

II. PROGRAM BACKGROUND

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

One primary difference between Porter-Cologne and the CWA is the role Congress intended the CWA to play in the state regulatory scheme. When adopting the CWA, Congress preserved the states' ability to impose more stringent water quality controls, allowing the Act to be a federal baseline for water quality.[4] California quickly elected to incorporate the CWA's NPDES program into its existing regulatory structure, becoming the first state in the nation authorized to issue NPDES permits. The California Legislature ("Legislature") determined that assuming the responsibility was "in the interest of the people of the state, ***in order to avoid direct regulation by the federal government of persons already subject to state law*** pursuant to this division . . . ."[5]

---

[3] 2 Cal. Code Reg. § 1183.1(c).

[4] Section 510 of the CWA, which is codified at Title 33 U.S.C. § 1370, acknowledges the states' authority to adopt or enforce standards or limitations regarding the discharge of pollutants provided such standards are not less stringent than the "effluent limitation, or other limitation, effluent standard, prohibition pretreatment standard or standard of performance" under the CWA.

[5] Cal Water Code § 13370(c) [emphasis added].

A. FEDERAL LAW

The principal federal law regulating water quality is the CWA, found at 33 U.S.C. § 1251 *et seq*. The CWA, was enacted in 1972, and amended in 1987 to implement a permitting system for all discharges of pollutants from point sources to waters of the United States. In 1987, the CWA was amended to make clear that such discharges include discharges from MS4s. Following the 1987 amendments, NPDES permits are required for discharges from MS4s serving a population of more than 100,000 or from systems that the United States Environmental Protection Agency ("US EPA") or the state determine contribute to a violation of a water quality standard or represent a significant contribution of pollutants to waters of the United States.[6] Pursuant to the CWA, the MS4 permits:

> (i) may be issued on a system or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[7]

In 1990, US EPA issued regulations to implement Phase 1 of the NPDES program, defining which entities need to apply for permits and the information to include in the permit application. The permit application must propose management programs that the permitting authority will consider in adopting the permit including the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. [8]

---

6 33 U.S.C. § 1342(p)(2) requires NPDES permits for the following discharges:

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

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

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

7 33 U.S.C. § 1342(p)(3)(B).

8 40 Code of Federal Regulations section 122.26(d)(2)(iv).

Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[9] are not less stringent than those set out in the CWA.[10] The California Supreme Court described the NPDES program 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).)[11]

B. CALIFORNIA LAW

The CWA requires the EPA to issue NPDES permits to MS4 dischargers, but allows the EPA to delegate that authority to the states.[12] In California, the Legislature assigned that responsibility to the State Water Resources Control Board ("State Board"), and the individual Regional Water Quality Control Boards ("Regional Boards"). The permit requirements are subject to the same federal regulations, however, because the state of California has broader authority to regulate discharges than the EPA would under the CWA, requirements in NPDES permits issued by the State and Regional Boards frequently exceed the requirements of federal law.

In *City of Burbank v. State Water Resources Control Board* (2005) 35 Ca1.4th 613, the California Supreme Court expressly recognized that NPDES permits issued by the State and Regional Boards can exceed the requirements of federal law, describing the statutory scheme 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

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[9] *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.)

[10] 33 U.S.C. § 1370.

[11] *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 621; Cal. Water Code, § 13263.

[12] Section 510 of the CWA, which is codified at Title 33 U.S.C. § 1370, acknowledges the states' authority to adopt or enforce standards or limitations regarding the discharge of pollutants provided such standards are not less stringent than the "effluent limitation, or other limitation, effluent standard, prohibition pretreatment standard or standard of performance" under the CWA.

> boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality. (§ 13001.)
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240). The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. (§ 13050, subd. (j).)[13]

With regard to the baseline role that the CWA plays in California water quality law, the Court held:

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority. . .[14]

Porter-Cologne therefore provides California with broader authority to regulate water quality than it would have if it were operating exclusively under the CWA. The State's authority under Porter-Cologne extends to non-point sources of pollution such as urban and agricultural runoff, discharges to ground water and discharges to land overlying ground water. It not only establishes broader regulatory authority than the CWA, but also extends that broader regulatory authority to a larger class of waters. It is under this authority that the State and Regional Boards act when issuing NPDES permits that exceed the minimum requirements set forth in federal law, namely Title 40, section 122.26 of the Code of Federal Regulations.

The courts, the State Board and the Regional Boards have repeatedly acknowledged that many aspects of NPDES permits issued in California exceed the minimum requirements of the CWA. In a decision on the merits of the 2001 NPDES permit for San Diego County, the State Board acknowledged that the since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States."[15] As the State Board has expressed it, "the inclusion of 'waters of the state' allows the protection of groundwater, which is generally not considered to be 'waters of the United States.'"[16]

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13 *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

14 *Id*. at pp. 627-628.

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

16 *Id.*

The Regional Boards have also acknowledged in official documents that many of the requirements of MS4 permits exceed the requirements of federal law and are based, therefore, on the broader authority of Porter-Cologne. For example, in a December 13, 2000 staff report regarding the San Diego Regional Water Quality Control Board's draft 2001 permit, it was found that 40% of the draft permit requirements "exceed the federal regulations" because they are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.[17]

In *Burbank v. State Board*, *supra*, 35 Cal.App.4th 613, the California Supreme Court acknowledged that NPDES permits may contain requirements that exceed federal CWA, and held that to the extent such provisions are not required by federal law, the State and Regional Boards are required to consider state law restrictions on agency action.[18] Implicit in the Court's decision is the requirement that orders issued by the State and Regional Boards are subject to State Constitutional restrictions, including those on funding set forth in Article XIII B section 6 of the California Constitution.

In a decision issued by California Court of Appeal in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the Appellate Court specifically considered whether permit terms in an MS4 Permit issued by the San Diego Regional Board (for San Diego County and the Cities therein) involving compliance with numeric effluent limits, were either "authorized" or "required" by the CWA. The Court held that: "it is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law."[19] In short, the Court in *BIA v. State Board* found that the San Diego Regional Board had the "discretion" to impose certain permit terms that were not "required" by the CWA. (*Id.* at 886 ["That provision gives the EPA ***discretion*** to determine what pollutant controls are appropriate," *citing Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1167-67.)]

III. STATE MANDATE LAW

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

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

The purpose of Section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII

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17 A copy of the Staff Report is included under Section 7 – Documentation to these Test Claims.

18 *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Ca1.4th 613, 618.

19 *Id.* at 881.

A and XIII B impose."[20] The section "was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues."[21] In order to implement Section 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims.[22] Under this scheme, the Legislature established the parameters regarding what constitutes a state mandated cost, defining "Costs mandated by the state" to include:

> any increased costs which a local agency ... is required to incur after July 1, 1980, as a result of any statute enacted on or after 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.[23]

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

> (a) The claim is submitted by a local agency . . . that requested legislative authority for that local agency . . . to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. . . .
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
>
> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. . . .
>
> (d) The local agency . . . has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies . . . that result in no net costs to the local agencies or . . . , or includes additional revenue that was specifically

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

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

[22] Cal. Gov. Code §§ 17500, *et seq.*; *Kinlaw v. State of California* (1991) 54 Ca1.3d 326, 331, 333 [statute establishes "procedure by which to implement and enforce section 6"].

[23] Cal. Gov. Code § 17514.

intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in, a ballot measure approved by the voters in a statewide or local election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

When a new program or level of service is in part federally required, courts have held that the authority to impose a requirement does not equate to a direct order or mandate to impose the requirement. This principle was expressly recognized in *Long Beach Unified School Dist. v. State of California*, (1990) 225 Cal.App.3d 155. In that case, the court found that an executive order that required school districts to take specific steps to measure and address racial segregation in local public schools constituted a reimbursable mandate to the extent the order's requirements exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial actions and measures that were merely advisory under the prior governing law.[24] There was no question that the State had the authority to impose the challenged requirement, and yet the authority to impose the requirement did not equate to federal mandate.

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

> Staff agrees with claimants about the applicability of the P.U.D. case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. ***Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it.*** This was not addressed in the P.U.D. decision.
>
> Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus,

[24] *Long Beach Unified School Dist. v. State of California, supra,* at p. 173.

> the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation." As in *Long Beach Unified School Dist. v. State of California*, the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen to impose these requirements. Thus, staff finds that part D.1.g. of the permit is not a federal mandate.[25]

None of the challenged programs in the 2009 Permit are specifically required by the CWA or its implementing regulations, yet the Permit imposes new requirements on the Permittees that exceed the requirements of federal law, and that are unique to the local government entities such as the Permittees.[26] The 2009 Permit therefore represents a state mandate for which the Permittees are entitled to reimbursement pursuant to Article XIII B section 6 of the California Constitution.

IV. STATE MANDATED ACTIVITIES

A. NEW REQUIREMENTS INVOLVING "NON-STORM WATER DISCHARGES" AS SET FORTH IN SECTION B OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

Section B.2 (Non-Storm Water Discharges) of the 2009 Permit provides the following list of non-storm water discharges that are **not** prohibited from being discharged into the MS4:

a) diverted stream flows;

b) rising ground waters;

c) uncontaminated ground water filtration to MS4s;

d) uncontaminated pumped ground water;

e) foundation drains;

f) springs;

g) water from crawl space pumps;

h) footing drains;

i) air conditioner condensation;

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[25] Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 45 [internal citations omitted].

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

j) flows from riparian habitats and wetlands;

k) water line flushing;

l) discharges from potable water sources not subject to NPDES Permit No. C AG679001, other than water main breaks;

m) individual residential car washing; and

n) dechlorinated swimming pool discharges. [27]

The 2009 Permit noticeably removes three types of non-storm water discharges from the 2002 Permit's list of exempted discharges: **landscape irrigation, irrigation water and lawn watering**. The removal of these three types of non-storm water discharges from the list of exempted discharges means that the Copermittees are now required to prohibit all discharges entering the MS4 from "landscape irrigation," irrigation water" and "lawn watering."

2. Requirements of Federal Law

Section B.2 of the 2009 Permit removes landscape irrigation, irrigation water and lawn watering from the list of exempted non-stormwater discharges that were in the 2002 Permit. The Regional Board provides no legal justification or authority for requiring the Copermittee to impose such an outright prohibition on all such irrigation waters. Neither the 2009 Permit, nor any of its supporting documents, identify any federal regulations as authority for prohibiting all such discharges as required in Section B.2 of the 2009 Permit As such, the removal of these three irrigation water discharges from the list of exempted discharges is not something required anywhere by federal law.

40 C.F.R. 122.26(d)(2)(iv)(B)(1) provides that "the following categories 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: . . . landscape irrigation . . . irrigation water . . . [and] lawn watering." (Emphasis added). This section of the federal regulations thus provides that a municipality must "***address***" such categories of non-storm water discharges, but not that it must "prohibit" all such discharges regardless of the quality or quantity of the irrigation water. Further evidence of the fact that federal law does not require an outright prohibition of all such waters from entering the MS4 is the 2002 Permit which plainly did not require that such discharges "prohibited," and there has been no subsequent change in the CWA or the federal regulations in this regard since then.

Moreover, 40 C.F.R. 122.26(d)(2)(iv)(B)(1) only requires that the municipality "address" such discharges specifically where the municipality first identifies these discharges as specific sources of pollutants. Nowhere in this C.F.R. section does it state that any such discharges must be prohibited. Even if the Copermittees previously identified a specific category or subcategory of non-storm water discharges as a potential source of pollutants in one discrete geographical area,

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[27] 2009 Permit, section B.2, pp. 19-20.

this does not mean that federal law requires the Regional Board to prohibit that entire category of non-storm water discharges throughout all of the Copermittees' jurisdictions. In this case, outside of possibly revising their respective municipal or county codes to provide legal authority as believed needed by the Copermittees to ensure compliance with this new 2009 Permit requirement, none of the Copermittees have determined that prohibiting "landscape irrigation," "irrigation water" in general or "lawn watering" was or is necessary as a means of addressing the alleged pollutants in such irrigation waters.

It is also important to acknowledge that there is a distinction between identifying a particular discharger as a source of pollutants and identifying the entire category as a source of pollutants. The preamble to the federal regulations makes clear that the Copermittees' illicit discharge program need not prevent discharges of the "exempt" categories into the MS4 "unless such discharges are specifically identified on a case-by-case basis as needing to be addressed." 55 Fed. Reg. at 47995. In other words, individual discharges within exempt categories must be addressed when the particular discharge is a source of pollutants to waters of the U.S. The federal regulations do not allow for removing entire categories of exempt non-storm water discharges. U.S. EPA confirmed this case-by-case approach in its Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems (November 1992) ("Part 2 Guidance Manual") where it states:

> If an applicant knows . . . that landscape ***irrigation water from a particular site*** flows through and picks up pesticides or excess nutrients from fertilizer applications, there may be a reasonable potential for a storm water discharge to result in a water quality impact. In such an event, 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.)[28]

As evidenced by the Guidance Manual, the removal of these three irrigation water discharges from the list of exempted discharges is not something required anywhere by federal law. Finally, not only does federal law not require that all irrigation waters be "prohibited" (*i.e.*, it only requires them to be "addressed"), it further does not require that "all" types of "sources" of irrigation water be "addressed" in the event that one or more types or subtypes of irrigation water, under certain conditions, are determined by that municipality to be sources of pollutants. Accordingly, removing all landscape irrigation, irrigation water and lawn watering from the list of exempted discharges, *i.e.*, in effect, requiring that no amount of irrigation runoff from any source (including residential irrigation water) enter the storm drain system, is not only unreasonable, but it is also not something required anywhere under federal law. In removing landscape irrigation, irrigation water and lawn watering from the list of exempted discharges, the Regional Board imposed a new requirement not mandated by federal law and thus imposed a new state mandated program.

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[28] Exhibit "1", Part 2 Guidance Manual at p. 6-33 (emphasis added).

3. Requirements of Previous Orders

The 2002 Permit included landscape irrigation, irrigation water and lawn watering in its list of exempted non-stormwater discharges. See Section B.2. of pages 8-9 of 2002 Permit.

4. Mandated Activities

Section B.2 of the 2009 Permit requires Copermittees to perform the following activities that are **not** required under either federal law or the 2002 Permit:

- By removing landscape irrigation, irrigation water and lawn watering from the list of exempted non-storm water discharges, the Regional Board is now requiring that each Copermittee take steps to "prohibit" all discharges resulting from landscape irrigation, irrigation water and lawn watering of any type or quantity, from entering the Copermittees MS4, *e.g.*, from entering the public streets, gutters, or any portion of the storm water conveyance system.

To comply with the prohibition against discharges from landscape irrigation, irrigation water and lawn watering set forth in Section B.2 of the 2009 Permit, the Copermittees must do the following in order to attempt to comply with this new state mandate:

1. Create new public education and outreach materials;

2. Expend significant staff time to amend each Copermittee's Water Quality Ordinance;

3. Expend significant staff time to coordinate with local water districts;

4. Expend significant staff time to track and respond to calls of over-irrigation, enforce, and monitor compliance; and

5. Improve, monitor and aggressively maintain municipal irrigation systems and landscaping throughout each Copermittee's jurisdiction.

5. Actual Increased Costs of Mandate

As set forth in the Declarations of the Joint Test Claimants, paragraph 6(a), Section B.2 of the 2009 Permit removes landscape irrigation, irrigation water and lawn watering from the list of discharge exceptions, exceptions that were included in the 2002 Permit. The Joint Test Claimants incurred costs to address this mandate, including with respect to the development of a new master ordinance to be adopted to address the prohibitions and requisite staff time to implement the new requirements. The Joint Test Claimants incurred increased costs of $401 during FY 2009-10 and costs of $46,947 in FY 2010-11 to address these requirements of the mandate.

B. THE 2009 PERMIT SECTION I ENTITLED "TOTAL MAXIMUM DAILY LOADS" IMPOSES A SERIES OF NEW UNFUNDED STATE MANDATES ON THE PERMITTEES

1. Challenged Program Requirement

Section I of the 2009 Permit, entitled "Total Maximum Daily Loads," imposes several new State-required programs upon the Permittees that are not mandated by federal law, without the Regional Board providing funding for any of these new mandated programs. Specifically, Section I of the Permit requires as follows:

- "The Copermittees in the Baby Beach Watershed "**shall implement BMPs capable of achieving the interim and final bacteria indicator waste load allocations ("WLAs") in discharges to Baby Beach as described in Table 6**. [TABLE 6: TMDL Waste Load Reduction Milestones.]" (2009 Permit, p. 78, § I.1.a.)

- "The Copermittees **shall conduct necessary monitoring, as described in Attachment A to Resolution No. R9-2008-0027**, and submit annual progress reports as part of their yearly reports." (2009 Permit, p. 78, § I.1.b.)

- "**The following WLAs (Table 7) are to be met in Baby Beach receiving water** by the end of year 2019 for wet weather and 2014 for dry weather: [TABLE 7: Final Bacterial Indicator Waste Load Allocations for Baby Beach.]" (2009 Permit, p. 78, § I.1.c.) and

- "**The Copermittees must meet the following Numeric Targets (Table 8) in Baby Beach receiving waters** in order to meet the underlying assumptions of the TMDL. The Numeric Targets are to be met once 100 percent of the WLA reductions have been achieved (See Table 7 above). [TABLE 8: Final Bacterial Indicator Numeric Targets for Baby Beach]." (2009 Permit, p. 78, § I.1.d.)

In short, the 2009 Permit imposes a series of new mandates in connection with a TMDL for Baby Beach, specifically requiring the Copermittees to meet both interim and final numeric limits (referenced as "Waste Load Allocations" or "WLAs" within the Permit) and to comply with monitoring and reporting requirements. None of these requirements (hereafter, the "TMDL-Related Mandates") are required by federal law. Thus, all are State mandates that are required to be funded under the California Constitution.

In addition, various findings within the 2009 Permit confirm that the TMDL-Related Mandates were included in the Permit with the specific intention of compelling compliance with numeric effluent limitations. In Finding E.11, on pages 15 and 16 of the 2009 Permit, the Regional Board explains its intent in imposing the TMDL-Related Mandates, as follows:

> **11. ... Approved TMDL WLAs are to be addressed using water quality-based effluent limitations (WQBELs) calculated as numeric limitations (either in the receiving water 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.**
>
> * * *
>
> 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 limitations for the City of Dana Point and the County of Orange.** The establishment of WQBELs expressed as BMPs should be sufficient to achieve the WLAs 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 bacteria indicators in the receiving waters.** (2009 Permit, p. 15-16, Finding E.11, emphasis added.)

Accordingly, this finding confirms that the Permit requires compliance with the numeric effluent limits set forth on page 78 of said Permit (and other TMDL numeric limits to be incorporated into the Permit in the future), and that even though the Copermittees may rely upon best management practices ("BMPs") in attempting to comply with these numeric effluent limits, implementation of such BMPs does not constitute compliance with the numeric limits. In sum, the 2009 Permit requires compliance with interim and final numeric limits, irrespective of what BMPs may or may not be implemented and regardless of how effective the BMPs may be. Under all circumstances, whether interim or final, "The Copermittees in the Baby Beach watershed ***shall implement*** BMPs capable of achieving the interim and final [WLAs];" "The following WLAs (Table 7) ***are to be met*** in Baby Beach;" "The Copermittees ***must meet the following Numeric Targets*** (Table 8) in Baby Beach," and "The Copermittees ***shall conduct necessary monitoring*** as described in Attachment A to resolution no. R9-2008-0027, and ***submit annual progress reports*** as part of their yearly reports." (2009 Permit, p. 78, § I.1.a, c, d and b.)

The Permit provisions requiring strict compliance with the Waste Load Allocations from the Baby Beach Bacteria TMDL are not compelled by federal law. Nor does federal law require the related monitoring and reporting requirements contained in the Permit. Accordingly, all such mandates require the subvention of funds before they can properly be required of the local agencies under the 2009 Permit.

2. TMDL Requirements of Federal Law

The CWA was enacted in 1972 by the United States Congress as "a 'comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[29] "To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the federal and state governments. Under the Act, [EPA] is required . . . to establish and enforce technology-based limitations on individual discharges into the Country's navigable waters," and each state is "to institute comprehensive water quality standards

[29] *City of Burbank v. State Water Resources Control Bd.* (2005) 135 Cal.4th 613, 620.

establishing water quality goals for all intrastate waters." According to the California Supreme Court, "[t]hese state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'"[30]

Under the CWA, a TMDL is to be established once a water body has been determined not to be meeting a water quality standard, *i.e.*, once the water body has been listed as being "impaired" for the particular pollutant or pollutants in issue.[31] A TMDL is to be established "at a level necessary to implement the applicable water quality standards."[32] Under the federal regulations, a "TMDL" is defined as follows:

> *Total Maximum Daily Load (TMDL).* The sum of the individual WLAs [waste load allocations] for point sources and LAs [load allocations] for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If best management practices ("BMPs") or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.[33]

The regulations then define a "wasteload allocation" or "WLA" as: "A portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation."[34]

Finally, federal regulations require that NPDES permit terms be "***consistent with the assumptions and requirements of any available wasteload allocations*** for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7."[35] The regulations do not require, however, that a WLA be incorporated into a stormwater permit as a strict numeric limit. Instead, how a WLA is to be incorporated into an NPDES Permit depends upon the nature of the permit itself. For industrial waste dischargers, Congress chose to require strict compliance with water quality standards pursuant to 33 U.S.C. § 1311 (b)(1)(C), *i.e.* the wasteload allocations need to be strictly enforced through the use of numeric limits in the industrial waste discharger's NPDES Permit. However, for municipal storm-sewer dischargers, Congress chose to replace ***"the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce***

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30 *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 704.

31 33 U.S.C. § 1313(d)(1)(C) and (D).

32 33 U.S.C. § 1313(d)(1)(C); also see *Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1404 ["A TMDL must be 'established' at a level necessary to implement the applicable water quality standards. . . . Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the waste load allocations in the TMDL."].

33 40 C.F.R. § 130.2(i).

34 40 C.F.R. § 130.3(h).

35 40 C.F.R. § 122.44(d)(1)(vii)(B).

the discharge of pollutants to the maximum extent practicable," and "expressly" ***"did not require municipal storm-sewer dischargers to comply strictly with 33 U.S.C. § 1311(b)(a)(C)."*** (*Defenders of Wildlife v. Browner* (9th Cir. 1999) ("*Defenders*") 191 F.3d 1159, 1165.)

In sum, while "TMDLs serve as a link in an implementation chain" linking the implementation of water quality standards to the NPDES Permits,[36] strict compliance with WLAs in the TMDL is ***not*** required when incorporating a TMDL into a stormwater NPDES Permit. Rather, a stormwater permit is "consistent with the assumptions and requirements" of the WLAs in a TMDL where it contains provisions to reduce pollutants to "maximum extent practicable," consistent with the MEP" standard.

Nonetheless, as this Commission has previously recognized, "the federal Clean Water Act authorizes states to impose more stringent measures than required by federal law." (Test Claim 07-TC-09, Discharge of Stormwater Runoff – Order No. R9-2007-0001, p. 41.) Thus NPDES "permits may include state-imposed, in addition[] to federally required measures. Those state measures . . . may constitute a state mandate if they 'exceed the mandate in . . . federal law.'" (*Id.* [finding individual permit terms must be analyzed "to determine whether the state requirements exceed the federal requirements imposed on local agencies"].)

Here, the Regional Board has clearly exercised its discretion "to impose more stringent measures than required by federal law." Specifically, the provisions within the 2009 Permit that require all interim and final numeric targets to be "achieved" and "met," as well as the monitoring and reporting obligations associated with such numeric targets, plainly go beyond what is required by federal law, and are thus State mandates. Further, the local agencies responsible for complying with such programs do not have any authority to impose fees to recover the cost of complying with these State mandates.

3. Federal Law Does Not Mandate That Numeric Effluent Limits Be Included In Municipal NPDES Permits, Whether From TMDLs Or Otherwise.

The plain language of the CWA confirms that numeric effluent limits, whether from TMDLs or otherwise, are not required to be imposed upon municipal stormwater NPDES permittees. Instead, federal law provides only that controls should be included in municipal NPDES Permits as needed "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." In this regard, the CWA provides as follows:

> (B) Municipal Discharge.
>
> Permits for discharges from municipal storm sewers –
>
> (i) may be issued on a system- or jurisdiction-wide basis;

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

> (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 in system, design and engineering methods, and such other provisions as the Administrator **or the State determines appropriate** for the control of such pollutants.[37]

Moreover, the law is clear that unless the CWA or the federal regulations expressly require a particular permit term, the Board has wide discretion in imposing permit requirements. (*See, e.g., Rancho Cucamonga v. Regional Water Quality Control Board, Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389 ("*Rancho Cucamonga*").) In *Rancho Cucamonga*, the Court of Appeal held that for municipal NPDES permits: "The Act authorizes States to issue permits with conditions necessary to carry out its provisions. [Citation] ***The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants***."[38] Similarly, in *Natural Resources Defense Council v. U.S. EPA* (Ninth Cir. 1992) 966 F.2d 1292, the Ninth Circuit Court of Appeal found that when it comes to municipal stormwater dischargers, "***Congress did not mandate a minimum standards approach***."[39]

In *Defenders, supra*, 191 F.3d 1159, the Ninth Circuit Court of Appeal recognized the different approach taken by Congress for stormwater, finding that "***industrial discharges must comply strictly with state water-quality standards," while "Congress chose not to include a similar provision for municipal storm-sewer discharges.***"[40] The Court found that "33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311," but instead Section 1342(b)(3)(B)(iii) "replaces the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable.'" The *Defenders* Court thus concluded that "***the statute unambiguously demonstrates*** that ***Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)***."[41]

Divers' Environmental Conservation Organization v. State Water Resources Control Board (2006) 145 Cal.App.4th 246 ("*Divers' Environmental"*) is directly relevant to the principal issue in dispute regarding the TMDL-Related Mandates in this Test Claim. In *Divers' Environmental*, the plaintiff brought suit claiming that an NPDES Permit issued to the United States Navy, by the San Diego Regional Board, was contrary to law because it did not incorporate waste load allocations ("WLAs") from a TMDL into the Navy's permit as numeric effluent limits. After discussing the relevant requirements of the CWA, as well as governing case authority, the Court of Appeal found that, in regulating stormwater permits, EPA ***"has repeatedly expressed a***

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37 33 U.S.C. § 1342(p)(3)(B), emphasis added.

38 *Rancho Cucamonga v. Regional Water Quality Control Board, Santa Ana Region, supra,* at p. 1389.

39 *Natural Resources Defense Council v. U.S. EPA, supra,* at p. 1308.

40 *Defenders,* at 1165, emphasis added.

41 *Ibid*. emphasis added.

preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations." (*Id.* at 256.) The Court went on to find that "it is now clear that in implementing numeric water quality standards, such as those set forth in CTR [the California Toxics Rule], permitting agencies ***are not required to do so*** solely by means of a corresponding ***numeric*** WQBEL's" (water quality based effluent limits). (*Id*. at 262, emphasis added.) Thus, *Divers' Environmental* confirms that the TMDL-derived numeric effluent limits included in the Permit here are not mandated by federal law, but were included at the discretion of the Regional Board.

Similarly, in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, a case, as discussed above, involving municipal NPDES Permit issued by the San Diego Regional Board, the California Court of Appeal confirmed the Ninth Circuit's holding in *Defenders* that the CWA does not require compliance with numeric limits for storm water permittees, finding as follows:

> [I]n 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.] In these amendments, enacted as part of the *Water Quality Act of 1987*, Congress distinguished between industrial and municipal storm water discharges. . . . **With respect to municipal storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable.**"[42]

A recent decision from the Oregon Court of Appeal further confirms that federal law does not require WLAs from a TMDL to be incorporated into a stormwater NPDES Permit. In *Tualatin River Keepers, et al. v. Oregon Department of Environmental Quality* (2010) 235 Ore. App. 132 ("*Tualatin River*"), the court considered whether WLAs from adopted TMDLs were required to be enforced as strict numeric effluent limits within a municipal NPDES Permit. The petitioners argued that the Oregon Department of Environmental Quality ("DEQ") had erred by issuing a permit that did not "specify wasteload allocations in the form of numeric effluent limits." (*Id*. at 137.) Specifically, the petitioners contended that, ***under State law***, numeric effluent limits were required to incorporate the wasteload allocations into the Permit "in a meaningful way." (*Id.* at 147-148.)

Noticeably, the petitioners in the *Tualatin* case did not even argue that ***federal law*** required WLAs from a TMDL to be incorporated into a municipal NPDES Permit as "numeric effluent limitations." And indeed, the Oregon Court found that under the CWA, best management practices were considered to be a "type of effluent limitation," and that such best management practices were authorized to be used pursuant to the CWA, section 33 U.S.C. § 1342(p) as a means of controlling "storm water discharges." (*Id*. at 141-142, citing 33 U.S.C. § 1342(p) and 40 CFR

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[42] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, emphasis in original, citing 33 U.S.C. § 1342(p)(3)(B)(iii) and *Defenders, supra,* at p. 1163.

§ 122.44(k)(2)-(3).) The Court in *Tualatin* then concluded that Oregon law did not require TMDLs to be enforced through the use of numeric effluent limits, holding as follows:

> The applicable TMDLs in this case set forth specific wasteload allocations for municipal storm water. The permits at issue, in turn, indicate the bodies of water for which TMDLs and wasteload allocations have been established and reference the specific TMDL for those bodies of water. **The permits provide in the "adaptive management" section that, "[w]here TMDL wasteload allocations have been established for pollutant parameters associated with the permittee's [municipal separate storm sewer system] discharges, the permittee must use the estimated pollutant load reductions (benchmarks) established in the [storm water management plan] to guide the adaptive management process. . . . Adequate progress toward achieving assigned wasteload allocations will be demonstrated through the implementation of best management practices that are targeted at TMDL-related pollutants."** Pursuant to that section, permittees must evaluate progress toward reducing pollutant loads "through the use of performance measures and pollutant load reduction benchmarks developed and listed in the [stormwater management plan]."
>
> * * *
>
> **Although the permits do not themselves include numeric wasteload allocations like those set forth in the TMDLs, the TMDL wasteload allocations are clearly referenced in the permits, and the permits require implementation of best management practices, set forth in the storm water management plans, to make progress towards meeting those wasteload allocations. Again, best management practices are a type of effluent limitation that is used in municipal storm water permits.** *See* 40 CFR § 122.44(k)(2)-(13). Furthermore, the permits incorporate benchmarks, through incorporation of the storm water management plan, which are specific pollutant load reduction goals for the permittees. Those measures are "permit requirements" that properly incorporate the TMDL wasteload allocations.

(*Id.* at 148-149, emphasis added.) The *Tualatin River* case thus further confirms that the CWA does not require WLAs from TMDLs to be incorporated into stormwater permits as numeric limits.

Moreover, all of the above authority confirming that federal law does not require the use of numeric effluent limits, in any fashion, within a municipal NPDES Permit is consistent with the long-held policies of the California State Water Resources Control Board ("State Board"). For example, in State Board Order No. 91-03 (Exhibit "1" hereto), in the context of considering the need for numeric effluent limitations in a municipal NPDES Permit (in the San Francisco Region),

the State Board concluded that: "***Numeric effluent limitations are not legally required***. Further, we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the Permit constitutes effluent limitations as required by law." (Exhibit "2", p. 30-31.)

Further, in a companion decision to Order No. 91-03, *i.e.* Order No. 91-04, related to the issuance of another municipal NPDES that did not contain numeric limits (this time for the Los Angeles Region), the State Board similarly found that: "***There are no numeric objectives or numeric effluent limits required at this time, either in the Basin Plan or any Statewide Plan that applied to storm water discharges***." (Exhibit "3", State Board Order No. 91-04, p. 14.)

The reason for the State Board's position was explained, in part, in a February 11, 1993 State of California Memorandum regarding the "*Definition of 'Maximum Extent* Practicable (Exhibit "4" hereto – hereafter "MEP Memo"), the State Board's Chief Counsel's Office concluded as follows:

> **On its face, it is possible to discern some outline of the intent of Congress in establishing the MEP standard. First, the requirement is to reduce the discharge of pollutants, rather than totally prohibit such discharge**. Presumably, the reason for this standard (and the difference from the more stringent standard applied to industrial dischargers in Section 402(p)(3)(A), **is the knowledge that it is not possible for municipal dischargers to prevent the discharge of all pollutants in storm water**. (MEP Memo, p. 2, bolding added, underlining in original.)

The Memo concluded the following factors should be considered in making a determination on whether a BMP is consistent with the "MEP" standard:

> 1. Effectiveness: Will a BMP address a pollutant 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 benefit to be achieved?**
>
> 5. **Technical feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?**[43]

Given these realities, the State Board has consistently recognized not only that federal law does not require that numeric limitations be included in an NPDES permit, but that such numeric limits are generally inappropriate in such permits.

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[43] Exhibit 10, MEP Memo, pp. 4-5, emphasis added.

Indeed, countless other State Board decisions and related policy and guidance documents have repeatedly reaffirmed the State Board's position that federal law does not require the use of numeric effluent limits within municipal NPDES Permits, like the 2009 Permit in question. (*See, e.g.*, Exhibit "5," State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs ***in lieu of numeric water quality-based effluent limitations***."]; Exhibit "6," State Board Order No. 2000-11, p. 3 **["*In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations*."]**; Exhibit "7," State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that ***the iterative approach***, which focuses on timely improvements of BMPs, is appropriate."]; Exhibit "8," State Board Order No. 96-13, p. 6 ["***federal law does not require*** the [San Francisco Reg. Bd] to dictate the specific controls."]; Exhibit "9," State Board Order No. 2006-12, p. 17 ["***Federal regulations do not require numeric effluent limitations for discharges of storm water***"]; Exhibit "10," *Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities*, June 19, 2006, p. 8 ["***It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers***."]; and Exhibit "11," an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 ["***Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs.***"].)

In *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 ("*Hayes*"), the Court of Appeals established the standard for the Commission to follow when determining whether a State mandate is required under federal law, particularly when a general federal requirement is imposed upon the State. Specifically, the Court found as follows:

> When the federal government imposes costs on local agencies, those costs are not mandated by the State and thus would not require State subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. **This should be true even though the State has adopted an implementation statute or regulation pursuant to the federal mandate so long as the State had *no* "true choice" in the manner of the implementation of the federal mandate**.…
> **[T]he reasoning would not hold true where the manner of implementation was left to the true discretion of the State.**[44]

Here, the Board's decision to incorporate WLAs from the Baby Beach TMDL into the 2009 Permit and to require strict compliance with such numbers was clearly the result of a "true choice" on the part of the Board, as it is well-established that federal law does not require that WLAs from a TMDL be incorporated into a stormwater permit as strict "numeric effluent limitations." Nor does federal law require the imposition of the various related TMDL monitoring and reporting requirements imposed on the Copermittees by the 2009 Permit. To the contrary, as

[44] *Hayes v. Commission on State Mandates*, *supra*, 11 Cal.App.4th at p. 1593.

confirmed by numerous court decisions as well as by various State Board Orders and policy, the CWA only requires the application of the MEP standard, not the imposition of numeric limits. In addition, and as the State Board's Numeric Effluent Limits Expert Panel concluded in 2006, **"*It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and, in particular, urban dischargers*"** (Exhibit "12", Numeric Effluent Limits Panel, p. 8). Further, "***it is not possible for municipal dischargers to prevent the discharge of all pollutants in stormwater***." (Exhibit 4, MEP Memo, p. 2.) A mandate that stormwater permittees comply with numeric limits, in any form, goes beyond federal law.

4. There Were No TMDL-Related Mandates In The 2002 Permit

The 2002 Permit contained none of the TMDL-Related Mandates in issue in this Test Claim. As such, all of the requirements involving TMDLs within the 2009 Permit are new requirements that go beyond what is required under federal law, and thus all such requirements constitute unfunded State mandates.

5. TMDL – Related Mandates and Actual Increased Costs to the Joint Test Claimants

2009 Permit Sections I.1.(a)-(d) impose mandates upon Copermittees County and City of Dana Point to meet the numeric effluent limits specified in Tables 6, 7 and 8 on page 78 of the 2009 Permit, along with related monitoring and reporting obligations.

Each of the TMDL-Related Mandates are new programs not contained anywhere in the 2002 Permit. Further, each obliges the various Copermittees to strictly meet interim or final numeric effluent limits, and exposes the Copermittees enforcement action or third-party citizen suits if the limits are not met. (*See* 33 U.S.C. § 1365; *also see NRDC v. County of Los Angeles et al.* (9th Circuit 2013) 725 F.3d 1194 [holding county and flood control district liable in a third-party citizen suit based upon monitoring results that showed exceedances of numeric water quality standards].) Yet, as discussed in detail above, and as confirmed in case after case and in numerous State Board Orders and policy documents, not to mention the plain language of the Act itself, the CWA does not require the imposition of numeric effluent limits within municipal NPDES Permits.

The San Diego RWQCB has therefore imposed a state mandate on the County and the City of Dana Point, who have incurred increased costs to address the requirements of the TMDL-related mandate. As set forth in the Section 6 Declarations at paragraph 6(i), the increased costs of the mandate to these Joint Test Claimants were $28,575.91 in FY 2009-10 and $33,646.10 in FY 2010-11.

C. THE 2009 PERMIT PROVISIONS, SECTIONS C AND F, REQUIRING THE DEVELOPMENT OF MONITORING AND INVESTIGATION AND COMPLIANCE PROGRAMS TO MEET NON-STORMWATER DRY WEATHER ACTION LEVELS" OR "NALS," ARE UNFUNDED STATE MANDATES

1. The Challenged Program Requirements Involving NALs

Under Section C of the 2009 Permit, entitled "Non-Stormwater Dry Weather Action Levels," the Copermittees are required to comply with a number of new requirements triggered by specified pollutant concentration levels termed "Non-Stormwater Dry Weather Actions Levels" or "NALs" (hereafter, "NAL-Triggered Mandates"). The NAL-Triggered Mandates are contained in Section C (pages 21-24) and Section F.4(d) and (e) (pages 70-71) of the 2009 Permit. They include an elaborate and very particular set of programmatic investigation, monitoring and reporting requirements, and action items, all based on the existence, type and frequency of a NAL exceedance.

Specifically, the 2009 Permit requires as follows:

> 1. Each Copermittee, beginning no later than May 1, 2011, **shall implement** the non-storm water dry weather action level (NAL) **monitoring** as described in Attachment E of this Order. (2009 Permit, p. 21, Section C.1.)
>
> 2. **In response to an exceedance of an NAL, each Copermittee must investigate and identify the source of the exceedance in a timely manner. . . . Following the source investigation and identification, the Copermittees must submit an action report dependant on the source of the pollutant exceedance as follows:**
>
> a. If the Copermittee identifies the source of the exceedance as natural (non-anthropogenically influenced) in origin and in conveyance into the MS4; then **the Copermittee shall report their findings and documentation** of their source investigation to the Regional Board **within fourteen days** of the source identification.
>
> b. **If the Copermittee identifies the source of the exceedance as an illicit discharge or connection, then the Copermittees must eliminate the discharge to their MS4 and report the findings**, including any enforcement action(s) taken, and documentation of the source investigation to the Regional Board **within fourteen days** of the source identification. If the Copermittee is unable to eliminate the source of discharge within fourteen days, **then the Copermittee must submit, as part of their action report, their plan and timeframe to eliminate the source of the exceedance . . . .**

c. If the Copermittee identifies the source of the exceedance as an exempted category of non-storm water discharge, **then the Copermittees must determine if this is an isolated circumstance or if the category of discharges must be addressed through the prevention or prohibition of that category of discharge as an illicit discharge. The Copermittee must submit their findings in including a description of the steps taken to address the discharge and the category of discharge, to the Regional Board for review with the next subsequent annual report.** Such description shall include relevant updates to or new ordinances, orders, or other legal means of addressing the category of discharge. The **Copermittees must also submit a summary of their findings with the Report of Waste Discharge**.

d. If the Copermittee identifies the source of the exceedance as a non-storm water discharge in violation or potential violation of an existing separate NPDES permit (e.g. the groundwater dewatering permit), **then the Copermittee must report, within three business days, the findings to the Regional Board including all pertinent information regarding the discharger and discharge characteristics.**

e. If the Copermittee is unable to identify the source of the exceedance after taking and documenting reasonable steps to do so, **then the Copermittee must identify the pollutant as a high priority pollutant of concern in the tributary subwatershed, perform additional focused sampling and update their programs within a year to reflect this priority. The Copermittee's annual report shall include these updates to their programs including, where applicable, updates to their watershed workplans (Section G.2), retrofitting consideration (Section F.3.d) and program effectiveness work plans (Section J.4).**

f. The Copermittee or any interested party, may evaluate existing NALs and propose revised NALs for future Board consideration.

3. . . . **Failure to timely implement required actions specified in this Order following an exceedance of an NAL constitutes a violation of this Order**. . . . During any annual reporting period in which one or more exceedances of NALs have been documented the **Copermittee must submit with their next scheduled annual report, a report describing whether and how the observed exceedances did or did not result in a discharge from the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters**.

4. **Monitoring of effluent will occur at the end-of-pipe prior to discharge** into the receiving waters, with the focus on Major Outfalls, as outlined in 40 CFR 122.26(B5-6) and Attachment E of this Order. **The Copermittees must develop their monitoring plans** to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. **At a minimum, outfalls that exceed any NALs once during any year must be monitored** in the subsequent year. Any station that does not exceed an NAL for three years may be replaced with a different station.

5. **Each Copermittee shall monitor** for the non-storm water dry weather action levels, which are incorporated into this Order as follows:

    a. **Action levels for discharger to inland surface waters:**

        Table 4.a.1: General Constituents . . .

        Table 4.a.2: Priority Pollutants . . .

    b. **Action levels for discharger to bays, harbors and lagoons/estuaries:**

        Table 4.b: General Constituents . . .

    c. **Action levels for discharges to the surf zone:**

        Table 4.c: General Constituents . . .

(2009 Permit, pp. 21-24, Section C, Non-Stormwater Action Levels.) Other NAL-Triggered Mandates are set forth in Section F.4 of the 2009 Permit, as follows:

d. **Each Copermittee must conduct** dry weather field screening and analytical **monitoring** of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order. (2009 Permit, p. 70, Section F.4.d.)

Also under Section F.4.e. of the Permit, entitled "**Investigation/Inspection And Follow-Up"**:

> **Each Copermittee must "implement procedures to investigate and inspect** portions of the MS4 that, based on the results of the field screening, analytical monitoring, or other appropriate information, indicate a reasonable potential of containing illicit discharges, illicit connections, or other sources of pollution in non-storm water.
>
> (1) Develop response criteria data: **Each Copermittee must develop, update and use the** numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed in response to water quality monitoring. The criteria **must include the required non-stormwater action levels** (see Section C) and a consideration of 303d-listed waterbodies and environmentally sensitive areas (ESAs) as defined in Attachment C. (2009 Permit, p. 70-71, Section F.4.e.)

Furthermore, Sections F.4.e(2)(b) and (c) provide:

> 2. Respond to data: **Each Copermittee must investigate portions of the MS4** for which water quality data or conditions indicate a potential illegal discharge or connection . . .
>
> > (b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittees **must either initiate an investigation to identify the source of the discharge or document the rationale** for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation **shall be included in the Annual Report**. (2009 Permit, p. 71, Section F.4.e(2)(b).)
> >
> > (c) Analytical data: Within five business days of receiving analytical laboratory results that exceed action levels, the Copermittees **must either initiate an investigation to identify the source of the discharge or document the**

> **rationale** for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation **shall be included in the Annual Report**. (2009 Permit, p. 71, Section F.4.e(2)(c).)

In short, Sections C and F of the Permit set forth a series of very detailed programmatic action requirements to monitor for, report on, and respond to NAL exceedances, all of which will be very costly and difficult to adhere to. Yet, NAL-Triggered Mandates are not required or even referenced anywhere in the CWA or in the federal regulations thereunder. Further, no numeric NAL-Triggered Mandates were included in the prior 2002 Permit.

2. There Are No NAL-Triggered Mandates Under Federal Law

No federal statute, regulation, or policy requires that municipal stormwater permits include monitoring, reporting and/or compliance obligations in connection with NALs or any other numeric action levels. In fact, nothing under the CWA, nor the regulations thereunder, requires the inclusion of numeric NALs in any fashion in a municipal stormwater permit.

To the contrary, as discussed in detail above in connection with the TMDL-Related Mandates, the language of the CWA, as well as the relevant authority discussing federal requirements for a municipal NPDES Permit under the CWA, all confirm that no numeric limits, whether or not styled as "action levels," are ***required*** to be included within a municipal storm water permit. (*See, e.g., Defenders of Wildlife, supra*, 191 F.3d 1159, 1163 and 1165 ["Industrial discharges must comply strictly with State water-quality standards," while "Congress chose not to include a similar provision for municipal storm-sewer discharges;" "the ***statute unambiguously demonstrates*** that Congress did not require municipal storm-sewer dischargers to strictly comply with 33 U.S.C. § 1311(b)(1)(C)."]; *BIA v. State Board, supra,* 124 Cal.App.4th 866, 874 ***["With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES Permit requirements to meet water quality standards without specific numeric effluent limits and to instead impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'"]***; *Divers' Environmental, supra*, 145 Cal.App.4th 246, 256 ***["In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations."]***; State Board Order No. 2000-11, p. 3 ["In prior orders this Board has explained the need for the municipal stormwater programs ***and the emphasis on BMPs in lieu of numeric effluent limitations***."]; State Board Order No. 2006-12, p. 17 ***["Federal regulations do not require numeric effluent limitations for discharges of stormwater."]***; and State Board Order No. 91-03, pgs. 30-31 ["***We . . . conclude that numeric effluent limitations are not legally required***. Further we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the Permit constitutes effluent limitations as required by law.'"].)

While the NALs are not traditional "strict" numeric effluent limits, in that an exceedance of an NAL does not automatically constitute a permit "violation," numeric NALs are similar to strict numeric effluent limits in that they impose new mandated requirements on the Copermittees to meet such numeric limits. If the Copermittees' non-storm water discharges exceed the NALs, the Copermittees must thereafter implement costly measures to comply with the numeric action

levels, regardless of the feasibility of complying. (*See* 2009 Permit, Section C (pages 21-24) and Section F.4(d) and (e) (pages 70-71).) Thus, the "NAL-Triggered Mandates" go far beyond what is required to be imposed in an MS4 permit. Accordingly, the Board had a "true choice" in deciding to impose the "NAL-Triggered Mandates." (*Hayes v. Commission on State Mandates*, *supra*, 11 Cal.App.4th at 1593.)

3. Requirements From The 2002 Permit

Although general dry-weather monitoring and follow-up requirements were included in the 2002 Permit, all of the NAL-Triggered Mandates set forth in the 2009 Permit are specific new requirements that were not included in the 2002 Permit.

4. The NAL-Triggered Requirements Are Unfunded State Mandates

None of the monitoring, reporting and compliance programs of the NALs-Triggered Mandates are compelled anywhere under federal law. In fact, the Courts and the State Board have consistently concluded that no numeric limits are ***required*** by federal law in any form, whether they are termed "action levels" or "numeric effluent limits." In addition, the NAL-Triggered Mandates under the 2009 Permit are all new requirements not contained in the 2002 Permit. Moreover, no changes have been to federal law since the 2002 Permit was adopted that would support any argument that NALs are now required under federal law, when they were clearly not required under that same federal law in 2002 when the 2002 Permit was adopted.

5. Actual Increased Costs of Mandate

As a result of the mandate set forth in Section C of the 2009 Permit, the Joint Test Claimants have incurred increased costs in the form of additional monitoring and the development of guidance to address NAL exceedances. In addition, certain Joint Test Claimants incurred additional costs in investigation and followup activities to address NAL exceedances. As set forth in the Section 6 Declarations, paragraph 6(b), the Joint Test Claimants incurred increased costs to address this mandate of $13,584 in FY 2010-11 and $63,761 in FY 2011-12.

D. THE 2009 PERMIT PROVISIONS UNDER SECTION D REQUIRING COMPLIANCE WITH VARIOUS PROGRAMS ASSOCIATED WITH STORMWATER ACTION LEVELS OR "SALs" ARE UNFUNDED STATE MANDATES

1. The Challenged Program Requirements Involving Stormwater Action Levels – SALs

Section D of the 2009 Permit, entitled "Stormwater Action Levels," imposes a series of new State mandated programs concerning what are referred to in the Permit as "Stormwater Action Levels" or "SALs." (2009 Permit, pgs. 25-26.) The SALs are purportedly applicable to discharges of "stormwater" (presumably meaning water from precipitation events that enters the MS4 and is thereafter discharged into waters of the United States). Similar to the NAL-Triggered Mandates, the "SAL-Related Mandates" include specific investigation and compliance program requirements in response to any exceedance of SAL, as well as monitoring and reporting obligations associated

with the SALs (hereafter, all such SAL related programs are collectively referred to as "SAL-Related Mandates").

Specifically, under Section D of the 2009 Permit:

> 1. Beginning Year 3 after Order adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States **that exceed the Storm Water Action Levels for the pollutants listed in Table 5 (below) will require each Copermittee to affirmatively augment and implement all necessary storm water controls and measures** to reduce the discharge of the associated class of pollutant(s) to the MEP standard. . . . Copermittees shall take the magnitude, frequency, and number of constituents exceeding the SAL(s), in addition to receiving water quality data and other information, into consideration when reacting to SAL exceedances in an iterative manner. **Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not complied with the MEP standard.**
>
> [Table 5. Storm Water Action Levels. . . .]

(2009 Permit, p. 25, § D.1.) Sections D.2 and D.4 then build on those SAL requirements and impose the following mandates:

> 2. . . . **The Copermittees must develop their monitoring plans to sample a representative percent of the major outfalls within each hydrologic subarea**. At a minimum, **outfalls that exceed SALs must be monitored** in the subsequent year. Any station that does not exceed an SAL for 3 years may be replaced with a different station. SAL samples must be 24 hour time waited composites."
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> 4. . . . To be relieved of the requirements to prioritize pollutant/watershed combinations of BMP updates and to continue monitoring a station, the **Copermittee must demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature.**

(2009 Permit, p. 25, § D.2 and D.4.) In short, similar to the NAL-Triggered Mandates, the 2009 Permit includes a series of new monitoring, reporting and compliance obligations associated with "SALs" that were not contained in the 2002 Permit, and that are not required by federal law.

2. There Are No SAL-Related Mandates Required Under Federal Law

Nothing anywhere in the CWA, nor the regulations thereunder, requires the inclusion of Storm Water Action Levels or SALs within a municipal NPDES Permit. In addition, there is no federal requirement that municipal NPDES Permits include monitoring, reporting or compliance obligations that are triggered by an exceedance of a SAL.

Contrary to any requirement to include a SAL-Related Mandate within a municipal NPDES Permit, the plain language of the CWA, as well as controlling case authority interpreting the Act, all make clear that no form of SALs or any related mandates are required to be included within a municipal NPDES Permit by federal law. (*See Defenders of Wildlife, supra*, 191 F.3d 1159, 1163 ***["Industrial discharges must strictly comply with State water-quality standards," while "Congress chose not to include a similar provision for municipal storm-sewer discharges."]***; *Divers' Environmental, supra*, 145 Cal.App.4th 246, 256 **[*"In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations."***]; and *BIA v. State Board, supra*, 124 Cal.App.4th 866, 874 ["With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES Permit requirements to meet water quality standards ***without specific numeric effluent limits*** and to instead impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'"]; State Board Order No. 2000-11, p. 3 ["In prior orders this Board has explained the need for the municipal stormwater programs ***and the emphasis on BMPs in lieu of numeric effluent limitations***."]; State Board Order No. 2006-12, p. 17 ***["Federal regulations do not require numeric effluent limitations for discharges of stormwater."]***; and State Board Order No. 91-03, pgs. 30-31 ["***We . . . conclude that numeric effluent limitations are not legally required***. Further we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the Permit constitutes effluent limitations as required by law.'"].)

Like the NALs, the SALs are not traditional "strict" numeric effluent limits that result in violations if exceeded, but are nonetheless similar to such limits in that they are new programs imposed on the Copermittees that are tied to achieving compliance with specific numeric limits. As with the NALs, if the Copermittees exceed the SALs, they are subject to additional and costly requirements, regardless of the feasibility of complying with the SALs. (*See* 2009 Permit, pgs. 25-26.) In short, all of these new requirements are tied to determining and achieving compliance with a set of numbers, none of which is required under federal law. Thus, like the NAL-Triggered Mandates, the SAL-Related Mandates go far beyond what is required to be imposed in an MS4 permit, and the Board had a "true choice" in deciding to impose the "SAL-Related Mandates." (*See Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th at 1593.)

3. There Were No SAL-Related Mandates In the 2002 Permit

All of the SAL-Related Mandates, including monitoring, investigation, reporting and compliance activities contained in the 2009 Permit are new programs that were not included in any fashion in the 2002 Permit.

4. The SAL-Related Requirements are Unfunded State Mandates

None of the monitoring, reporting, or compliance related programs imposed in connection with the SAL-Related Mandates under the 2009 Permit are required by federal law. Further, it is clear that the Courts (as well as the State Board) have consistently found, without exception, that numeric limitations of any kind are ***not required*** in a municipal NPDES Permit. The costs of complying with the SAL-Related Mandates will continue throughout this 2009 Permit and indefinitely with future permits, unless this new program is eliminated. As such, this new state mandate must be funded by the State in accordance with the California Constitution.

5. Actual Increased Costs of Mandate

As a result of the mandates set forth in Section D.2 of the 2009 Permit, the Joint Test Claimants have incurred increased costs in monitoring and the development of SAL protocols, as well as followup activities. As set forth in the Section 6 Declarations, paragraph 6(c), the Joint Test Claimants have incurred increased costs from this mandate of $19,690 in FY 2010-11 and $16,504 in FY 2011-12.

E. NEW "LOW IMPACT DEVELOPMENT" ("LID") AND HYDRO-MODIFICATION REQUIREMENTS REQUIRED BY SECTIONS F.1.D AND F.1.H OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

The 2009 Permit requires the Permittees to develop and implement a program to ensure that new development and significant redevelopment, as those terms are defined in the 2009 Permit, comply with strict low impact development and hydromodification prevention requirements. Specifically, the 2009 Permit imposes the following new LID requirements on Permittees: review and update the model and local Standard Storm Water Mitigation Plan ("SSMP"), add low impact development ("LID") BMP requirements for each priority development project ("PDP"),[45] create a formalized review process for all PDPs, assess potential on- or off-site collection and reuse of storm water, amend local ordinances to remove barriers to LID implementation, maintain or restore natural storage reservoirs and drainage corridors, drain a portion of impervious areas into pervious areas, and construct low-traffic areas with permeable surfaces.[46] The 2009 Permit also requires the Permittees to collaboratively develop and implement a Hydromodification Management Plan ("HMP").

The issue of whether these requirements exceed the requirements of federal law, and represent reimbursable state mandates was considered by the Commission in Test Claim 07-TC-09, Discharge of Stormwater Runoff – Order No. R9-2007-0001 (regarding the San Diego County Municipal Stormwater Permit). In its decision on Test Claim 07-TC-09, the Commission determined that the San Diego County NPDES permit's LID and hydromodification requirements exceed the requirements of federal law, and as such represent state mandates. The Commission found, however, that the state mandates were not reimbursable, because the County of San Diego and the other permittees retained the ability to assess fees for new development.

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45 2009 Permit, part D.1.d(3)-(10).

46 *Id*. at part D.1d(4).

With the passage of California's Proposition 26 in November, 2010, it is clear that the costs associated with developing and implementing the LID and hydromodification programs is not recoverable through fees. Proposition 26, enacted by the voters this year to amend Article XIII C of the California Constitution, defined virtually any revenue device enacted by a local government as a tax requiring voter approval, unless it fell within certain enumerated exceptions.

Article XIII C § 2(d)[47] now provides that:

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

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

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

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

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

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

> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.
>
> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

In order not to be characterized as a tax subject to a voter approval, a fee must fall within the express exemptions it authorized by Article XIII C § 1(e). The fee must be such that it recovers no more than the amount necessary to recover costs of the governmental program being funded by the fee. Further the person or business being charged the fee, the payor, may only be charged a fee based on the portion of the total government costs attributable to burdens being placed on the government by that payor or an amount based on the direct benefits the payor receives from the program or facility being funded by the fee.

A fee or charge that does not fall within the seven exceptions listed in Article XIIIC § 1(e) is automatically deemed a tax, which must be approved by the voters. Any fee that does not fall within one of the one of the exceptions listed in Article XIII C § 1(e) that is imposed for a specific purpose, such as funding all or portion of a program designed to comply with a local government's obligation under the MS4 Permit, would constitute a "special tax." Article XIII A § 4 and Article XIII C § 2(d) would thus require it to be approved by 2/3 of the voters of the portion of the jurisdiction subject to the fee.

With regard to municipal projects, the Commission found that the low impact development and hydromodification requirements in the San Diego County permit are not reimbursable state mandates because the permittees in that case are under no obligation to construct projects that would trigger the San Diego County permit requirements.[48]

In support of this determination, the Commission cited the California Supreme Court's decision in *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727. In *Kern High School Dist.*, the Court held that certain hearing requirements imposed upon school districts did not constitute a reimbursable state mandate because they were a requirement of voluntary program the school districts had elected to participate in. The Court held "activities undertaken at the option or discretion of a local government entity (that is, actions

[48] Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 46, 52.

undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement."[49]

In coming to this decision, the Court relied on a lower court decision in *City of Merced v State of California* (1984) 153 Cal.App.3d 777. In that case, the city elected to take property by eminent domain, under which it was required by then recent legislation to compensate the owner for loss of "business goodwill." The city sought reimbursement from the state, arguing that the new statutory requirement was a reimbursable state mandate. The Court of Appeal concluded that the city's increased costs flowed from its optional decision to condemn the property. The court reasoned: "whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. . . Thus, payment for loss of goodwill is not a state-mandated cost."[50]

The conditions that dictated the Court's decision in *Kern High School Dist.* are not present in the 2009 Permit. For one, the 2009 Permit is not a voluntary program. The 2009 Permit nonetheless requires the Copermittees to take immediate actions related to low impact development and hydromodification, including requirements that are not triggered by any voluntary action on the part of the Copermittees. The conditions that dictated the Court's decision in *Kern High School Dist.* are also absent with regard to project implementation. Again, the 2009 Permit is not a voluntary program, yet it requires the Copermittees to incur costs related to low impact development and hydromodification on municipal projects.[51] This includes recreational facilities, parking lots, streets, roads, highways, and any other project large enough to exceed the specified thresholds. The development and upkeep of these municipal land uses is not optional. They are integral to the Copermittee's function as municipal entities, and the failure to make necessary repairs, upgrades and extensions can expose to the Copermittees to liability.

The rationale from *City of Merced* is likewise inapplicable. In that case, the city had the ability to avoid the new program by purchasing property, rather than taking it with eminent domain. Under the 2009 Permit, the Permittees have no such option. The 2009 Permit will force the Copermittees to incur new, additional costs on every municipal project. Moreover, the California Supreme Court has rejected the applicability of *City of Merced* in circumstances beyond those present in Kern High School Dist.

In *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, the Court considered similar regulatory requirements to those at issue in *Kern High School Dist.* The Court discussed its decision in *Kern High School Dist.*, at length, and cautioned against future reliance on *City of Merced* holding:

> [W]e agree with the District and amici curiae that ***there is reason to question an extension of the holding of City of Merced so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514 whenever an***

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[49] *Department of Finance v. Commission on State Mandates* (Kern High School Dist.) (2003) 30 Cal.4th 727, 742.

[50] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

[51] 2009 Permit section XII.B.7 requires the Permittees to document which low impact development BMPs are included on any project in the WQMP for the project.

> ***entity makes an initial discretionary decision that in turn triggers mandated costs***. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley*, *supra*, 190 Cal.App.3d 521, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (Id., at pp. 537–538.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced*, *supra*, 153 Cal.App.3d 777, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.[52]

Thus strict reliance on the *City of Merced* rationale is only appropriate in the very limited circumstances presented in the *Kern High School Dist.*, case. Those conditions are not present in the 2009 Permit, which imposes requirements on the Copermittees that are either wholly unrelated to voluntary action on the part of the Copermittees, or are triggered by municipal projects that the Copermittees implement with little to no discretion because they are integral to the Copermittees' function as municipal entities, and/or the failure to undertake them would expose the Copermittees to liability. As set forth above, and in greater detail below, these requirements exceed federal law and represent reimbursable state mandates.

1. Challenged Program Requirements

The Permittees challenge parts F.1.d of the 2009 Permit as applied to municipal projects and development of program Permittees also challenge F.1.h in its entirety.

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[52] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

a. Challenged LID Requirements

To comply with these parts F.1.d(4) and F.1.d(7), the Permittees must invest significant resources to review and update the model and local SSMPs and add LID BMP requirements for each priority development project ("PDP").[53] Continued compliance with these sections will also require the Permittees to add requirements to municipal projects and will significantly increase the costs of design and construction.

New LID BMP requirements include creating a formalized review process for all PDPs, assessing potential on- or off-site collection and reuse of storm water, amending local ordinances to remove barriers to LID implementation, maintaining or restoring natural storage reservoirs and drainage corridors, draining a portion of impervious areas into pervious areas, and constructing low-traffic areas with permeable surfaces.[54] Mandatory language in the 2009 Permit, part F.1.d, creates a state mandate for Permittees to do all of the following:

> (4) Low Impact Development BMP Requirements
>
> Each Copermittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss.
>
> (a) The following LID BMPs must be implemented:
>
> (i) Each Copermittee must require LID BMPs or make a finding of infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(8);
>
> (ii) Each Copermittee must incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for Priority Development Projects;
>
> (iii) The review of each Priority Development Project must include an assessment of potential collection of storm water for on-site or offsite reuse opportunities;
>
> (iv) The review of each Priority Development Project must include an assessment of techniques to infiltrate, filter, store, evaporate, or retain runoff close to the source of runoff; and

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53 2009 Permit, part D.1.d(3)-(10).

54 *Id*. at part D.1.d(4).

(v) Within 2 years after adoption of this Order, each Copermittee must review its local codes, policies, and ordinances and identify barriers therein to implementation of LID BMPs. Following the identification of these barriers to LID implementation, where feasible, the Copermittee must take, by the end of the permit cycle, appropriate actions to remove such barriers.

(b) The following LID BMPs must be implemented at all Priority Development Projects where technically feasible as required below:

(i) Maintain or restore natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams.

(ii) Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other pertinent factors.

(iii) Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.

(iv) Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

(c) To protect ground water resources any infiltration LID BMPs must comply with Section F.1.(c)(6).

(d) LID BMPs sizing criteria:

(i) LID BMPs shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map ("design capture volume");

(ii) If onsite retention LID BMPs are technically infeasible per section F.1.d.(7)(b), LID biofiltration BMPs may treat any volume that is not retained onsite by the LID BMPs. The LID biofiltration BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP. Due to the flow through design of biofiltration BMPs, the total volume of the BMP, including pore spaces and prefilter detention volume, must be sized to hold at least 0.75 times the design storm volume that is not retained onsite by LID retention BMPs;

(iii) If it is shown to be technically infeasible to treat the remaining volume up to and including the design capture volume using LID BMPs (retention or biofiltration), the project must implement conventional treatment control BMPs in accordance with Section F.1.d.(6) below and must participate in the LID waiver program in Section F.1.d.(7).

(e) All LID BMPs shall be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

* * *

(7) Low Impact Development (LID) BMP Waiver Program.

The Copermittees must develop, collectively or individually, a LID waiver program for incorporation into local SSMPs, which would allow a Priority Development Project to substitute implementation of all or a portion of required LID BMPs in section F.1.d(4) with implementation of treatment control BMPs and a mitigation project, payment into an in-lieu funding program, and/or watershed equivalent BMP(s) consistent with Section F.1.d.(11). The Copermittees shall submit the LID waiver program as part of their updated model SSMP. At a minimum, the program must meet the requirements below:

(a) Prior to implementation, the LID waiver program must clearly exhibit that it will not allow PDPs to result in a net impact (after consideration of any mitigation and in-lieu payments) from pollutant loadings over and above the impact caused by

projects meeting LID requirements; (b) For each PDP participating, a technical feasibility analysis must be included demonstrating that it is technically infeasible to implement LID BMPs that comply with the requirements of Section F.1.(d)(4). The Copermittee(s) must develop criteria for the technical feasibility analysis including a cost benefit analysis, examination of LID BMPs considered and alternatives chosen. Each PDP participating must demonstrate that LID BMPs were implemented as much as feasible given the site's unique conditions. Analysis must be made of the pollutant loading for each project participating in the LID substitution program. The estimated impacts from not implementing the required LID BMPs in section F.1.d.(4) must be fully mitigated. Technical infeasibility may result from conditions including, but not limited to:

(i) Locations that cannot meet the infiltration and groundwater protection requirements in section F.1.c.(6). Where infiltration is technically infeasible, the project must still examine the feasibility of other onsite retention LID BMPs;

(ii) Smart growth and infill or redevelopment locations where the density and/or nature of the project would create significant difficulty for compliance with the onsite volume retention requirements; and

(iii) Other site, geologic, soil or implementation constraints identified in the Copermittees updated local SSMP document.

(c) The LID waiver program must include mechanisms to verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements;

(d) The LID waiver program must develop and implement a review process verifying that the BMPs to be implemented meet the designated design criteria. The review process must also verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements.

(e) The LID waiver program must include performance standards for treatment control BMPs specified in compliance with section F.1.(d)(6).

(f) Each PDP that participates in the LID waiver program must mitigate for the pollutant loads expected to be discharged due to not implementing the LID BMPs in section F.1.d.(4). Mitigation projects must be implemented within the same hydrologic subarea as the PDP. Mitigation projects outside of the hydrologic subarea but within the same hydrologic unit may be approved provided that the project proponent demonstrates that mitigation projects within the same hydrologic subarea are infeasible and that the mitigation project will address similar beneficial use impacts as expected from the PDPs pollutant load types and amount. Offsite mitigation projects may include green streets projects, existing development retrofit projects, retrofit incentive programs, regional BMPs and stream restoration. Project applicants seeking to utilize these alternative compliance provisions may propose other offsite mitigation projects, which the Copermittees may approve if they meet the requirements of this subpart.

(g) A Copermittee may choose to implement a pollutant credit system as part of the LID waiver program provided that such a credit system clearly exhibits that it will not allow PDPs to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements. Any credit system that a Copermittee chooses to implement must be submitted to the Executive Officer for review and approval as part of the waiver program.

(h) The LID waiver program shall include a storm water mitigation fund developed by the Copermittee(s) to be used for water quality improvement projects which may serve in lieu of the PDP's required mitigation in section F.1.d.(8)(e). The LID waiver program's storm water mitigation fund shall, at a minimum, identify:

(i) The entity or entities that will manage the storm water mitigation fund (i.e., assume full responsibility);

(ii) The range and types of acceptable projects for which storm water mitigation funds may be expended;

(iii) The entity or entities that will assume full responsibility for each water quality improvement project, including its successful completion; and

(iv) How the dollar amount of storm water mitigation fund contributions will be determined. In-lieu payments must be

proportional to the additional pollutant load discharged by not fully implementing LID.

(i) Each Copermittee must notify the Regional Board in their annual report of each PDP choosing to participate in the LID waiver program. The annual report must include the following information:

(i) Name of the developer of the participating PDP;

(ii) Site location;

(iii) Reason for LID waiver including technical feasibility analysis;

(iv) Description of BMPs implemented;

(v) Total amount deposited, if any, into the storm water mitigation fund described in section F.1.d.(8)(f);

(vi) Water quality improvement project(s) proposed to be funded; and

(vii) Timeframe for implementation of water quality improvement projects.

(8) Site Design and Treatment Control BMP Design Standards As part of its local SSMP, each Copermittee must develop and require Priority Development Projects to implement sitting, design, and maintenance criteria for each site design and treatment control BMP listed in its local SSMP to determine feasibility and applicability and so that implemented site design and treatment control BMPs are constructed correctly and are effective at pollutant removal, runoff control, and vector minimization. LID techniques, such as soil amendments, must be incorporated into the criteria for appropriate treatment control BMPs. Development of BMP design worksheets which can be used by project proponents is encouraged.

(9) Implementation Process As part of its local SSMP, each Copermittee must implement a process to verify compliance with SSMP requirements. The process must identify at what point in the planning process Priority Development Projects will be required to meet SSMP requirements and at a minimum, the Priority Development Project must implement the required post-construction BMPs prior to occupancy and/or the intended use of any portion of that project. The process must also include identification of the roles and responsibilities of various municipal departments in implementing the SSMP requirements, as well as any

other measures necessary for the implementation of SSMP requirements.

By adding requirements and increasing the specificity of existing requirements, the 2009 LID requirements are new programs or higher levels of service.

b. Challenged Hydromodification Requirements

Part F.1.h requires Permittees to collaboratively develop and implement a Hydromodification Management Plan ("HMP") to manage increases in runoff discharge rates and durations from all PDPs. Permittees must then incorporate the HMP into the local SSMP. The HMP must be so designed and implemented so as to ensure that past-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations. To comply with part F.1.h, the Copermittees must invest significant resources to hold public hearings, hold collaborative meetings, develop an HMP, train staff, and adopt the local SSMP. Continued compliance with these sections will also require Copermittees to add requirements to municipal projects and will significantly increase the costs of design and construction.

Within one year of the 2009 Permit, Copermittees must take interim steps to ensure all PDPs are implementing specified criteria by comparing the pre-development and post-project flow rates and durations, using a continuous simulation hydrologic model. Within two years of the 2009 Permit, Permittees must submit a draft HMP to the Regional Board. On its submission, the draft HMP must have been reviewed by the public. The HMP itself is subject to 14 separate requirements, as follows:

> h. Hydromodification – Limitation on Increases of Runoff Discharge Rates and Durations
>
> Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects. The HMP shall be incorporated into the local SSMP and implemented by each Copermittee so that estimated post-project runoff discharge rates and durations shall not exceed pre-development discharge rates and durations. Where the proposed project is located on an already developed site, the pre-project discharge rate and duration shall be that of the pre-developed, naturally occurring condition. The HMP shall be submitted to the Executive Officer within 2 years of permit adoption. The HMP will be made available for public review and comment and the Executive Officer will determine the need for a public hearing.
>
> (1) The HMP must:
>
> > (a) Identify a method for assessing susceptibility of channel segments which receive runoff discharges from Priority Development Projects. The geomorphic stability within the

channel shall be assessed. A performance standard shall be created that ensures that the geomorphic stability within the channel not be compromised as a result of receiving runoff discharges from Priority Development Projects.

(b) Utilize continuous simulation of the entire rainfall record (or other analytical method proposed by the Copermittees and deemed acceptable by the Regional Board) to identify a range of runoff flows for which priority Development Project post-project runoff flow rates and durations shall not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses. In addition, the identified range of runoff flow rates and durations must compensate for the loss of sediment supply due to the development. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches. In the case of an artificially hardened (concrete lined, rip rap, etc.) channel, the lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks of a comparable soft-bottomed channel.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project (naturally occurring) runoff flow rates and durations by more than 10 percent for the range of runoff flows identified under section F.1.h.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses; (2) do not result in channel conditions which do not meet the channel standard developed under section F.1.h.(1)(a) for channel segments downstream of Priority Development Project discharge points; and (3) compensate for the loss of sediment supply due to development.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent runoff from the projects from increasing and/or continuing unnatural rates of erosion of channel beds and banks, silt pollutants

generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Identify areas within the San Juan Hydrologic Unit where historic hydromodification has resulted in a negative impact to benthic macroinvertebrate and benthic periphyton by identifying areas with low or very low Index of Biotic Integrity (IBI) scores.

(g) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects. This protocol must include the use of the IBI score as a metric for assessing impacts and improvements to downstream watercourses.

(h) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(i) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(j) Include technical information supporting any standards and criteria proposed.

(k) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(l) Include a description of pre- and post-project monitoring and other program evaluation, including IBI score, to be conducted to assess the effectiveness of implementation of the HMP.

(m) Include mechanisms for assessing and addressing cumulative impacts within a watershed on channel morphology.
(n) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) In addition to the hydrologic control measures that must be implemented per section F.1.h.(1)(c), the HMP must include a suite of management measures to be used on Priority Development Projects to protect and restore downstream beneficial uses and prevent or further prevent adverse physical changes to downstream

channels. The measures must be based on a prioritized consideration of the following elements in this order:

(a) Hydrologic control measures;

(b) On-site management controls;

(c) Regional controls located upstream of receiving waters; and

(d) In-stream controls. Where stream channels are adjacent to, or are to be modified as part of a Priority Development Project, management measures must include buffer zones and setbacks. Under no circumstances will in-stream controls include the use of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc. The suite of management measures shall also include stream restoration as a viable option to achieve the channel standard in section F.1.h.(1)(a).

(3) Each individual Copermittee has the discretion to not require Section F.1.h. at Priority Development Projects where the project:

(a) Discharges storm water runoff into underground storm drains discharging directly to bays or the ocean; or

(b) Discharges storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes.

(4) HMP Reporting and Implementation

(a) Within 2 years of adoption of the Order, the Copermittees shall submit to the Regional Board a draft HMP that has been reviewed by the public, including the analysis that identifies the appropriate limiting range of flow rates per section F.1.h.(1)(b).

(b) Within 180 days of receiving Regional Board comments on the draft HMP, the Copermittees shall submit a final HMP that addressed the Regional Board's comments.

(c) Within 90 days of receiving a finding of adequacy from the Executive Officer, each Copermittee shall incorporate and implement the HMP for all Priority Development Projects.

(d) Prior to approval of the HMP by the Regional Board, the early implementation measures likely to be included in the HMP shall be encouraged by the Copermittees.

(5) Interim Hydromodification Criteria

Within one year of adoption of this Order, each Copermittee must ensure that all Priority Development Projects are implementing the following criteria by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model such as US EPA's Hydrograph Simulation Program-Fortran (HSPF):

(a) For flow rates from 10 percent of the 2-year storm event to the 5 year storm event, the post-project peak flows shall not exceed predevelopment (naturally occurring) peak flows.

(b) For flow rates from the 5 year storm event to the 10 year storm event the post-project peak flows may exceed pre-development (naturally occurring) flows by up to 10 percent for a 1-year frequency interval. The interim hydromodification criteria do not apply to Priority Development Projects where the project discharges (1) storm water runoff into underground storm drains discharging directly to bays or the ocean, or (2) storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes. Within one year of adoption of this Order, each Copermittee must submit a signed, certification statement to the Regional Board verifying implementation of the interim hydromodification criteria.

(6) No part of section F.1.h shall alleviate the Copermittees responsibilities for implementing Low Impact Development BMPs as required under section F.1.d.(4).

2. Requirements of Federal Law

Nothing in the CWA, its regulations, or case law requires local agencies to review and update the BMP requirements listed in an SSMP, to add LID BMP requirements to PDPs, to add a waiver program to development and implement interim hydromodification protocols, or to create an HMP.[55] Indeed, the Commission has already considered whether the requirement to review and update BMP in local SSMPs or the requirement to submit and implement an updated Model SSMP is required by federal law or regulation.[56] This Commission decided "nothing in the federal regulation requires agencies to update local or model SSMPs."[57] In addition, the Commission

[55] 33 U.S.C. § 1342; 40 C.F.R. § 122.26; see also Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 51.

[56] Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, p. 51.

[57] *Ibid*.

determined that the hydromodification requirement constituted "a state-mandated, new program or higher level of service."[58]

The Commission considered and decided that nothing in federal law or regulation requires an updated Model SSMP to define minimum LID and other BMP requirements for incorporation into local SSMPs.[59] Likewise, nothing in federal law or regulation requires a municipality to adopt or implement an HMP.[60] The CWA only requires MS4 permits to impose controls that reduce the discharge of pollutants to the maximum extent practicable ("MEP").[61] MEP is not defined, but the CWA suggests management practices, control techniques, and system, design, and engineering methods as options for attaining the maximum reduction possible.[62] When suggestions are no longer merely being suggested as options for consideration "but are required acts, [t]hese requirements constitute a higher level of service."[63]

Federal regulations require part of a permit application to include a plan for developing, implementing and enforcing controls to reduce the discharge from MS4s that originate in areas of new development.[64] Requiring post-construction controls to limit pollutant discharges originating in areas of new development may be within the requirements of Section 122.26(d)(2)(iv)(A), but the specific LID requirements contained in the 2009 Permit are not required in this Section. By adopting permit provisions that require Permittees to review and update SSMPs, to implement LID requirements and to develop an HMP, the state has freely chosen[65] to impose requirements and related costs that are not federally mandated and that, when mandated by the state, constitute a new program or higher level of service.[66]

3. Requirements of Previous Orders

The 2002 Permit does not require the Copermittees to develop and implement LID permit requirements or an HMP. The most analogous section in the 2002 Permit, part F.1 "Land-Use Planning for New Development and Redevelopment Component," requires each Copermittee to assess the general plan, modify the development project approval process, revise environmental review processes and conduct education efforts.[67] This part does not require review or revision of model or local SSMPs or impose LID requirements.

4. Mandated Activities

To comply with the low impact development and hydromodification requirements in the 2009 Permit, the Copermittees will need to develop and impose a number of new programs. The

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58 *Id.* at p. 97.
59 *Id.* at p. 51.
60 *Id.* at p. 44.
61 33 U.S.C. § 1342(p)(3)(B)(iii).
62 *Ibid*.
63 Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 51; see also *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173.
64 40 C.F.R. § 122.26(d)(2)(iv)(A)(2).
65 *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594.
66 Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 51.
67 California Regional Water Quality Control Board San Diego Region Order No. R9-2002-0001, NPDES No. CAS0108740.

specific mandated activities are described in greater detail in section IV.D.1, above. In sum, within one year of the 2009 Permit, Copermittees were required to take interim steps to ensure all PDPs are implementing specified criteria by comparing the pre-development and post-project flow rates and durations, using a continuous simulation hydrologic model. Within two years of the 2009 Permit, Copermittees must develop and submit a draft HMP to the Regional Board. On its submission, the draft HMP must have been reviewed by the public.

The Copermittees are also required to develop and implement LID and hydromodification prevention design principles on municipal projects that qualify as PDPs. This will require creating a formalized review process for all PDPs, training staff on the new protocol, assessing potential on- or off-site collection and reuse of storm water, amending local ordinances to remove barriers to LID implementation, maintaining or restoring natural storage reservoirs and drainage corridors, draining a portion of impervious areas into pervious areas, and constructing low-traffic areas with permeable surfaces.[68] Projects that are subject to these requirements include municipal yards, recreation centers, civic centers, and road improvements, and any other municipal projects meeting the permit-specified thresholds or geographical criteria.

To date, the Copermittees have been and will continue to be required to invest significant resources to review and update the model and local SSMPs and add LID BMP requirements for each PDP.[69] Continued compliance with these sections will also require Copermittees to add requirements to municipal projects and will significantly increase the costs of design and construction.

5. Actual Increased Costs of Mandate

To comply with the 2009 Permit's LID and HMP requirements, the Joint Test Claimants were required to expend resources to develop and administer programs relating to these requirements. The Copermittees, including the Joint Test Claimants, jointly retained consultants to develop the program on a cost-sharing basis, and have been required to expend resources on an individual jurisdictional basis to comply with the LID and HMP requirements within their jurisdictions. As set forth in the Section 6 Declarations, paragraph 6(d), the Joint Test Claimants incurred increased costs of $125,988 in FY 2009-10 and $54,715 in FY 2010-11.

F. NEW REPORTING REQUIREMENTS INCLUDING AN ANNUAL ASSESSMENT OF THE EFFECTIVENESS OF THE JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM AND A WORK PLAN DEMONSTRATING A RESPONSIVE AND ADAPTIVE APPROACH FOR THE USE OF RESOURCES AS SET FORTH IN SECTION J OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

Sections J.1.b, J.2, J.3 and J.4 of the 2009 Permit require the Copermittees to develop a new system of assessing the effectiveness of its stormwater management program and impose new requirements to annually report that assessment to the Regional Board. These requirements are all

[68] 2009 Permit, part D.1.d(4)

[69] *Id.* at part D.1.d(3)-(10).

new requirements and go beyond the requirements of federal law and are being challenged as unfunded mandates.

2. Requirements of Federal Law

The assessment methodology that the Regional Board is requiring in the 2009 Permit is not required by federal regulation. The relevant federal regulation setting forth requirements concerning the assessment of the effectiveness of the MS4 Permittees' stormwater program can be found in 40 CFR § 122.26(d)(2)(v) and 40 CFR §§ 122.42 (c)(3).

40 CFR § 122.26(d)(2)(v) requires a Copermittee to include the following in its application for a MS4 Permit:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

40 CFR §§ 122.42 (c)(3) requires the Copermittees to submit an Annual Report that includes:

> Revisions, if necessary, to the assessment of controls … reported in the permit application under §122.26(d)(2)(iv) and (d)(2)(v) of this part;

The federal requirements are extremely general and leave a Copermittee great latitude in the method they adopt to evaluate the effectiveness of the pollution controls they propose as part of their stormwater program. The federal regulation allows a Copermittee to develop its methodology for the assessment of the effectiveness of its stormwater program.

The federal regulations also require very limited reporting of a Copermittee's proposed assessment activities. The MS4 Permittee's initial application must include an assessment of estimated reductions in pollutants as a result of a Copermittee's proposed watershed management program. The annual reporting requirements in federal regulations related to that assessment are also very limited. A Permittee is required to include in its Annual Report only revisions to its assessment that prove necessary. The federal regulations do not require a formalized ongoing annual reassessment of the entire stormwater program.

3. Requirements of Previous Orders

The program assessment requirements in the 2002 Permits are in Section F.8 of the 2002 Permit. Those provisions are as follows:

> a. As part of its individual [Jurisdictional Urban Runoff Management Plan (Jurisdictional URMP)], each Copermittee shall develop a long-term strategy for assessing the effectiveness of its

> individual Jurisdictional URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that each Copermittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.
>
> b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

Section H.9.1.a.(9).(a) required the Copermittees to submit a written report to the Regional Board describing their Jurisdictional URMP. One of the elements that needed to be included in that report was a description of the strategy that the Copermittee proposed to use to assess the effectiveness of its Jurisdictional URMP. It provided:

> At a minimum, the individual Jurisdictional URMP document shall contain the following information for the following components: … A description of strategies to be used for assessing the long-term effectiveness of the individual Jurisdictional URMP.

The requirements in the 2002 Permit were much less prescriptive and gave the Copermittees latitude in developing procedures for assessing the effectiveness of their stormwater management program and were much more in line with federal regulatory requirements.

4. Mandated Activities in the 2009 Permit

Section J of the 2009 Permit requires all of the Copermittees to develop a system for assessing the effectiveness of their individual Jurisdictional Runoff Management Plan (JRMP). The Copermittees are required under this permit to develop a method for measuring how effective the Copermittees JRMP is in meeting certain objectives. The objectives that must be tracked and measured are

- The effectiveness of the JRMP in reducing discharges of storm water pollutants from its MS4 into each downstream 303(d)-listed water body for which that waterbody is impaired. Assessment measures must be developed for each of the six outcome levels described by CASQA.[70]

- the effectiveness of its management measures in the JRMP for protecting downstream ESAs from adverse effects caused by discharges from its MS4.

[70] *Id.* at section J.1.a(1), p. 79 of 92.

Assessment measures must be developed for each of the six outcome levels described by CASQA.[71]

- The effectiveness of each individual element of the JRMP that Permittees are required to develop by the 2009 Permit[72].

- The effectiveness of "each measure conducted in response to a determination to implement the "iterative" approach to prevent or reduce any storm water pollutants that are causing or contributing to the exceedance of water quality standards as outlined in this Order."[73]

Annually the Copermittees are required to utilize the methodology developed under Section J of the Permit to review its activities conducted to comply with the requirements of this permit and review any BMPs implemented and evaluate the effectiveness of those activities and BMPs to meet the objectives set forth above[74]. The Copermittees must also annually evaluate the methodology itself.[75] The Copermittees must then propose and implements changes to their activities and modifications of BMPs to better meet the objectives set forth above.[76]

Section J also adds significant new reporting requirements that were not in prior permits. Section J.3.a of the 2009 Permit[77] now requires the following:

> Each Copermittee must include a description and summary of its annual and long-term effectiveness assessments within each Annual Report. Beginning with the Annual Report due in 2011, the Program Effectiveness reporting must include:
>
> > (1) 303(d) waterbodies: A description and results of the annual assessment measures or methods specifically for reducing discharges of storm water pollutants from its MS4 into each 303(d)-listed waterbody;
> >
> > (2) ESAs: A description and results of the annual assessment measures or methods specifically for managing discharges of pollutants from its MS4 into each downstream ESA;
> >
> > (3) Other Program Components: A description of the objectives and corresponding assessment measures and results used to evaluate the effectiveness of each general program component. The results must include findings from both program implementation and water quality assessment where applicable;

[71] *Id.* at section J.1.a(2), p. 79 of 92.
[72] *Id.* at section J.1.a(3), pp. 79-80 of 92.
[73] *Id.* at section J.1.a(4), p. 80 of 92.
[74] *Id.* at section J.1.b(1), p. 80 of 92.
[75] *Id.* at section J.1.b(2), p. 80 of 92.
[76] *Id.* at section J.2, pp. 80-81 of 92.
[77] *Id.* at section J.3, p. 81 of 92.

> (4) Receiving water protection: A description and results of the annual assessment measures or methods employed specifically for actions taken to protect receiving water limitations in accordance with Section A.3 of this Order;
>
> (5) A description of the steps taken to use dry-weather and wet-weather monitoring data to assess the effectiveness of the programs for 303(d) impairments, ESAs, and general program components;
>
> (6) A description of activities conducted in response to investigations of illicit discharge and illicit connection activities, including how each investigation was resolved and the pollutant(s) involved;
>
> (7) Responses to effectiveness assessments: A description of each program modification, made in response to the results of effectiveness assessments conducted pursuant to Section J.1.a, and the basis for determining (pursuant to Section J.2.b.) that each modified activity and/or BMP represents an improvement with respect to reducing the discharge of storm water pollutants from the MS4.
>
> (8) A description of the steps that will be taken to improve the Copermittee's ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6. Include a time schedule for when improvement will occur; and
>
> (9) A description of the steps that will be taken to identify aspects of the Copermittee's Jurisdictional Runoff Management Program that will be changed based on the results of the effectiveness assessment

In addition to the information mentioned above, Section J.4 of the 2009 Permit requires the Copermittees to develop a Work Plan. This Work Plan Requirement is a new requirement and was not in prior permits. Section J.4 of the 2009 Permit[78] provides:

> Each Copermittee must develop a work plan to address their high priority water quality problems in an iterative manner over the life of the permit. The goal of the work plan is to demonstrate a responsive and adaptive approach for the judicious and effective use of available resources to attack the highest priority problems. The work plan shall include, at a minimum, the following:

[78] *Id.* at section J.4, p. 82 of 92.

> **a.** The problems and priorities identified during the assessment;
>
> **b.** A list of priority pollutants and known or suspected sources;
>
> **c.** A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts;
>
> **d.** A description and schedule for new and/or modified BMPs. The schedule is to include dates for significant milestones;
>
> **e.** A description of how the selected activities will address an identified high priority problem. This will include a description of the expected effectiveness and benefits of the new and/or modified BMPs;
>
> **f.** A description of implementation effectiveness metrics;
>
> **g.** A description of how efficacy results will be used to modify priorities and implementation; and
>
> **h.** A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments. The Copermittee shall submit the work plan to the Regional Board within 365 days of adoption of the Order. Annual updates are also required and shall be included with the annual JRMP report. The Regional Board will assess the work plan for compliance with the specific and overall requirements of the Order. To increase effectiveness and efficiencies, Copermittees may combine their implementation efforts and work plans within a hydrologic area or sub area. Each Copermittee, however, maintains individual responsibility for developing and implementing an acceptable work plan.

The requirements in Section J of the 2009 Permit go beyond federal law in a number of significant ways. The assessment methodology set forth in Section J is a methodology created in whole by the Regional Board. This was not a methodology that was proposed by the Copermittees nor is it a methodology that is found in any federal regulation. The 2009 Permit sets forth the objectives that the Copermittees' assessment methodology should measure as well as every element that must be included in that assessment methodology. The Copermittee must develop an assessment methodology that meets those prescriptive requirements.

The 2009 Permit also requires the development of a Work Plan with very specific elements. The formal Work Plan requirement is not found in any federal regulation. Section J of the 2009 Permit requires an annual assessment of the Claimants' stormwater program, the JRMP, be done

and included in reports provided to the Regional Board. That annual assessment covers every aspect of JRMP. That annual assessment must not only assess the effectiveness of elements of the JRMP but also must assess the assessment methodology itself. The Work Plan required by Section J.4 must also be updated annually. These annual reporting requirements and annual requirements to revise the Copermittees original assessment go well beyond anything found in federal regulations.

5. Actual Increased Costs of Mandate

As set forth in the Section 6 Declarations at paragraph 6(h)(i), the Joint Test Claimants have incurred increased costs to address the assessment methodology and criteria required by the mandates in Sections F and J of the 2009 Permit, including development of reporting templates and conducting assessments. The increased costs to the Joint Test Claimants from these mandates were $1,750 in FY 2009-10, $34,439 in FY 2010-11 and $14,990 in FY 2011-12. These increased costs also included the reporting requirements of Sections F, K and Attachment D, discussed in Section IV.H. below.

6. Conclusion

Section J of the 2009 Permit creates a highly prescriptive and highly bureaucratic system for evaluating the JRMP that each of the Copermittees is required to develop. The assessment requirements in the 2002 Permit were contained in three paragraphs that took up one half of a page of the prior permit. The assessment requirements of the 2009 Permit now take up almost four full pages of the new permit. The assessment method required by the 2009 Permit goes well beyond what is required by federal law and significantly different than what was contained in the prior 2002 Permit issued by the Regional Board. These changes are not an incremental changes to existing programs that simply increase the cost of providing existing activities but rather represent a significant increase in the actual level and type of activities required of them by the Regional Board and therefore constitutes a requirement for a "higher level of service" within the meaning of Article XIIIB § 6 of the California Constitution.[79] None of the costs that will be incurred by Copermittees in complying with these new requirements can be recouped through fees given the legal restrictions on local government's power to charge fees. The additional program elements described above, therefore constitute unfunded mandates. Copermittees are constitutionally entitled to be reimbursed for the cost of implementing these mandates.

G. NEW REPORTING REQUIREMENTS, INCLUDING A WATERSHED WORKPLAN REPORT AS SET FORTH IN SECTION K.1.B OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

The Public Meeting requirements found in sections G.6, and K.1.b.(4).(n) of the 2009 Permit are being challenged as unfunded state mandates.

[79] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Ca1.4th 859, 877.

2. Requirements of Federal Law

The federal regulations that dictate the essential elements of a MS4 Permittee's program for the management of stormwater is found in 40 CFR § 122.26(d)(2)(iv). Although this regulation spells out certain elements that must be included in a Permittee's stormwater management program, the federal regulations do not set out any procedural requirements that must be followed by a Permittee in developing its program. Specifically there are no provisions in the relevant federal regulations that require a Permittee to conduct a public meeting before adopting any aspect of that management program.

3. Requirements of Previous Orders

The Watershed Urban Runoff Management Program requirements of the 2002 Permit were found in sections J – M of the previous permit. Sections L and M of the 2002 Permit contained the Permittees' reporting requirements related to the Watershed Urban Runoff Management Program.

Although the requirement to develop a Watershed Workplan is similar to reporting requirements in Sections L and M of the 2002 Permit, there are significant additional requirements in the 2009 Permit related to the development of the Watershed Workplan. The most significant of those new requirements is the requirement that Copermittees conduct an annual Watershed Workplan Review at a noticed public meeting[80]

4. Mandated Activities in the 2009 Permit

The requirement to conduct annual public meetings when developing any aspect of a Copermittee's stormwater management program is a new requirement and is not a requirement found in federal regulations.

Section K.1.b and sections G.2 of the 2010 Permit require the preparation of a Watershed Water Quality Workplan (Watershed Workplan) that describes

> … the Permittees' development and implementation of a collective watershed strategy to assess and prioritize the water quality problems within the watershed's receiving waters, identify and model sources of the highest priority water quality problem(s), develop a watershed-wide BMP implementation strategy to abate highest priority water quality problems, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the WMA.[81]

Section G of the 2009 Permit also sets forth the procedure that the Copermittees must follow when performing the required annual update to the Watershed Workplan. Specifically the Copermittees are required to conduct a noticed public hearing in each watershed. The permit requirements are as follows:

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[80] 2009 Permit, sections G.6, p. 74 of 91 and K.1.b.4. n, p. 84 of 91.
[81] *Id.* at section G.2, p. 73 of 91.

> Watershed Copermittees shall review and update the Watershed Workplan annually to identify needed changes to the prioritized water quality problem(s) listed in the workplan. All updates to the Watershed Workplan shall be presented during an Annual Watershed Review Meeting. Annual Watershed Review Meetings shall occur once every calendar year and be conducted by the Watershed Copermittees. Annual Watershed Review Meetings shall be open to the public and adequately noticed. Individual Watershed Copermittees shall also review and modify their jurisdictional programs and JRMP.

Section K.1.b.4. of the permit requires:

> Each Watershed Workplan shall, at a minimum, include: … A scheduled annual Watershed Workplan Review Meeting once every calendar year. This meeting shall be open to the public.

5. Actual Increased Costs of Mandate

The public meeting requirements of sections G.6 and K.1.b.4 caused the Joint Test Claimants to incur costs in implementing this requirement, which was new to the 2009 Permit. As set forth in the Section 6 Declarations, paragraph (h)(ii), the Joint Test Claimants incurred increased costs of $823 in FY 2011-12 and costs of $256 in FY 2012-13 to address this mandate.

6. Conclusion

The new public hearing requirement for the Watershed Workplan Review in the 2009 Permit is a significant new requirement being required of the Copermittees. This change is not just an incremental change to an existing program that simply increases the cost of providing existing activities but rather represents a significant increase in the actual level and type of activities required of the Copermittees by the Regional Board and therefore constitutes a requirement for a "higher level of service" within the meaning of Article XIIIB § 6 of the California Constitution.[82] As explained above this higher level of service is not mandated by federal regulations. None of the costs associated with conducting these public meetings can be recouped through fees given the legal restrictions on local government's power to charge fees. The additional program elements described above, therefore constitute unfunded mandates. Copermittees are constitutionally entitled to be reimbursed for the cost of implementing these mandates.

H. 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 2009 PERMIT ARE UNFUNDED STATE MANDATES

[82] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Ca1.4th 859, 877.

1. Challenged Program Requirement

2009 Permit sections F.1.d.(7).(i), F.3.a.(4).(c),; section K.3.a.(3), 1 and Attachment D of the 2009 Permit are unfunded mandates being challenged.

2. Requirements of Federal Law

The federal requirement relating to the Annual Report can be found in 40 CFR §122.42(c) which requires the following:

The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:

> (1) The status of implementing the components of the storm water management program that are established as permit conditions;
>
> (2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with §122.26(d)(2)(iii) of this part; and
>
> (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under §122.26(d)(2)(iv) and (d)(2)(v) of this part;
>
> (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;
>
> (5) Annual expenditures and budget for year following each annual report;
>
> (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;
>
> (7) Identification of water quality improvements or degradation;

The relevant federal regulations governing the reporting of the impact of Permittee's flood control faculties and other structural controls can be found in 40 CFR §§122.26(d)(iv)(A)(1) and 122.26(d)(iv)(A)(4) which requires a Permittee to include in its stormwater management plan the following:

> (A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a

proposed schedule for implementing such controls. At a minimum, the description shall include:

> (*1*) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers; …
>
> (*4*) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible; …

3. Requirements of Previous Orders

The reporting requirements under the 2002 Permit are found in sections H and I of that permit. Although Annual Reports were required in the 2002 Permit, the 2009 Permit adds a number of new reporting requirements.

4. Mandated Activities

Section K.3.a of the 2009 Permit requires that each Copermittee prepare an individual JRMP Annual Report which cover implementation of its jurisdictional activities during the past annual reporting period[83]and specify the contents of the JRMP Annual Reports.[84]

New requirements of the Annual Report include:

- The report of priority development projects choosing to participate in the LID waiver program, including details of the feasibility analysis, BMPs implemented and funding details.[85]

- An evaluation of the Copermittees' existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device as well as submit this inventory and evaluation to the Regional Board.[86]

- A Reporting Checklist.[87]

None of these new requirements can be found in the requirements for the Annual Report set forth in 40 CFR §122.42(c).

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[83] 2009 Permit, section K.3.a.1, p. 85 of 91.
[84] *Id*. at section K.3.a.3, pp 85-89 of 91.
[85] Id. at sections F.1.d.(7).(i), p. 39 of 91.
[86] *Id*. at section F.3.a.(4).(c), p. 55 of 91.
[87] *Id*. at section K.3.a.(3), p. 86 of 91 and Attachment D of the 2009 Permit.

As discussed previously in this Narrative, the LID requirements in the section F.1.d. (4) of the 2009 Permit go beyond the requirements of federal regulations. The reporting requirements related to the waiver program required as part of those LID requirements, also go beyond requirements of federal law.

The requirements in section F.3.a.(4).(c) of the 2009 Permit to inventory all of a Permittees' flood control devices also goes beyond the requirements of federal law. 40 CFR §122.26(d)(iv)(A)(1) and 122.26(d)(iv)(A)(4) require that a Permittees application include a description of a Permittee's maintenance practices for its flood control facilities and require a Permittee to develop a procedure to assess the impacts of flood control projects on water quality of receiving waters as well as a procedure to evaluate the feasibility of retrofitting those identified facilities. The federal regulations do not require a full inventory of these facilities and don't require that a Permittee submit such an inventory to the Regional Board.

Finally the Checklist requirement found in section K.3.a.(3), and Attachment D of the 2009 Permit are not required by 40 CFR §122.42(c) requirements for the Annual Report.

5. Actual Increased Costs of Mandate

Please see Section IV.F.5 above with respect to the amounts and dates of the increased costs required by this mandate, which is discussed in the Section 6 Declarations at paragraph (h)(i).

6. Conclusion

The new reporting requirements in the 2009 Permit are significant new requirements being required of the Copermittees. These changes are not just incremental changes to existing programs that simply increase the cost of providing existing activities but rather represent a significant increase in the actual level and type of activities required of them by the Regional Board and therefore constitute a requirement for a "higher level of service" within the meaning of Article XIII B § 6 of the California Constitution.[88] As explained above, this higher level of service is not mandated by federal regulations. None of the costs associated with conducting these activities can be recouped through fees given the legal restrictions on local government's power to charge fees. The additional program elements describe above, therefore constitute unfunded mandates. Copermittees are constitutionally entitled to be reimbursed for the cost of implementing these mandates.

I. THE 2009 PERMIT, SECTION F.4, IMPOSES NEW REQUIREMENTS MANDATING THE USE OF GEOGRAPHICAL INFORMATION SYSTEM (GIS) MS4 MAPS

1. Challenged Program Requirement

Section F.4.b. of the 2009 Permit provides as follows:

"**b. Maintain MS4 Map**

[88] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Ca1.4th 859, 877.

> Each Copermittee must maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. *The use of GIS is required.* The accuracy of the MS4 map must be confirmed during dry weather field screening and analytical monitoring and must be updated at least annually. The GIS layers of the MS4 map must be submitted with the updated Jurisdictional Runoff Management Plan within 365 days after adoption of this Order."[89]

2. Requirements of Federal Law

Neither the 2009 Permit, nor any of its supporting documents, specifically identify any federal regulations as specific authority for imposition of the GIS requirement set forth in Section F.4.b of the 2009 Permit. Moreover, the CWA and the federal regulations do not specifically require the inclusion of a MS4 map with GIS layers. 40 C.F.R. 122.26(d)(2)(iv) (B)(4) requires a description of procedures to prevent, contain and respond to spills that my discharge into the municipal separate storm sewer. 40 C.F.R. 122.26(d)(2)(iv) (B)(4) does not, however, expressly require or mention the use of a GIS MS4 map or layer as part of this program. Federal law does not require the Regional Board to impose this GIS requirement, and thus, the 2009 Permit's requirement for the inclusion of a GIS MS4 map is an unfunded state mandate.

3. Requirements from 2002 Permit

The 2002 Permit provided that each Copermittee develop or obtain an up-to-date labeled map of its entire MS4 and the corresponding drainage watershed within its jurisdiction. Although the use of GIS was recommended, the 2002 Permit did not require that Copermittees use GIS to develop their MS4 maps. *See* Section E.4.a of page E-1 of the 2002 Permit for complete text.

4. Mandated Activities

Section F.4.b of the 2009 Permit requires Copermittees to use GIS in maintaining an updated map of the entire MS4 and the corresponding drainage areas within its jurisdiction, which is **not** required under either federal law or the 2002 Permit. To comply with the GIS requirement set forth in Section F.4.b the Copermittees have or will perform the following activities to comply with the new GIS requirement:

1) Procure GIS field equipment;

2) Digitize storm drains systems and develop a GIS storm drain layer using field equipment; and

3) Maintain an updated map in the GIS system on Copermittee computer system.

[89] 40 C.F.R. § 122.26(d)(2)(iv)(A)(4).

5. Actual Increased Costs of Mandate

To comply with Section F.4.b of the 2009 Permit, the Joint Test Claimants were required to expend time in FY 2009-10 and thereafter to develop, administer and maintain a GIS storm drain layer. As set forth in the Section 6 Declarations, paragraph 6(g), the Joint Test Claimants participated in a cost-sharing effort to achieve this mapping. The Joint Test Claimants incurred costs of $7,570 in FY 2009-10 and $48,639 in FY 2010-11 to address this mandate.

J. NEW REQUIREMENTS FOR DEVELOPING AND IMPLEMENTING A RETROFITTING PROGRAM FOR EXISTING DEVELOPMENT IN SECTION F.3.D OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

The 2009 Permit requires Copermittees to develop and implement a new program, which is not required under federal law or previous Permits, to retrofit existing development. Specifically, the 2009 Permit requires Copermittees to identify existing developments, including municipal developments, as candidates for retrofitting, evaluate and rank candidates according to preestablished criteria, prioritize work plans for implementation according to the evaluation, cooperate with landowners to retrofit private improvements, and track and inspect retrofitting projects. Copermittees will be required to invest significant staff time and other valuable resources into developing and implementing this new and costly program. The retrofitting provisions of the 2009 Permit at issue in this claim are as follows:

> d. Retrofitting Existing Development
>
> Each Copermittee must develop and implement a retrofitting program which meets the requirements of this section. The goals of the existing development retrofitting program are to reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards. Where feasible, at the discretion of the Copermittee, the existing development retrofitting program may be coordinated with flood control projects and infrastructure improvement programs.
>
> (1) Source Identification
>
> The Copermittee must identify and inventory existing developments (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting. Potential retrofitting candidates must include but are not limited to:
>
> (a) Development that contributes pollutants of concern to a TMDL or a ESA;

(b) Receiving waters channelized or otherwise hardened;

(c) Development tributary to receiving waters that are channelized or otherwise hardened;

(d) Developments tributary to receiving waters that are significantly eroded;

(e) Developments tributary to an ASBS or SWQPA; and

(f) Development that causes hydraulic constriction.

(2) Each Copermittee shall evaluate and rank the inventoried existing developments to prioritize retrofitting. Criteria for evaluation must include but is not limited to:

(a) Feasibility;

(b) Cost effectiveness;

(c) Pollutant removal effectiveness;

(d) Impervious area potentially treated;

(e) Maintenance requirements;

(f) Landowner cooperation;

(g) Neighborhood acceptance;

(h) Aesthetic qualities; and

(i) Efficacy at addressing concern.

(3) Each Copermittee must consider the results of the evaluation in prioritizing work plans for the following year. Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs. Where feasible, the retrofit projects should be designed in accordance with the SSMP requirements within sections F.1.d.(3) through F.1.d.(8). In addition, the Copermittee shall encourage retrofit projects to implement where feasible the Hydromodification requirements in Section F.1.h.

(4) When requiring retrofitting on existing development, the Copermittees will cooperate with private landowners to encourage retrofitting projects. The Copermittee may consider the following practices in cooperating and encouraging private landowners to retrofit their existing development:

(a) Demonstration retrofit projects;

(b) Retrofits on public land and easements;

(c) Education and outreach;

(d) Subsidies for retrofit projects;

(e) Requiring retrofit projects as mitigation or ordinance compliance;

(f) Public and private partnerships; and

(g) Fees for existing discharges to the MS4.

(5) The completed retrofit BMPs shall be tracked and inspected in accordance with section F.1.f.

(6) Where constraints on retrofitting preclude effective BMP deployment on existing developments at locations critical to protect receiving waters, a Copermittee may propose a regional mitigation project to improve water quality. Such regional projects may include but are not limited to:

(a) Regional water quality treatment BMPs;

(b) Urban creek or wetlands restoration and preservation;

(c) Daylighting and restoring underground creeks;

(d) Localized rainfall storage and reuse to the extent such projects are fully protective of downstream water rights;

(e) Hydromodification project; and

(f) Removal of invasive plant species.

(7) A retrofit project or regional mitigation project may qualify as a Watershed Water Quality Activity provided it meets the requirements in section G. Watershed Runoff Management Program.

2. Requirements of Federal Law

Nothing in the CWA, its regulations, or case law requires local agencies to develop, fund, and implement a retrofitting program. US EPA regulations require municipal NPDES permits to include "[a] description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal

from storm water is feasible."[90] This requirement however applies only to structural flood control devices and simply would not apply to the type of comprehensive program required in the 2009 Permit.

3. Requirements from Previous Orders

Nothing in the 2002 Order requires a retrofitting program. The most analogous section in the 2002 Permit, part F.3.a.(4)(b)(i) stated, in its entirety, "Each Permittee shall evaluate feasibility of retrofitting existing structural flood control devices and retrofit where needed." Developing, funding, and implementing a retrofitting program on existing development is extensively broader and more detailed than simply retrofitting flood control devices as needed. Indeed, the 2009 Permit contains multiple requirements in comparison with the 2002 Permit's single sentence.

4. Mandated Activities

The 2009 Permit imposes at least six new requirements on Copermittees. These requirements are not required by federal law and represent state mandates for which Copermittees are entitled to reimbursement. The costs of developing and implementing the retrofitting program for existing development for which Copermittees should be reimbursed arise from the extensive list of requirements in the 2009 Permit. These requirements include:

- Identifying potential retrofitting candidates by researching and locating developments that contribute to a TMDL or ESA, that are channelized or hardened, that are tributary to receiving waters which are an ASBS, SWQPA, or are significantly eroded, or that cause hydraulic constriction;
- Evaluating the feasibility, cost effectiveness, pollutant removal effectiveness, impervious area, maintenance requirements, landowner cooperation, neighborhood acceptance, aesthetic qualities, and efficacy for each potential retrofitting candidate and then ranking each candidate accordingly;
- Prioritizing retrofit projects in the following year's municipal work plan and designing retrofit projects according to the SSMP requirements and hydromodification where feasible;
- Cooperating with and encouraging private landowners to retrofit;
- Tracking and inspecting retrofit BMPs;
- Considering regional mitigation projects where retrofitting is precluded.

5. Actual Increased Costs of Mandate

As set forth in the Section 6 Declarations, paragraph 6(f), the requirements to develop, fund and implement a retrofitting program involved work by Joint Test Claimants to review land areas

[90] 40 C.F.R. 122.26(d)(2)(iv)(A)(1).

within their jurisdictions for potential retrofitting possibilities. The increased cost associated with these efforts for the Joint Test Claimants was $9,125 in FY 2010-11 and $158,508 in FY 2011-12, plus additional costs as set forth in the Declarations.

K. NEW BMP MAINTENANCE TRACKING REQUIREMENTS IN SECTION F.1.f OF THE 2009 PERMIT ARE UNFUNDED STATE MANDATES

1. Challenged Program Requirement

The 2009 Permit requires Copermittees to develop and implement a new program, which is not required under federal law or previous Permits, to retrofit existing development. Specifically, the 2009 Permit requires Copermittees to inventory and track maintenance of recently existing and future BMPs. Copermittees will be required to invest significant staff time and other valuable resources into developing and implementing this new program. The challenged requirements from the 2009 Permit are as follows:

> f. BMP MAINTENANCE TRACKING
>
> (1) Each Copermittee must develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance within its jurisdiction since July 2001. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. At a minimum, the database must include information on BMP type, location, watershed, date of construction, party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions, including whether the site was referred to the Vector Control District.
>
> (2) Each Copermittee must establish a mechanism not only to track post-construction BMPs, but also to ensure that appropriate easements and ownerships are properly recorded in public records and the information is conveyed to all appropriate parties when there is a change in project or site ownership.
>
> (3) Each Copermittee must verify that approved post-construction BMPs are operating effectively and have been adequately maintained by implementing the following measures:
>
> > (a) An annual inventory of all approved BMPs within the Copermittee's jurisdiction. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. The inventory must also include all BMPs approved for Priority Development Projects since July 2001;

(b) The designation of high priority BMPs. High-priority designation must include consideration of BMP size, recommended maintenance frequency, likelihood of operational and maintenance issues, location, receiving water quality, and other pertinent factors;

(c) Verify implementation, operation, and maintenance of BMPs by inspection, self-certification, surveys, or other equally effective approaches with the following conditions:

(i) The implementation, operation, and maintenance of at least 90 percent of approved and inventoried final project public and private SSMPs (a.k.a. WQMPs) must be verified annually. All post-construction BMPs shall be verified within every four year period;

(ii) Operation and maintenance verifications must be required prior to each rainy season;

(iii) All (100 percent) projects with BMPs that are high priority must be inspected by the Copermittee annually prior to each rainy season;

(iv) All (100 percent) public agency projects with BMPs must be inspected by the Copermittee annually;

(v) At least 50 percent of projects with drainage insert treatment control BMPs must be inspected by the Copermittee annually;

(vi) Appropriate follow-up measures (including re-inspections, enforcement, maintenance, etc.) must be conducted to ensure the treatment BMPs continue to reduce storm water pollutants as originally designed;

(vii) All inspections must verify effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and this Order; and

(viii) Inspections must note observations of vector conditions, such as mosquitoes. Where conditions are identified as contributing to mosquito production, the Copermittee must notify the Orange County Vector Control District.

2. Requirements of Federal Law

Nothing in the CWA, its regulations, or case law requires local agencies to develop, fund, and implement a retroactive BMP maintenance tracking database and inspection program. US EPA regulations require municipal NPDES permits to include "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers".[91] This general requirement is no where near the specificity included in the 2009 Permit. Pursuant to the court's decision in *Long Beach Unified School Dist. v. State of California*, (1990) 225 Cal.App.3d 155, when the state exercises its discretion to impose requirements that exceed the express requirements of a federal law or program, it imposes a state mandate.

3. Requirements from Previous Orders

Nothing in the 2002 Permit requires the comprehensive BMP maintenance tracking program included in the 2009 Permit.

4. Mandated Activities

The 2009 Permit imposes several new requirements on Copermittees. These requirements are not required by federal law and represent state mandates for which Copermittees are entitled to reimbursement. The costs of developing the retrofitting program for existing development for which Copermittees should be reimbursed arise from the extensive list of requirements in the 2009 Permit. These requirements include:

- developing and maintaining a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance within its jurisdiction since July 2001, including information on BMP type, location, watershed, date of construction, party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions, including whether the site was referred to the Vector Control District;

- verifying that approved post-construction BMPs are operating effectively and have been adequately maintained;

- conducting an annual inventory of all approved BMPs within the Copermittee's jurisdiction installed since 2001;

- designating high priority BMPs for inspection and verification; and

- verifying implementation, operation, and maintenance of BMPs by inspection, self-certification, surveys, or other equally effective means.

[91] 40 C.F.R. 122.26(d)(2)(iv)(A)(1).

5. Actual Increased Costs of Mandate

As set forth in the Section 6 Declarations, paragraph 6(e), to implement the mandates set forth in the above-described requirements, the Joint Test Claimants were required to undertake activities within their jurisdictions to inspect and verify the operation and maintenance of BMPs. The Joint Test Claimants incurred increased costs of $34,175 in FY 2010-11 and $45,717 in FY 2011-12 with respect to this mandate.

V. STATEWIDE COST ESTIMATE

This Joint Test Claim concerns a municipal stormwater permit applicable only to local agencies located in the portion of Orange County within the jurisdiction of the San Diego RWQCB. Therefore, any statewide cost estimate must, by virtue of this limitation, apply only to costs incurred by such local agencies. The Joint Test Claimants estimate that, for all requirements set forth in the 2009 Permit that are the subject of this Joint Test Claim applicable to all Copermittees, the amount of $295,100 was expended in FY 2009-10, $349,062 in FY 2010-11 and $369,344 in FY 2011-12. *See* Section 6 Declarations of the Joint Test Claimants, paragraphs (a-i) and the Declaration (Second) of Chris Crompton, paragraph 9.

VI. FUNDING SOURCES

A. THE COPERMITTEES DO NOT HAVE FEE AUTHORITY TO OFFSET THESE COSTS.

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

1. Copermittees' Activities Mandated by the 2009 Permit Do Not Convey Unique Benefits on or Deal with Unique Burdens Being Imposed on the MS4 by Individual Persons, Businesses or Property Owners.

The provisions of the 2009 Permit that are the subject of this claim involve requirements to develop programs and perform activities that apply throughout the jurisdiction and are not related to services being performed directly for individual businesses property owners, or residents. The programs are intended to improve the overall water quality of receiving water which benefits all persons within the jurisdiction. It would be impossible to identify benefits that any individual resident, business or property owner within the jurisdiction is receiving that are distinct from benefits that all persons within the jurisdictions are receiving. The Copermittees, therefore, cannot develop a fee structure that allocates the total costs of complying with the mandates in the 2009 Permit to individuals that would be based on the unique benefit that such individuals are receiving from that program or activity.

The 2009 Permit is intended to deal with water quality impacts from stormwater that is being conveyed by the Copermittees' MS4 System and reduce pollutants being discharged from the MS4 to the maximum extent practicable. Most of the requirements in the 2009 Permit involve developing programs to minimize the likelihood of pollutants being carried by runoff into the MS4 and to otherwise reduce those pollutants before being discharged into receiving waters.

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

As explained below, because of the impossibility to develop a fee structure based on the benefits enjoyed or burdens imposed by prospective payors, and because none of the activities being performed in response to the 2009 Permit requirements at issue in this claim are being provided directly to any prospective payor, the Copermittees would not have the authority to charge a fee to recoup the costs of complying with the mandates in the 2009 Permit.

2. Article XIII C of the California Constitution Limits Copermittees' Power To Impose Fees

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

Article XIII C § 2(d)[92] now provides that:

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

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

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

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

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

> … any levy, charge, or exaction of any kind imposed by a local government, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.
>
> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

Valid fees therefore must recover no more than the amount necessary to recover costs of the governmental program being funded by the fee. The person or business being charged the fee, the payor, may only be charged a fee based on the portion of the total government costs attributable to burdens being placed on the government by that payor or an amount based on the direct benefits the payor receives from the program or facility being funded by the fee. The services and work products produced by the Copermittees in response to the requirements of the 2009 Permit are not being provided directly to any individual or are related to a specific benefit conferred on any individual. Any fee charged by the Copermittees for costs related to the requirements of the 2009

Permit at issue in this claim, therefore would not meet the requirement of Article XIII C, sections 1(e) (1) and 1(e) (2) and would not be a valid fee.

3. Any Fee or Tax Charged By Copermittees Not Based On Benefits Received or Burdens Imposed By Payor Must Be Approved By a Vote of the Electorate

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

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

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

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

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

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

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

Article XIII D section 2(h) defines property-related service as "… a public service having a direct relationship to property ownership."

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

The case of *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 struck down a fee that the City of Salinas attempted to enact to fund the city's stormwater

program. The court held in that case that a stormwater fee was a property related fee governed by Article XIII D and that such a fee could not be imposed unless it was approved by the voters.

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

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

The City asserted that the fee did not require voter approval requirements of Article XIII D section 6(c) on two grounds. The first ground was that the fee was not a "property related" fee but rather a "user fee" which the property owner could avoid simply by maintaining a storm water management facility on the property. The City argued that because it was possible to own property without being subject to the fee that it was not a fee imposed "as an incident of property ownership."[93] The second ground asserted by the City was that, even if the fee could be characterized as a property related fee, it was exempted from the voter approval requirements by provisions of Article XIII D § 6(c) that allow local governments to enact fees for sewer and water services without prior voter approval.[94] The court rejected both arguments.

The *Salinas* Court found that because the fee was not directly based on or measured by use, comparable to the metered use of water or the operation of a business, it could not be characterized as a use fee. Rather the fee was based on ownership or occupancy of a parcel and was based on the size of the parcel and therefore must be viewed as a property related fee.[95]

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

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93 *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* at p. 1354.

94 *Ibid.*

95 *Id.* at p. 1355.

property related fee subject to the requirements of Article XIII D and not a user fee. The fee was therefore subject to the voter-approval requirements of Article XIII D unless one of the exceptions in section 6(c) of that section applied.[96]

The Court then went on to reject that the City's contention that the fee fell within exemption from the voter-approval requirement applicable to fees for sewer or water services. The court concluded that that the term "sewer services" was ambiguous in the context of both section 6(c) and Article XIII D as a whole. The court found that, because Article XIII D was enacted through the initiative process, the rule of judicial construction that an enactment must be strictly construed required the court to take a narrow reading of the sewer exemption. The court went on to hold that the sewer services exception in Article XIIID § 6(c) was applicable only to sanitary sewerage and *not* to services related to stormwater.[97]

The Court observed:

> The City itself treats storm drainage differently from its other sewer systems. The stated purpose of [the City storm drainage fee ordinance] was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways … the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water..[98]

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

> …[W]e cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." *Government Code section 53750*, enacted to explain some of the terms used in articles XIII C and XIII D, defines " '[w]ater' " as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.[99]

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96 *Ibid*.

97 *Id*. at pp.1357-1358.

98 *Id.* at p. 1358.

99 *Ibid*.

4. Conclusion

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

B. FUNDING SOURCES

The Permittees are not aware of any state, federal or non-local agency funds that are available to completely fund these new activities. To the extent such funding was received, the Declarations reflect General Fund costs not covered by any such funds. In the case of the County, funding that was additional to the General Fund, including from road, parks and Flood District funding, was available for certain Permit obligations. See Section 6 Declarations, paragraph 8.

VII. PRIOR MANDATE DETERMINATIONS

A. LOS ANGELES COUNTY

In 2003 and 2007, the County of Los Angeles and 14 cities within the county (the Los Angeles claimants) submitted test claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21. The test claims asserted that provisions of Los Angeles Water Board Order 01 -1 82 constitute reimbursable state mandates. As is the case with the Regional Board Order that is the subject of this Test Claim, Order 01-182 was the 2001 renewal of the existing MS4 Permit. Order 01-182 is the MS4 Permit for Los Angeles County and most of its incorporated cities, and serves as an NPDES permit. The permit provisions require the Los Angeles claimants to install and maintain trash receptacles at specified transit stops and to inspect certain industrial, construction, and commercial facilities for compliance with local and/or state storm water requirements.

On September 3, 2009, the Commission issued a final decision entitled In re Test Claim On: Los Angeles Regional Quality Control Board Order No. 01-182, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 ("Los Angeles Decision"). The Los Angeles Decision partially approved the test claims. The Commission found the trash receptacle requirement to be a reimbursable state mandate.

B. SAN DIEGO COUNTY

In 2007, the County of San Diego and 21 cities within the county (the San Diego claimants) submitted test claim 07-TC-09. The test claim asserted that many provisions of San Diego Water Board Order R9-2007-0001 constitute reimbursable state mandates. Order R9-2007-0001 is the 2007 renewal of the municipal storm water permit for San Diego County and many of its incorporated cities, and serves as an NPDES permit. The challenged permit provisions require the San Diego claimants to: (1) conduct and report on street sweeping activities; (2) clean and report on storm sewer cleaning; (3) implement a regional urban runoff management program; (4) assess program effectiveness; (5) conduct public education and outreach; (6) collaborate among

Permittees to implement the program; (7) implement hydromodification management plans; and (8) implement plans for low impact development.

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

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

The Commission also found the hydromodification and low impact development requirements in the San Diego Permit to be state mandates, but not reimbursable mandates because the local agencies could charge fees to pay for these programs.

VIII. CONCLUSION

The 2009 Permit imposes many new mandated activities and programs on the Copermittees that are not required to be imposed on local governments under federal law. As detailed above the costs to develop and implement these new programs and activities are substantial. Yet, the Copermittees do not have the ability/authority to develop and impose fees to fund any of these new State mandated programs. The costs incurred and to be incurred to comply with these state mandated programs all satisfy the criteria for reimbursable mandates, and the Copermittees respectfully request that the Commission make such findings as to each of the mandated programs and activities set forth herein, and find that they require funding under the State Constitution.

SECTION 6 DECLARATIONS
IN SUPPORT OF

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

DECLARATION OF CHRIS CROMPTON ON BEHALF OF THE COUNTY OF ORANGE IN SUPPORT OF TEST CLAIM

I, Chris Crompton, declare as follows:

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

2. I am employed by the County of Orange (hereafter, "County") as Manager, Water Quality Compliance in OC Public Works. I have knowledge of the County's funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 25 years and have managed compliance with the municipal stormwater permit program for the County of Orange and its role as Principal Permittee for the entire time.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the County. The County was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The County was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the County, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigate of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. In addition to these direct costs, the copermittees, including the County, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the County share of these costs was $163 in Fiscal Year (FY) 2009-10 and $3,099 in FY 2010-11. I am further informed and believe and therefore state that the County first incurred these costs on or about April 2, 2010. In addition, I am informed and believe and therefore state that the County incurred direct costs in response to this mandate in the amount of $16,935.95 in FY 2010-11. I am further informed and believe and therefore state that the County first incurred these costs on or about July 9, 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the County, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also

required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the County, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the County, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the County, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the County, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the County's share of the cost for such consultant support was $5,511 in FY 2010-11 and $22,490 in FY 2011-12. I am further informed and believed and therefore state that the County first incurred costs for these mandated activities on or about July 9, 2010. In addition to these shared costs, I am informed and believe and therefore state that the County incurred additional direct increased costs of $40,148.72 in FY 2011-12 as the result of followup activities following monitoring which recorded NAL exceedances.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the County, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were

required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the County, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the County, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the County was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the County share of such costs was $6,905 in FY 2010-11 and $5,198 in FY 2011-12. I am further informed and believed and therefore state that the County first incurred costs for these mandated activities on or about July 9, 2010.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the County, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the County, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees,

including the County, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required County staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the County, to develop a LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the County, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the County, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the County, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the County's share of the cost of this program in FY 2009-10 was $62,319 and in FY 2010-11 was $18,006. I am further informed and believe and therefore state that the County first incurred these costs on or about January 22, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the County, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the cost to the County for these requirements was $17,765.27 in

FY 2010-11 and $29,979.88 in FY 2011-12. I am further informed and believe and therefore state that the County first incurred these costs on or about July 9, 2010. I am further informed and believe and therefore state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the County, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the County, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that while the County did not incur direct costs for these requirements in FY 2010-11 or FY 2011-12, the County incurred costs in subsequent fiscal years during the term of the Permit.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the County, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the County, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the County's share of such costs in FY 2009-10 was $3,071 and that the County's share of such costs in FY 2010-11 was $2,753. I am further informed and believe and therefore state that the County first incurred these costs on or about January 8, 2010.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the County, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the County, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the County, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the County, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the County's share of such costs in FY 2010-11 was $5,801 and that the costs in FY

2011-12 were $3,748. I am further informed and believe and therefore state that the County first incurred costs for these mandates on or about July 9, 2010.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the County, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the County's cost share for such requirements was $334 in FY 2011-12 and $104 in FY 2012-13. I am further informed and believe and therefore state that the County first incurred costs with respect to such mandated activities on or about October 29, 2010.

i. Total Maximum Daily Loads (TMDLs): Permit Section I.1 required the County to comply with a series of new numeric effluent limits based on waste load allocations for the Baby Beach Bacterial Indicator TMDL. These new program requirements involved the imposition of numeric effluent limits from wasteload allocations from this TMDL, as set forth in Permit Tables 6, 7 and 8. This TMDL-related program was not required as a part of the 2002 Permit and thus constitutes a new program under the Permit. I am informed and believe and therefore state that the County's share of the costs for this mandated program was $28,575.91 in FY 2009-10 and $31,646.10 in FY 2011-12. I am further informed and believe and therefore state that the County first incurred such costs on or about January 22, 2010.

7. The County first incurred costs under the Permit in FY 2009-10, which began on July 1, 2009.

8. I am informed and believe and therefore state that there are no dedicated state, federal or regional funds that were available to pay for any of these new programs/activities. The County, in addition to its General Fund, had sources of other County funding, including from road, parks and Flood District funding, for certain Permit obligations. To the extent such fees were employed and/or such funds appropriated for such obligations, they would not be available for other County obligations. I am informed and believe and therefore state that I am not aware of any other fee or tax which the County would have the discretion to impose under California law to cover any portion of the cost of these new programs/activities.

Executed January 6 2017 at Orange, California.

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

Chris Crompton
Manager, Water Quality Compliance
OC Public Works

DECLARATION (SECOND) OF CHRIS CROMPTON ON BEHALF OF THE COUNTY OF ORANGE IN SUPPORT OF TEST CLAIM

I, Chris Crompton, declare as follows:

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

2. I am employed by the County of Orange ("County") as Manager, Water Quality Compliance at OC Public Works. I have knowledge of the County's funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 25 years and have managed compliance with the municipal stormwater permit program for the County of Orange and its role as Principal Permittee for the entire time.

4. I am familiar with the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB") Order No. R8-2009-0030, issued by the RWQCB on May 22, 2009 (the "Permit"). The County is a permittee under that Permit.

5. I am also familiar with the matters set forth in the Test Claim filed before the Commission on State Mandates regarding the Permit and the municipalities that are Joint Test Claimants in that Test Claim.

6. The County was designated as the Principal Permittee in the Permit. In that role, the County has, among other things, responsibility for budgeting, contracting with consultants and other third parties, and the invoicing of permittees for their share of the costs of programs

subject to cost-sharing among the permittees. In my role as Manager, I am familiar with these processes and how permittees are invoiced.

7. The cost-sharing programs in which permittees under the Permit participated can be divided into two main categories: (a) compliance with Total Maximum Daily Load ("TMDL") provisions applicable to Baby Beach, set forth in Paragraph 6(i) of my Declaration on behalf of the County in this Test Claim; and (b) non-TMDL compliance activities, including those activities identified in Paragraph 6(a)-(h) of my Declaration on behalf of the County in this Test Claim.

8. I have reviewed financial records maintained by the County in its regular business relating to the cost-sharing programs. I have also reviewed the dates on which the Joint Test Claimants submitted payment for such cost-sharing amounts. Based on that review, I understand and believe and therefore state that:

a. With regard to Baby Beach TMDL requirements, the County received payment from the City of Dana Point on or about August 12, 2011.

b. With regard to the non-TMDL requirements of the Permit that were subject to cost sharing, for requirements for which compliance efforts commenced in the second half of FY 2009-10, the County received payment from the Joint Test Claimants during a period commencing on or about December 21, 2009 and ending on or about January 21, 2010. For Permit compliance efforts which commenced in FY 2010-11, the County received payment from the Joint Test Claimants during a period commencing on or about January 18, 2011 and ending on or about March 3, 2011. For Permit compliance efforts which commenced in FY 2011-12, the County received payment from the Joint Test Claimants during a period commencing on or about January 17, 2012 and ending on or about July 22, 2013.

9. From my review of the financial records of the cost-sharing programs, I determined that the total amount paid by the permittees for the Baby Beach TMDL in FY 2009-10 was $28,575.91, and in FY 2010-11 was $33,652.65. For the other cost-sharing requirements at issue in the Test Claim, the total amount paid by the permittees in FY 2009-10 was $256,350, in FY 2010-11 was $164,535.91 and FY 2011-12 was $124,240.65.

10. Documents reflecting the information set forth in this Declaration, including documents that I prepared or caused to be prepared, were distributed to representatives of the Joint Test Claimants in connection with the preparation of declarations in support of the Test Claim.

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

Executed January 6 2017 at Orange, California.

Chris Crompton
Manager, Water Quality Compliance
OC Public Works

DECLARATION OF LISA ZAWASKI ON BEHALF OF THE CITY OF DANA POINT IN SUPPORT OF TEST CLAIM

I, Lisa Zawaski, declare as follows:

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

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

3. I have held my current position for approximately eleven (11) years. My duties include management of the City's storm water program.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigate of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. I am informed and believe and therefore state that the City had costs of $21,040 in Fiscal Year (FY) 2010-11 and $20,000 in FY2011-12 and first incurred these costs on or about July 6, 2010. In addition to these City costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $27 in Fiscal Year (FY) 2009-10 and $519 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it was paid an invoice from the County for these and other services on or about December 21, 2009.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin

standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such consultant support was $922 in FY 2010-11 and $3,764 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for these and other services on or about January 24, 2011. In addition to the cost-share costs, I am informed and believe and therefore state that the City had costs of $3,125 in FY 2011-12 and first incurred these costs for such requirements on or about August 23, 2011.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour

time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $1,156 in FY 2010-11 and $870 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for such activities and other requirements on or about January 24, 2011.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including

the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $10, 431 and in FY 2011-12 was $3,014. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about December 21, 2009. In addition to the cost-share costs, I am informed and believe and therefore state that the City had costs of $4,500 in FY2010-11 and $2,375 in FY2011-12 and first incurred these costs on or about August 1, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the cost to the City for these requirements was $8,125 in FY 2010-11 and $7,375 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about June 1, 2010. I am further informed and believe and therefore

state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that the City's costs for these requirements was $38,250 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities on or about June 30, 2013.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state that the City's share of such costs in FY 2009-10 was $514 and that the City's share of such costs in FY 2010-11 was $461. I am further informed and believe and therefore state that the City first incurred these costs on or about December 21, 2009 when it paid an invoice from the County for those services and others. In addition to the cost-share costs, I am informed and believe and therefore state, that the City had costs of $5,000 in FY 2010-11 and $4,000 in FY 2011-12 and first incurred these costs on or about July 27, 2010.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). I am informed and believe and therefore state that the City had costs of $1,750 in FY 2009-10 and $4,375 in FY 2010-11 and first incurred these costs on or about April 29, 2010. In addition to the City costs, the copermittees, including the City, participated in a cost-sharing program to develop updated

reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 was $971 and that the costs in FY 2011-12 were $627. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about January 24, 2011.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. I am informed and believe and therefore state that the City had costs of $2,500 in FY 2011-12 and first incurred these costs on or about November 1, 2011. The copermittees, including the County, also participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $56 in FY 2011-12 and $17 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about July 22, 2013.

i. Total Maximum Daily Loads (TMDLS): Permit Section I.1 required the City to comply with a series of new numeric effluent limits based on waste load allocations for the Baby Beach Bacterial Indicator TMDL. These new program requirements involved the imposition of numeric effluent limits from wasteload allocations from this TMDL, as set forth in Permit Tables 6, 7 and 8. This TMDL-related program was not required as a part of the 2002 Permit and thus constitutes a new program under the Permit. I am informed and believe and therefore state that

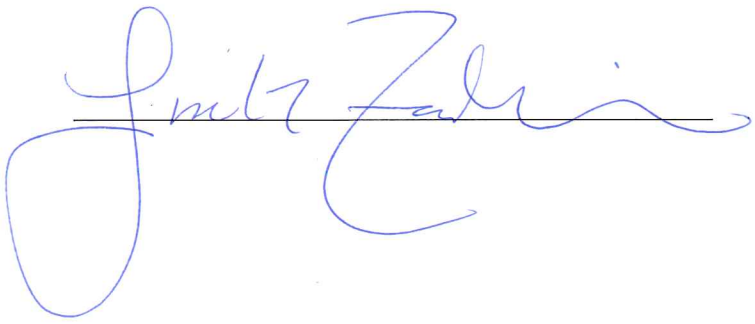
the City had costs of $3,125 in FY 2010-11 and first incurred these costs on or about November 1, 2010. The Baby Beach Watershed Agencies, including the City and County, also participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the City's share of the costs for this mandated program was $2,006.54 in FY 2010-11 and $1,719.20 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred such costs when it paid an invoice from the County for such costs on or about August 12, 2011.

7. The City first incurred costs under the Permit in FY 2009-10, which began on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 4, 2017 at Dana Point, California.

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



DECLARATION OF KENNETH H. ROSENFIELD, P.E.

FOR THE CITY OF LAGUNA HILLS

DECLARATION OF KENNETH H. ROSENFIELD ON BEHALF OF THE CITY OF LAGUNA HILLS, CALIFORNIA IN SUPPORT OF TEST CLAIM

I, Kenneth H. Rosenfield, declare as follows:

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

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

3. I have held my current position for approximately 21 years. My duties include the implementation of the NPDES program, maintenance of all public facilities, traffic engineering, civil engineering and capital improvement construction programs.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigate of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $21 in Fiscal Year (FY) 2009-10 and $406 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it was paid an invoice from the County for these and other services on or about January 19, 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin

standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such consultant support was $721 in FY 2010-11 and $2,943 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for these and other services on or about January 31, 2011.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of

storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $904 in FY 2010-11 and $680 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for such activities and other requirements on or about January 31, 2011.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City,

were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $8,155 and in FY 2011-12 was $2,356. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about January 19, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the City did not incur any costs pertaining to these requirements in FY 2010-11 or in FY 2011-12, but that the City did incur costs pertaining to these items in subsequent fiscal years during the Permit term. I am further informed and believe and therefore state that most of the costs incurred by the City during the Permit term regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set

forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that the City did not incur any costs pertaining to these requirements in FY 2010-11 or in FY 2011-12, but that the City did incur costs pertaining to these items in subsequent fiscal years during the Permit term.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was $402 and that the City's share of such costs in FY 2010-11 was $360. I am further informed and believe and therefore state that the City first incurred these costs on or about January 19, 2010 when it paid an invoice from the County for those services and others.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision

are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 was $759 and that the share in FY 2011-12 was $490. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about January 31, 2011.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including

the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $44 in FY 2011-12 and $14 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about January 30, 2012.

7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed this 4th day of January, 2017 at Laguna Hills, California.

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

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

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

I, Nancy Palmer, declare as follows:

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

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

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

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows; expending of staff time to create new public education and outreach programs; tracking, monitoring, responding to and investigation of incidents and complaints of irrigation runoff; and improvement of municipal irrigation systems and landscaping. I am informed and believe and therefore state that efforts to address such requirements resulted in direct expenditures by the City of $9,161 in increased staff allocation costs in Fiscal Year (FY) 2010-11, $22,432 in increased staff allocation time and design costs for the Crown Valley Parkway Medians Runoff Elimination Project in FY 2011-12, and $28,206 in design costs for the Crown Valley Parkway Medians Runoff Elimination Project in FY 2012-13. The City first incurred direct costs under the Permit in FY 2010-11, which commenced on July 1, 2010. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $55 in FY 2009-10 and $1,052 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these shared costs when it paid an invoice from the County for these and other services on or about January 11, 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels; and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet Basin Plan standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. I am informed and believe and therefore state that efforts to address such requirements have resulted in direct expenditures by the City of $914 in increased staff allocation costs in FY 2010-11, and in direct expenditures by the City of $479 in increased staff allocation costs and $600 in laboratory analytical costs in FY 2011-12. The City first incurred direct costs under the Permit in FY 2010-11, which commenced on July 1, 2010. In addition to these direct costs, the copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for

such consultant support was $1,870 in FY 2010-11 and $7,634 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred shared costs for these mandated activities when it paid an invoice from the County for these and other services on or about December 23, 2010.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $2,344 in FY 2010-11 and $1,764 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred shared costs for these mandated

activities when it paid a County invoice for such activities and other requirements on or about December 23, 2010.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. I am informed and believe and therefore state that efforts to address such requirements have resulted in direct expenditures by the City of $4,966 in increased staff allocation costs in FY 2010-11. The City first incurred direct costs under the Permit in FY 2010-11, which commenced on July 1, 2010. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I

am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $21,153 and in FY 2011-12 was $6,112. I am further informed and believe and therefore state that the City first incurred these shared costs when it paid an invoice to the County for these and other services on or about January 11, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements, and costs for contract inspectors to conduct BMP maintenance inspections. I am informed and believe and therefore state that the direct expenditures by the City to implement these requirements was $750 in increased staff allocation costs in FY 2010-11 and $4,880 in contract inspector costs in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about July 1, 2010. I am further informed and believe and therefore state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the

inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that the City's direct costs for these requirements was $3,342 in increased staff allocation costs in FY 2010-11. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities in FY 2010-11, which began on July 1, 2010.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was $1,042 and that the City's share of such costs in FY 2010-11 was $934. I am further informed and believe and therefore state that the City first incurred these shared costs on or about January 11, 2010 when it paid an invoice from the County for those services and others.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in Permit Section J at pages 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual

JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). I am informed and believe and therefore state that efforts required to address such requirements have resulted in direct expenditures by the City of $10,464 in increased staff allocation time in FY 2010-11, and in expenditures by City of $450 in increased staff allocation in FY 2011-12. The City first incurred direct costs under the Permit in FY 2010-11, which commenced on July 1, 2010. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 were $1,969 and that the costs in FY 2011-12 were $1,272. I am further informed and believe and therefore state that the City first incurred shared costs for these mandates when it paid an invoice from the County for these and other services on or about December 23, 2010.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the City's cost share for such requirements was $113 in FY 2011-12 and $35 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred shared costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about January 19, 2012.

7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 5, 2017 at Laguna Niguel, California.

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

Mary R Paluch

DECLARATION OF DEVIN SLAVEN ON BEHALF OF THE CITY OF LAKE FOREST IN SUPPORT OF TEST CLAIM

I, Devin Slaven, declare as follows:

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

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

3. I have held my current position for approximately twelve years. My duties include management of the City's Water Quality Division and directing the pollution prevention and enforcement program.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which included adoption of a new ordinance to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigation of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. I am informed and believe and therefore state that the City's direct costs were at least $450 in Fiscal Year (FY) 2010-11 and $360 in FY 2011-12. I am informed and believe and therefore state that the City first incurred these costs in January 2010. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. The copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $21 in FY 2009-10 and $392 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it was paid an invoice from the County for these and other services on or about January 21, 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels

(NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. I am informed and believe and therefore state that the City's direct costs were approximately $2,250 in FY 2011-12. I am informed and believe and therefore state that the City first incurred these costs on or about August 16, 2011. In addition, the copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such consultant support was $698 in FY 2010-11 and $2,848 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for these and other services on or about March 3, 2011.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine

stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $874 in FY 2010-11 and $658 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for such activities and other requirements on or about March 3, 2011.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features

into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further, Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. I am informed and believe and therefore state that the City's direct costs were at least $1,350 in FY 2011-12. I am informed and believe and therefore state that the City first incurred these costs in on or about August 2, 2012. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $7,891 and in FY 2011-12 was $2,280. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about January 21, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all

approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the cost to the City for these requirements was $2,208 in FY 2010-11 and $552 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about July 31, 2010. I am further informed and believe and therefore state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. The City received partial funding through a grant from the Orange County Transportation Authority. I am informed and believe and therefore state that the City's direct General Fund costs for these requirements were $900 in FY 2010-11 and approximately $155,852 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities on or about July 11, 2010.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology.

The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was $389 and that the City's share of such costs in FY 2010-11 was $349. I am further informed and believe and therefore state that the City first incurred these costs on or about January 21, 2010 when it paid an invoice from the County for those services and others.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit

this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 were $735 and that the costs in FY 2011-12 were $475. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about March 3, 2011.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $42 in FY 2011-12 and $13 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about February 10, 2012.

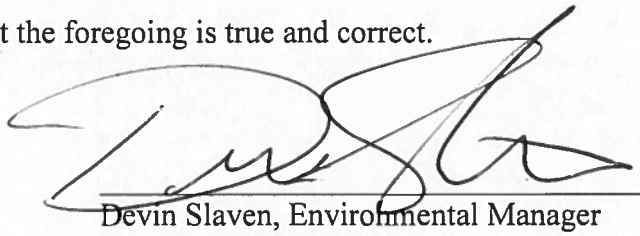
7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not

aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 6, 2017 at Lake Forest, California.

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



Devin Slaven, Environmental Manager
City of Lake Forest

DECLARATION OF RICHARD SCHLESINGER ON BEHALF OF THE CITY OF MISSION VIEJO IN SUPPORT OF TEST CLAIM

I, Richard Schlesinger, declare as follows:

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

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

3. I have held my current position for approximately 12 years. My duties include managing the Public Works Department and overseeing divisional supervisors in Engineering Services and Water Quality.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigate of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. The direct cost to the City to comply with these requirements was $30,000 in Fiscal Year (FY) 2010-11 and $30,000 in FY 2011-12. The City first incurred costs for these mandated activities on August 16, 2010. In addition, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $76 in FY 2009-10 and $1,449 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it was paid an invoice from the County for these and other services on or about December 22, 2009.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin

standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such consultant support was $2,577 in FY 2010-11 and $10,517 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for these and other services on or about January 19, 2011. In addition, the City was required to incur additional direct costs to implement this program, including staff costs to identify the source of pollutants, documenting their findings and reporting them to the RWQCB, analytical costs incurred to aid in source identification and evaluation of NALs, and the costs of discharge abatement and other compliance efforts to attempt to comply with the new mandated program. I am informed and therefore state that the City incurred costs of $1,875 during FY 2010-11 and $1,875 during FY 2011-12 to address these requirements. The City first incurred costs for these mandated activities on July 1, 2010.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine

stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's share of such costs was $3,229 in FY 2010-11 and $2,431 in FY 2011-12. I am further informed and believed and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for such activities and other requirements on or about January 19, 2011. Additionally, the City incurred direct costs to implement this new mandated program, including the follow up, exceedance triggered compliance actions, and staff costs to conduct field investigations, and to evaluate, abate, and take other actions to comply with this program. I am informed and believe and therefore state that the City first incurred costs of $1,875 in FY 2010-11 and $1,875 in FY 2011-12 for these

direct costs. I am informed and believe and thereon state that the City first incurred costs for these mandated activities on December 10, 2010.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $29,141 and in FY 2011-12 was $8,420. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about December 22, 2009. In addition, the City incurred

direct increased costs to implement these mandated requirements. I am informed and believe and therefore state that the direct cost to the City in FY 2010-11 for these requirements was $1,875 and in FY 2011-12 was $1,875. I am further informed and believe and therefore state that the City first incurred this cost on or about August 1, 2010. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements, maintain a database, and write letters of violation for property owners that did not respond to City requests for information. I am informed and believe and therefore state that the cost to the City for these requirements was $1,900 in FY 2010-11 and $1,900 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about August 1, 2010. I am further informed and believe and therefore state that most of the costs described above relating to previously installed BMPs cannot be recouped through fees charged to private entities.

f. [Reserved]

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was

$1,436 and that the City's share of such costs in FY 2010-11 was $1,287. I am further informed and believe and therefore state that the City first incurred these costs on or about December 22, 2009 when it paid an invoice from the County for those services and others. I am informed and believe and therefore state that the City's direct costs to develop, implement and initially comply with these mandated requirements were $30,000 for FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs for these mandated activities on or about July 1, 2009.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to

reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the City's share of such costs in FY 2010-11 were $2,712 and that the costs in FY 2011-12 were $1,753. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about January 19, 2011. The City also incurred direct increased costs to implement these requirements. I am informed and believe and therefore state that the cost to the City of these mandated requirements in FY 2010-11 was $1,875 and that the cost in FY 2011-12 was $1,875. I am further informed and believe and therefore state that the City first incurred costs for these mandates on or about July 1, 2010.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $156 in FY 2011-12 and $49 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an

invoice from the County for these and other services on or about January 18, 2012.

7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 5, 2017 at Mission Viejo, California.

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

Richard Schlesinger
City Engineer

DECLARATION OF BENJAMIN SIEGEL ON BEHALF OF THE CITY OF SAN JUAN CAPISTRANO IN SUPPORT OF TEST CLAIM

I, Benjamin Siegel, declare as follows:

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

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

3. I have held my current position for approximately one year. My duties include overseeing all departments in the City, including the Public Works Department and its stormwater management duties.

4. I have reviewed California Regional Water Quality Control Board San Diego Region ("RWQCB"), Order No. R9-2009-0002 issued by the RWQCB on December 16, 2009 (the "Permit") and am familiar with the requirements of the Permit as it applies to the City. The City was a copermittee under that permit.

5. I have also reviewed and I am familiar with the requirements of the Order No. R9-2002-0001 issued by the San Diego RWQCB on February 13, 2002 (the "2002 Permit"). The City was a copermittee under that permit.

6. Based on my understanding of the requirements of the 2002 Permit and the requirements of the Permit, I believe that the Permit required the copermittees to perform the

following new activities, among others, that were not required by the 2002 Permit, and which are unique to local government entities:

a. Non-Stormwater Discharges: Permit Section B removes from the list of exempted discharges all landscape irrigation, irrigation water, and lawn watering discharges originating from any location or source, including residential irrigation discharges from potable water sources, which was previously included in the category of exempted discharges in the 2002 Permit. The removal of this discharge exemption required the copermittees, including the City, to undertake various tasks, which could include adoption of new ordinances to address these flows, expending staff time to create new public education and outreach materials, the tracking, monitoring, and response to and investigation of incidents and complaints of irrigation runoff and improvement of municipal irrigation systems and landscaping. In addition to these direct costs, the copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. The copermittees, including the City, participated in a cost-sharing effort to develop a model ordinance addressing the new discharges. I am informed and believe and therefore state that the City's share of these costs was $38 in Fiscal Year (FY) 2009-10 and $722 in FY 2010-11. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice from the County for these and other services on or about December 21, 2009. In addition, the City incurred direct costs in connection with this mandate. I am informed and believe and therefore state that the cost to the City to comply with these requirements in FY 2010-11 was $8,567 and in FY 2011-12 was $4,283. I am further informed and believe and therefore state that the City first incurred costs for these activities in October 2010.

b. Non-Stormwater Dry Weather Action Levels: Permit Sections C and F.4.(d) and (e) required the copermittees, including the City, to implement new follow-up investigation and source tracking activities triggered by exceedances of dry-weather non-stormwater action levels (NALs) according to newly established, prescriptive concentration levels, and also required testing of new and expanded numbers of constituents as compared to the 2002 Permit. In the 2002 Permit, the copermittees, including the City, were allowed to set their own criteria for investigative and source tracking actions in the previously implemented dry weather program to meet basin standards. As a consequence of this expanded NAL monitoring and follow-up investigation program, an exceedance of any NAL required each copermittee, including the City, to investigate and identify the source of the exceedance in a timely manner. If this was not possible, the copermittees, including the City, were required to submit a prioritization plan and timeline that identified the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees were required to submit an action report dependent on the source of the pollutant exceedances following the identification process set forth in Permit Section C.2. The copermittees, including the City, collectively retained consultants on a cost-sharing basis to develop guidance on implementing the required compliance actions and to evaluate the action levels in Permit Tables 4 a-c. I am informed and believe and therefore state that the City's share of the cost for such work was $1,285 in FY 2010-11 and $5,243 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities when it paid an invoice from the County for those and other services on or about January 18, 2011. In addition, the City incurred direct costs to implement this new mandated program, including staff costs to identify the source of pollutants, documenting their findings and

reporting them to the RWQCB, analytical costs incurred to aid in source identification and evaluation of NALs, and the costs of discharge abatement and other compliance efforts to attempt to comply with the new mandated program. I am informed and believe and therefore state that the City incurred costs of $4,197 during FY 2011-12 to address these requirements. I am further informed and believe and therefore state that the City first incurred costs for these activities on or about August 29, 2011.

c. Stormwater Action Levels: Permit Section D required the copermittees, including the City, to conduct end-of-pipe assessments during wet weather monitoring to determine stormwater action level (SAL) compliance metrics at major outfalls. The copermittees were required to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceeded SALs would trigger additional monitoring in the subsequent year. Any station that did not exceed a SAL for 3 years were required to be replaced with a different station. SAL samples were required to be 24-hour time weighted composites. Future requirements included, beginning in Year 3 after the Permit adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceeded the SALs for the pollutants listed in Table 5 of the Permit would require the copermittees, including the City, to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s). Additionally, the copermittees, including the City, were required to utilize the exceedance information when adjusting and executing annual work plans. To address these requirements, the City was part of a copermittee program to share the costs for monitoring elements of this mandated program and the initial development of SAL protocols. I am informed and believe and therefore state that the City's

share of such costs was $1,610 in FY 2010-11 and $1,212 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities when it paid a County invoice for those and other services on or about January 18, 2011. Additionally, the City incurred direct costs to implement this new mandated program, including followup, exceedance-triggered compliance actions, and staff costs to conduct field investigations, and to evaluate, abate and take other actions to comply with this program. I am informed and believe and therefore state that the City incurred costs of $343 in FY 2010-11 and $1,456 in FY 2011-12 for these direct costs. I am further informed and believe and therefore state that the City first incurred these costs on or about November 21, 2010.

d. Low Impact Development (LID) and Hydromodification Requirements: Permit Sections F.1.d and F.1.h required the copermittees, including the City, to ensure that new development and significant redevelopment comply with low impact development ("LID") and hydromodification prevention requirements. These sections required the copermittees, including the City, to develop and implement LID principals set forth in the Permit and structural features into public agency Priority Development Projects (PDPs). In addition, the copermittees, including the City, were required under Permit Section F.1.d.4 to establish a land development program whereby each PDP was required to implement LID BMPs. This program required City staff to undertake various steps, including to develop this program and to train municipal staff on implementation requirements. Further Permit Section F.1.d.7 required the copermittees, including the City, to develop an LID waiver program for incorporation into local SSMPs which met specific Permit requirements. Further, under Permit Section F.1.h, the copermittees, including the City, were required to collaborate to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all

PDPs. Further, Permit Section F.1.h.5 required the copermittees, including the City, to implement interim hydromodification criteria prior to the development of the HMP. The copermittees, including the City, participated in a cost-sharing program with outside consultants and County staff to address these requirements. I am informed and believe and therefore state that the City's share of the cost of this program in FY 2009-10 was $14,527 and in FY 2011-12 was $4,197. I am further informed and believe and therefore state that the City first incurred these costs when it paid an invoice to the County for these and other services on or about December 21, 2009. I am further informed and believe and therefore state that the City incurred direct costs in response to these mandated activities, including the development of these programs in the City. I am informed and believe and therefore state that the cost to the City in FY 2010-11 for these requirements was $5,996 and in FY 2011-12 was $5,139. I am further informed and believe and therefore state that the City first incurred these direct costs on or about May 19, 2011. I am further informed and believe and therefore state that most of the costs described above cannot be recouped through fees charged to private entities.

e. BMP Maintenance Tracking: Permit Section F.1.f required the copermittees, including the City, to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance activities conducted within its jurisdiction since July 2001. This program required staff time to contact property owners for permission to inspect on-site BMPs or process self-certification statements. I am informed and believe and therefore state that the cost to the City for these requirements was $3,427 in FY 2010-11 and $1,071 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs on or about September 14, 2010. I am further informed and

believe and therefore state that most of the costs described above regarding previously installed BMPs cannot be recouped through fees charged to private entities.

f. Retrofitting Existing Development: Permit Section F.3.d required the copermittees, including the City, to develop and implement a retrofitting program to meet the requirements set forth in that section. This new mandated program required the copermittees, including the City, to identify and inventory areas of existing development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting; evaluate and rank the inventoried existing developments to prioritize retrofitting; consider the results of the evaluation in prioritizing work plans for the following year; and track and inspect completed retrofit BMPs. I am informed and believe and therefore state that the City's direct costs for these requirements were $4,883 in FY 2010-11 and $2,656 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred costs for these mandated activities on or about December 7, 2010.

g. Maintain MS4 Map: Permit Section F.4.b required the copermittees, including the City, to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction, including the use of Geographical Information System (GIS) technology. The Copermittees, including the City, engaged in a cost-sharing effort to achieve this mapping. I am informed and believe, and therefore state, that the City's share of such costs in FY 2009-10 was $716 and that the City's share of such costs in FY 2010-11 was $642. I am further informed and believe and therefore state that the City first incurred these costs on or about December 21, 2009 when it paid an invoice from the County for those services and others. In addition, the City incurred direct costs in the implementation of this mandate. I am informed and believe and therefore state that the City's direct costs to develop, implement and comply with these

mandated requirements were $6,853 for FY 2010-11 and $1,285 for FY 2011-12. I am further informed and believe and therefore state that the City first incurred these costs for these mandated activities on or about September 14, 2010.

h. Reporting Requirements

(i) Program Effectiveness Assessment and Reporting and Jurisdictional Runoff Management Program (JRMP) Annual Reports: In addition to what was required in the 2002 Permit, Permit Section J required the copermittees, including the City, to develop a work plan, an effectiveness assessment system based on CASQA outcome levels, and an annual assessment review to address their high priority water quality problems in an iterative manner over the life of the Permit. The minimum requirements of this provision are set forth in pages Permit Section J at 79-82. Further, Permit Section F.1.d(7)(i) required the copermittees, including the City, to generate upgraded individual JRMP Annual Reports which cover implementation of their jurisdictional activities during the past annual reporting period. Additional requirements in the Permit compared to the 2002 Permit included: reporting of PDPs choosing to participate in the LID waiver program, including details of the feasibility analysis, implemented BMPs and funding details with the second year JRMP Annual Report. In addition, pursuant to Permit Section F.3.a.(4)(c), each copermittee, including the City, was required to evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device, and to submit this inventory and evaluation to the RWQCB. Such evaluation was also required to include a Reporting Checklist (Permit Section K.3.a.(3) and Attachment D). The copermittees, including the City, participated in a cost-sharing program to develop updated reporting templates, conduct assessments for the Unified Annual Report and to develop watershed workplans. I am informed and believe and therefore state that the

City's share of such costs in FY 2010-11 were $1,352 and that the costs in FY 2011-12 were $874. I am further informed and believe and therefore state that the City first incurred costs for these mandates when it paid an invoice from the County for these and other services on or about January 18, 2011. In addition, the City incurred direct costs with respect to the JRMP annual reports of $3,426 in FY 2010-11 and $3,426 in FY 2011-12. I am further informed and believe and therefore state that the City first incurred these directs costs on or about October 1, 2010.

(ii) Watershed Workplan Public Meetings: Permit Sections K.1.b.4 and G.6 required the copermittees, including the City, to hold an annual public Watershed Workplan Review Meetings to present updates to the Watershed Workplan. This public meeting requirement was not contained in the 2002 Permit. The copermittees, including the County, participated in a cost-sharing effort to undertake these activities. I am informed and believe and therefore state that the city's cost share for such requirements was $78 in FY 2011-12 and $24 in FY 2012-13. I am further informed and believe and therefore state that the City first incurred costs with respect to such mandated activities when it paid an invoice from the County for these and other services on or about January 17, 2012.

7. The City first incurred costs under the Permit in FY 2009-10, which commenced on July 1, 2009.

8. I am informed and believe that there are no dedicated State, Federal or regional funds that are or will be available to pay for any of these new programs or activities. I am not aware of any fee or tax which the City would have the discretion to impose under California law in order to recover any portion of these new programs or activities. I am further informed and

believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund.

Executed January 4, 2017 at San Juan Capistrano, California.

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

Benjamin Siegel, City Manager
City of San Juan Capistrano

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

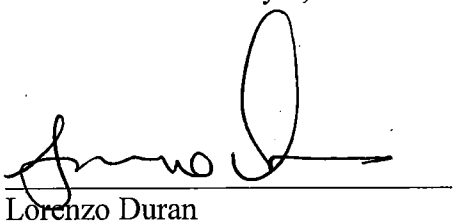
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

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
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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.)

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