NARRATIVE STATEMENT

IN SUPPORT OF JOINT TEST CLAIMS IN RE SANTA ANA RWQCB

ORDER NO. R8-2009-0030

(NPDES NO. CAS618030)

TABLE OF CONTENTS

Page

Page

NARRATIVE STATEMENT IN SUPPORT OF TEST CLAIM

I. INTRODUCTION

On May 22, 2009, the California Water Quality Control Board Santa Ana Region ("Santa Ana RWQCB") issued a new storm water Permit (Order No. R8-2009-0030 (NPDES – "National Pollutant Discharge Elimination System"), NPDES No. CAS618030, hereinafter the "2009 Permit" or "Permit") regulating discharges from the municipal separate storm sewer systems ("MS4s") in north Orange County, California.[1] The 2009 Permit includes numerous requirements that exceed the requirements of federal law and that were not included in the prior 2002 Santa Ana RWQCB MS4 NPDES Permit, Order No. R8-2002-0010, NPDES No. CAS618030 ("2002 Permit").[2] The 2009 Permit is a renewal of the 2002 Permit, and contains a number of new unfunded State mandates for which the County of Orange and the incorporated cities of north Orange County (the "Permittees")[3] 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/activities are described in detail below, but are generally described as follows:

A. A series of new programs involving what are known as "Total Maximium Daily Loads" or "TMDLs" as set forth in Section XVIII of the 2009 Permit (Watershed Action Plans and TMDL Implementation);

B. New "Low Impact Development" or "LID" requirements involving public agency projects as set forth in Subsection XII.C of the Permit;

C. New requirments involving "Hydrologic Conditions of Concern" or "HCOC" concerning Pubic Agency Projects as set forth in Subsection XII.D of the Permit;

D. New Public Education Program requirements involving: common interest areas and areas managed by homeowner associations or management companies (Subsection XI.4 of the Permit), the conducting of a public awareness survey (Subsection XIII.1 of the Permit), the conducting of sector-specific workshops (Subsection XIII.4 of the Permit), and the development and implementation of a new Public Participation program involving various water quality plans and fact sheets (Subsection XIII.7 of the Permit); and

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[1] A copy of the 2009 Permit is included under Section 7 –Documentation to these Test Claims, along with a copy of the Fact Sheet for the 2009 Permit.

[2] A copy of the 2002 Permit is included under Section 7 –Documentation to these Test Claims.

[3] The Permittees are the County of Orange, the Orange County Flood Control District, and the cities of Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Garden Grove, Huntington Beach, Irvine, Laguna Hills, Laguna Woods, La Habra, La Palma, Lake Forest, Los Alamitos, Newport Beach, Orange, Placentia, Santa Ana, Seal Beach, Stanton, Tustin, Villa Park, Westminster, and Yorba Linda.

E. New requirements to develop and maintain a Geographical Information System (GIS) for Industrial Facilities and Newly Specified Commercial Facilities as set forth in Sections IX (Municipal Inspections of Industrial Facilities) and X (Municipal Inspections of Commercial Facilities) of the 2009 Permit.

II. PROGRAM BACKGROUND

California ("State") has long been a leader in protecting the quality of all the waters of the State for the use and enjoyment of the people of the state. In fact, 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" or "Act") 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 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 graft 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] In other words, because the State had an existing, more aggressive regulatory program, it was not in the State's interest to allow direct federal regulation through a more narrowly tailored program.

III. 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 ("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:

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[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].

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

(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, the 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]

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.

(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 USC § 1342(p)(3)(B).

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

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.

> 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]

IV. 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 has assigned that responsibility to the State Water Resources Control Board ("State Board"), and the individual Regional Water Quality Control Boards ("Regional Boards"). Permits issued by the State Board or the Regional Boards 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 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

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[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.

> 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.[15] 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."[16] 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.'"[17]

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

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

[14] *City of Burbank v. State Water Resources Control Bd.*, (2005) 35 Ca1.4th 613, 627-628.

[15] *See* Cal. Water Code § 13050 [defining the term "Waters of the State" more broadly than the CWA definition of "Waters of the United States"]; *see also* Cal. Water Code § 13260 [requiring a state issued permit for "[a]ny person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system"].

[16] *In Re Building Industry Association of San Diego County and Western States Petroleum Association,* State Board Order WQ 2001-15, Exhibit 9 to the Miscellaneous Authorities included with Section 7 – Documentation.

[17] *Id.*

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.[18]

Lastly, in *Burbank*, the California Supreme Court acknowledged that aspects of NPDES permits can exceed federal requirements, 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.[19] 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.

V. 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 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

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[18] *See* San Diego Regional Board Staff Report, p. 3, ¶ 14, included as Exhibit 18 under Section 7 – Documentation – to these Test Claims.

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

[20] *County of San Diego* (1991) 15 Ca1.4th 68, 81; *County of Fresno* (1991) 53 Ca1.3d 482, 487.

[21] *County of Fresno* (1991)53 Cal.3d 482, 487; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 984-85.

[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"].

> 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 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.

[23] Cal. Gov. Code § 17514.

When a new program or level of service is in part federally required, courts have held that the authority to impose a condition does not equate to a direct order or mandate to impose the condition. This principle was expressly recognized in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564. In that case, the appellate court held "[i]f the state freely chooses to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[24] As a result, when a state agency exercises discretion in choosing which requirements to impose in an executive order, those aspects that were not strictly required by the federal scheme are state mandates.[25]

Similarly, when a state law or order mandates changes to an existing program that requires an increase in the actual level or quality of governmental services provided, that increase will represent a "higher level of service" within the meaning of Article XIII B § 6 of the California Constitution.[26] For example, in *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, an executive order required school districts to take specific steps to measure and address racial segregation in local public schools. The appellate court held that this constituted a "higher level of service" to the extent the order's requirements exceeded federal law by mandating school districts to undertake defined remedial actions that were merely advisory under prior governing law. [27]

The 2009 Permit imposes new requirements on the Permittees that exceed the requirements of federal law, and that are unique to the Permittees.[28] For that reason, the 2009 Permit represents a state mandate for which the Permittees are entitled to reimbursement pursuant to Article XIII B section 6 of the California Constitution.

VI. STATE MANDATED ACTIVITIES

On May 22, 2009, the Santa Ana RWQCB issued the 2009 Permit to the Permittees. The 2009 Permit mandates many new programs and activities not required by either federal law or the 2002 Permit. The program and activities that are at issue in this Test Claim are as follows:

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[24] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593.

[25] *Id*.

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

[27] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173.

[28] 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.

A. 2009 PERMIT SECTION XVIII (WATERSHED ACTION PLANS AND TMDL IMPLEMENTATION) IMPOSE A SERIES OF NEW UNFUNDED STATE MANDATES ON THE PERMITTEES.

1. CHALLENGED PROGRAM REQUIREMENT

Section XVIII of the 2009 Permit imposes a number of new State mandated programs upon the Permittees, that are not mandated by federal law, and without the Santa Ana RWQCB providing funding for any of such programs. Each of the new programs set forth in 2009 Permit Section XVIII concerns what are referred to as "Total Maximum Daily Loads" or "TMDLs" i.e., each involves either: (1) programs designed to implement a EPA and/or a State developed TMDL, in a manner that is not required by federal law; (2) pre-TMDL programs that are not required by federal law; or (3) programs designed to implement partially developed State TMDLs that have not yet been finally approved. The one common thread in each of these new Permit programs is that they all impose new requirements that are not mandated by federal law; nor do the Permittees have fee authority to recover their costs in complying with any of these TMDL-related State mandates. Accordingly, each of the TMDL programs discussed below is an unfunded State mandate which is constitutionally required to be reimbursed by the State.

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 establishing water quality goals for all intrastate waters." "These state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'"[30]

The Act provides that these state-developed Water Quality Standards ("Standards") are to include (1) the designated beneficial use of the water body, and (2) the "water quality criteria" to protect such designated use.[31] The water quality criteria component of the Standards "can be expressed in narrative form or in a numeric form, e.g., specific pollutant concentrations."[32] "Narrative criteria are broad statements of desirable water quality goals in a water quality plan,"

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29 *Burbank, supra*, 135 Cal.4th 613, 619, 620.

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

31 33 U.S.C. § 1313(c)(2)(A); 40 CFR § 131.3(i).

32 *Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1403.

such as "no toxic pollutants in toxic amounts."[33] A TMDL is to be established "at a level necessary to implement the applicable water quality standards."[34]

The federal regulations define a TMDL 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.[35]

The federal regulations then proceed to 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."[36] NPDES permit terms must be consistent with their assumptions and requirements of the waste load allocations within a TMDL.[37]

In short, once adopted, "TMDLs serve as a link in an implementation chain" linking the implementation of the Standards to the NPDES Permits.[38] However, a TMDL is not self-executing and is only enforceable through NPDES permits.[39] In incorporating a TMDL under the federal regulations, NPDES Permits need only be "consistent with the assumptions and requirements of any available waste load allocations for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7."[40]

With these test claims, the Permittees contend that the 2009 Permit terms at issue go beyond what is required by federal law and thus impose a serious of unfunded State mandates in

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[33] *Id.*

[34] 33 U.S.C. §1313(d)(1)(c); *also see Arcadia v. State Board, supra*, 235 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."].

[35] 40 CFR § 130.2(i).

[36] 40 CFR § 130.3(h).

[37] 40 CFR § 122.44(d)(1)(vii)(B).

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

[39] *Id.*

[40] 40 CFR 122.44(d)(1)(vii)(B).

relation to TMDLs, as follows: (1) various Permit terms require compliance with numeric effluent limits derived from finally adopted TMDLs, even though federal law only requires that municipal NPDES Permits reduce the discharge of pollutants to the "maximum extent practicable" ("MEP") Standard, and do not require compliance with numeric effluent limits; (2) certain Permit terms require compliance with numeric effluent limits derived from the WLAs contained in TMDLs, even though the TMDLs have not been finally adopted or approved by EPA. Federal law does not require an NPDES Permit to require compliance, in any fashion, with a TMDL that has not been "approved by EPA pursuant to 40 CFR 130.7.;"[41] (3) some Permit terms require the Permittees to themselves develop the TMDLs or to otherwise conduct studies or take other action towards the development of TMDLs. Yet, federal law does not mandate that the Permittees take any action towards the development or study of a TMDL. The development of the TMDL is the responsibility of the Regional Water Quality Control Boards, a division of the State.

3. FEDERAL LAW DOES NOT MANDATE THE IMPOSITION OF NUMERIC EFFLUENT LIMITS FROM TMDLS OR OTHERWISE TO BE INCLUDED IN MUNICIPAL NPDES PERMITS.

The plain language of the CWA confirms that numeric effluent limits, either from TMDLs or otherwise, are not required to be imposed on municipal NPDES Permittees. Instead, federal law only requires controls to 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," where it provides as follows:

> (B) Municipal Discharge.
>
> Permits for discharges from municipal storm sewers –
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
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> (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.[42]

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[41] *Id.*

[42] 33 U.S.C. § 1342(p)(3)(B), emphasis added.

In *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159 ("Defenders"), the Ninth Circuit Court of Appeal recognized the different approach taken by Congress for Stormwater, finding that "***industrial discharges must comply strictly with state water-quality standards," while Congress chose "not to include a similar provision for municipal storm-sewer discharges.***"[43] The Court found that "because 33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311," 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 statute unambiguously demonstrates that ***Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)***."[44]

In *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, the California Court of Appeal similarly found:

> [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.**"[45]

With respect to TMDLs, the fact that wasteload allocations within a TMDL are not required under the CWA to be enforced as "numeric limits" through a Stormwater Permit, was specifically confirmed by EPA itself in a November 22, 2002 EPA Guidance Memorandum on "*Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs*" ("EPA Guidance Memo").[46] In this EPA Guidance Memorandum, EPA explained that for NPDES Permits regulating municipal storm water discharges, any water quality based effluent limit for such discharges should be "***in the form of BMPs and that numeric limits will be used only in rare instances***."[47] EPA further concluded that ***"for NPDES-regulated municipal . . . dischargers***

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[43] *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165, emphasis added.

[44] *Defenders*, at 1165, emphasis added.

[45] *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 1163.

[46] All Exhibit references in this Narrative Statement are contained within the Miscellaneous Authority provided within Section 7 – Documentation to the Test Claims. The EPA Guidance Memo is Exhibit 1 thereto.

[47] Exhibit 1, EPA Guidance Memo, p. 6, emphasis added.

effluent limits should be expressed as best management practices (BMPs), rather than as numeric effluent limits."[48]

EPA went on to expressly recognize the difficulties in regulating Stormwater discharges and explained its policy as follows:

> **EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges. The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers. Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances.**[49]

In a recent Oregon Appellate Court decision in *Tualatin Riverkeepers, et al. v. Oregon Department of Environmental Quality* ("*Tualatin*") (April 28, 2010) 235 Ore.App. 132, the Oregon Court of Appeal addressed, among other issues, the need for waste load allocations contained within developed TMDLs to be enforced as numeric effluent limits within a municipal NPDES Permit under Oregon law. The petitioners in that case argued that the Oregon Department of Environmental Quality ("DEQ") had erred because it had issued a permit that did not ***"incorporate waste load allocations as enforceable effluent limits."***[50]

The Oregon Court initially found that the CWA does not require that municipal NPDES Permits contain "numeric" effluent limits as a means of enforcing Standards, finding that under the CWA "although a permit must include restrictions on discharges of pollutants into the water, the applicable statute does not specify what form they must take. 'Best management practices,' such as those incorporated in the permits at issue in this case, are a type of effluent limitations."[51]

The Oregon Court also discussed the purpose of a TMDL, noting that a TMDL is required to be established for pollutants and waters of the state identified pursuant to section 1313(d) of the CWA. Further, the Oregon Court addressed the petitioners' prime contention that the TMDLs were required under Oregon law to have been incorporated into the Permit as

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[48] *Id.* at p. 4; *also see* August 22, 2003 letter from EPA Headquarters to the Honorable Bart Doyle, then Councilmember for the City of Sierra Madre, wherein EPA Headquarters made clear that EPA has ***"worked closely with all ten Regions on this memo and expects that it will be followed by the states."*** (Exhibit 2, EPA August 22, 2003 Letter, p. 2.

[49] EPA Guidance Memo, p. 4.

[50] *Tualatin, supra*, 235 Ore. App. 132 at 145-146.

[51] *Tualatin, supra,* at 141.

"enforceable effluent limitations."[52] Notably, there was no suggestion that federal law required a TMDL to be incorporated into a municipal NPDES Permit as a "numeric effluent limitation." Instead, as referenced above, the Oregon Court discussed the fact 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."[53]

The Court in *Tualatin* went on to conclude that the DEQ need not require that TMDLs be enforced through the use of numeric effluent limits, finding as follows:

> The applicable TMDLs in this case set forth specific waste load 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 [storm water 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

[52] *Tualatin, supra,* at 145-146.

[53] *Tualatin, supra,* at 141, citing 33 U.S.C. § 1342(p) and 40 CFR § 122.44(k)(2)-(3).

> permittees. Those measures are "permit requirements" that properly incorporate the TMDL wasteload allocations.[54]

The Oregon opinion confirms that numeric effluent limits are not required to be included in municipal NPDES Permits as a means of implementing the wasteload allocations in a TMDL, or otherwise. Yet, the 2009 Permit in issue contains a series of specific numeric effluent limits based on wasteload allocations from TMDLs, but without providing appropriate funding to fund these new programs. As such, all of the new TMDL-related programs in the Permit which require compliance with numeric effluent limits are unfunded State mandates that are not required under federal law; such mandates must, therefore, be funded by the State.

In a recently EPA-issued draft technical document entitled "TMDLs Stormwater Handbook, November, 2008" (Exhibit 3, hereafter "EPA Draft Handbook"), EPA provides "information to TMDL practitioners and NPDES stormwater permit writers" on various subjects, including:

> - **Approaches for translating TMDL WLAs and implementation recommendations into NPDES stormwater permit requirements and implementation strategies.[55]**

The EPA Draft Handbook is designed to assist in the development of "TMDL implementation plans that connect WLAs and stormwater permits by either (1) including specific recommendations (e.g., performance standards, management measures) for implementing WLAs, or (2) providing technical information for permit writers and permittees on how to analyze, select, and implement provisions to implement the WLAs."[56] The Draft Handbook specifically references and quotes from the EPA Guidance Memo (referenced above), and provides that: ***"EPA expects that most WQBELs for NPDES-regulated municipal and small construction storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances."***[57]

Furthermore, in a report entitled "*Assessing the TMDL Approach to Water Quality Management,"* (September, 2001), issued for Congress by the National Research Council ("NRC"), a member of the National Academies of Science, the NRC similarly concluded that adaptive BMPs should be utilized to enforce TMDLs:

> Many debates in the TMDL community have centered on the use of "phased" and "iterative" TMDLs. Because these terms have particular meanings, this report uses a more general term – adaptive implementation. Adaptive implementation is, in fact, the application of the scientific method to decision-making. It is a

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54 *Tualatin, supra,* at 148.

55 EPA Draft Handbook, p. 1.

56 EPA Draft Handbook, p. 1.

57 EPA Draft Handbook, p. 133; emph. added.

> process of taking actions of limited scope commensurate with available data and information to continuously improve our understanding of a problem and its solutions, while at the same time making progress toward attaining a water quality standard.[58]

In addition to all of the above authority, there is a plethora of State Board Orders and related formal documentation confirming that the long-held policy of the State of California is not to require the use of numeric limits for stormwater dischargers, but rather to apply the MEP standard through an iterative BMP process. *See, e.g.*, Exhibit 5, State Board Order No. 91-04, p. 14 ["There are ***no numeric objectives or numeric effluent limits*** required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14]; Exhibit 6 State Board Order No. 96-13, p. 6 ["***federal laws does not require*** the [San Francisco Reg. Bd] to dictate the specific controls."]; Exhibit 7, 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 8 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 9, 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 10, State Board Order No. 2006-12, p. 17 [***"Federal regulations do not require numeric effluent limitations for discharges of storm water"***]; Exhibit 11, 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 an Exhibit 12, 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 short, neither State nor federal law or policy provide for the incorporation of wasteload allocations as numeric limits into an MS4 Permit. To the contrary, both EPA and the State have long recognized that numeric limits should only be incorporated into an MS4 Permit in "rare instances," with the State Board's own Numeric Effluent Limits Panel concluding that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers."

4. REQUIREMENTS FROM 2002 PERMIT

With the exception of the TMDL programs in the 2002 Permit involving the sediment and nutrient TMDLs for San Diego Creek and Newport Bay (not in issue in these Test Claims), and the need for further studies regarding fecal coliform in Newport Bay (also not in issue in these Test Claims), the 2002 Permit contains no TMDL-related programs and imposes no requirements on the Permittees to develop or implement any TMDL program in issue in these

[58] Exhibit 4, *Assessing the TMDL Approach to Water Quality Management*, p. 90.

Test Claims; nor does the 2002 Permit contain any requirement to meet numeric effluent limitations derived from a wasteload allocation from a TMDL or otherwise (other than the requirements involving the sediment and nutrient TMDLs that are not in issue here).

5. 2009 PERMIT MANDATED TMDL-RELATED ACTIVITIES

a. The Permit Programs Under Section XVIII.B Involving Promulgated TMDLS for Toxic Pollutants, Are All Unfunded State Mandates.

Under 2009 Permit Section XVIII.B, the Santa Ana RWQCB seeks to impose a series of new programs not contained in any prior permit, based on: "*EPA Promulgated Technical TMDLs for Toxic Pollutants in San Diego Creek and Newport Bay, including metals, organo-chlorine compounds, selenium, and organo-phosphate pesticides. EPA and the Los Angeles Regional Water Quality Control Board established technical TMDLs for metals in Coyote Creek.*"[59]

For each of these referenced TMDLs, the 2009 Permit incorporates and requires compliance with specific numeric waste load allocations or load allocations taken from these various TMDLs. Yet, requiring compliance with each of these numeric effluent limits set forth in the tables under Section XVIII.B of the Permit (pages 68-74), constitutes new unfunded State mandates that are not required by federal law.

Each of the new TMDL-related programs is designed to implement either the EPA promulgated TMDLs for toxic pollutants, discussed above, or Regional Board promulgated TMDLs for other toxic pollutants which have not yet been "approved by EPA pursuant to 40 CFR 130.7." Further, all of the adopted or to be adopted TMDLs referenced in Subsections XVIII.B.1 through B.4 have been based on what is known as the "California Toxics Rule" or "CTR," a rule adopted by EPA in May of 2000.[60] Yet, a review of CTR itself, as well as EPA's Responses to Comments made in connection with CTR (Excerpts of which are included as Exhibit 15), even further confirms that TMDLs, once approved by EPA, impose no specific federal mandates on the State, but only trigger "a number of discretionary choices" for the State to make.

To start with, in the Preamble to CTR, ***EPA made clear it was not intending to require municipal dischargers to strictly comply with the numeric objectives set forth in CTR.*** To the contrary, EPA stated that CTR contains "no federal mandates" for State, local, or tribal government or the private sector.[61] Rather than imposing a federal mandate and requiring the State of California to apply the CTR limits as strict Stormwater Standards, EPA indicated the exact opposite was to occur:

> EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small

[59] Permit, p. 68, Section XVIII.B.1.

[60] *See* Exhibit 13, California Toxics Rule ("CTR"), 65 Fed. Reg. 31682.

[61] Exhibit 13, 65 Fed. Reg. 31682, 31708.

> governments. This rule establishes ambient water quality criteria which, by themselves do not directly impact any entity. The State will implement these criteria by ensuring that NPDES permits result in discharges that will meet these criteria. **In so doing, the State will have considerable discretion.**
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> * * *
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> Under the CWA water quality standards program, States must adopt water quality standards for their waters that must be submitted to EPA for approval.
>
> * * *
>
> Thus, under the CWA, EPA's promulgation of water quality criteria or standards establishes standards that the State, in turn, implements through the NPDES permit process. **The State has <u>considerable discretion</u> in deciding how to meet the water quality standards and in developing discharge limits as needed to meet the standards.** In circumstances where there is more than one discharger to a water body that is subject to water quality standards or criteria, a State also has discretion in deciding on the appropriate limits for the different dischargers. While the State's implementation of federally-promulgated water quality criteria or standards may result indirectly in new or revised discharge limits for small entities, the criteria or standards themselves do not apply to any discharger, including small entities.
>
> Today's rule, as explained above, does not itself establish any requirements that are applicable to small entities. As a result of EPA's actions here, the State of California will need to ensure that permits it issues include limits as necessary to meet the water quality standards established by the criteria in today's rule. **In so doing, the State will have a number of discretionary choices associated with permit writing.** While California's implementation of today's rule may ultimately result in some new or revised permit conditions for some dischargers, including small entities, EPA's action today does not impose any of these as yet unknown requirements on small entities.[62]

Moreover, according to EPA, CTR was <u>not</u> to have a direct affect on Stormwater dischargers. Instead, EPA stated that with respect to Stormwater permits, "compliance with water quality standards through the use of Best Management Practice (BMPs) is appropriate."[63] EPA also claimed it would "continue to work with the State to implement storm water permits

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[62] <u>Exhibit 13</u>, 65 Fed. Reg. 31682, 31708-709; emphasis added.

[63] <u>Exhibit 13</u>, 65 Fed Reg. 31703.

that comply with water quality standards with an emphasis on pollution prevention and best management practices ***rather than costly end-of-pipe controls***."[64]

EPA further represented that the CTR language "allows the practice of applying maximum extent practicable (MEP) to MS4 permits, along with best management practices (BMPs) as effluent limits to meet water quality standards where infeasible or insufficient information exists to develop WQBELS."[65] Additional examples of EPA representations in this regard are as follows:

County of Ventura's comments at the CTR public hearing:

> "We have also recently completed a four-year monitoring program and, using the information from the monitoring program, we have attainability of the data that we have collected for our program. This attainability data indicates that even if we comply – apply the BMP program to the maximum extent possible, the expenditure of radial funds, we would still not be able to meet the requirements of the proposed criteria for several of the metals and other constituents which would then – of course, our program would go into a treatment mode for stormwater discharges. We believe that this was going to be very costly for us, particularly very costly for smaller communities who don't have the base to spread the cost of such expense over their population."[66]

EPA's Response –

> *If you look across the country, across the U.S., there are many, many states that have standards on the books, water quality standards that are far more stringent than the numbers we're promulgating or proposing to promulgate in Southern California. If you look at their standards, you won't see any black boxes on the end of those storm water discharges.* ***Nobody builds treatment for storm water treatment in this country. They've been implementing standards for 15 years, California is no different."***[67]

A portion of EPA's response to comments of Los Angeles County:

> *EPA did not ascribe benefits or costs of controlling storm water discharges in the proposed or final Economic Analysis. EPA believes that many storm water dischargers can avoid violation of*

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64 Exhibit 14, EPA Response to Comment 001-007.

65 Exhibit 14, EPA Response to Comment 040-004.

66 Exhibit 14, EPA Response to CTR H-002-017.

67 Exhibit 14, EPA Response to CTR H-002-017.

> *water quality standards* ***through application of best management practices that are already required by the current storm water permits.***
>
> *The commenter claims that even with the application of current BMPs, its storm water dischargers would still violate water quality standards due to the CTR criteria. The commenter appears to assume that storm water discharge would be subject to numeric water quality based effluent limits which would be equivalent to the criteria values and applied as effluent limits never to be exceeded, or calculated in the same manner that effluent limits are calculated for other point sources, such as POTWs. The comment then appears to assume that such WQBELs would then require the construction of very costly end-of-pipe controls.*
>
> *EPA contends that neither scenario is valid with regards to developing WQBELs for storm water discharges or establishing compliance with WQBELs. . . EPA will continue to advocate the use of BMPs, as discussed in the CTR preamble. . . .* ***EPA will continue to work with the State to implement storm water permits that comply with water quality standards with an emphasis on pollution prevention and best management practices rather than costly end-of-pipe controls.***[68]

A portion of EPA's Response to Comments of Sacramento County –

> *EPA believes the applicability of water quality standards to storm water discharges is outside the scope of the rule.*[69]

An excerpt of EPA's written response to Fresno County Metropolitan Flood Control District –

> ***EPA believes that implementation of the criteria [CTR] as applied to wet-weather dischargers will not require the construction of end-of-pipe facilities.***[70]

Other EPA comments on the issue:

> ***As further described in the responses to CTR-021-008, CTR-013-003 and CTR-040-004, EPA believes that the final CTR will not significantly affect the current storm water program being implemented by the State, which includes the requirement to develop best management practices to control pollutants in storm***

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[68] Exhibit 14, EPA Response to CTR-001-007.

[69] Exhibit 14, EPA Response to CTR-040-014b.

[70] Exhibit 14, EPA Response to CTR-031-005b.

> ***water discharges. As such, EPA believes that inclusion of end-of-pipe treatment costs for storm water are inappropriate.***[71]

EPA written comments to the California Storm Water Task Force:

> ***EPA disagrees with the cost estimates provided by the commenter as EPA does not believe that storage and treatment of stormwater would be required to ensure compliance with the CTR.***[72]
>
> ***EPA believes that the CTR language allows for the practice of applying maximum extent practicable (MEP) to MS4 permits, along with best management practices (BMPs) as effluent limits to meet water quality standards where infeasible or insufficient information exists to develop WQBELs.***[73]

EPA similarly confirmed that CTR was not creating a "federal requirement" when it issued its "Economic Analysis of the California Toxic Rule," October 1999, which was prepared for EPA by Science Applications International Corporation (hereafter, "EPA's Economic Analysis of CTR," Exhibit 15). In EPA's Economic Analysis of CTR, it concluded that ***"[t]he State of California has significant flexibility and discretion*** as to how it chooses to implement the CTR within the NPDES permit program."[74]

The fact that CTR-derived TMDLs should not be strictly applied to stormwater through numeric limits has further been confirmed by the State of California in its "*Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (SIP)," adopted by the State Board by Resolution 2000-015 on April 26, 2000.[75] California's SIP confirms on page 1 that the SIP was designed to establish "implementation provisions for priority pollutant criteria promulgated by . . . EPA through the . . . California Toxics Rule (CTR)," but that it ***"does not apply to regulation of stormwater discharges."***[76]

As such, each of the TMDL Programs as described below that seek to require compliance with wasteload allocations through the use of "numeric effluent limitations," are unfunded State mandates subject to reimbursement.

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71 Exhibit 14, EPA Response to CTR-035-044c.

72 Exhibit 14, EPA Response to CTR H-001-001b.

73 Exhibit 14, EPA Responses to CTR-040-004.

74 EPA Economic Analysis of CTR, p. ES-2; *also see* CTR, 65 Fed. Reg. 31703 [where EPA confirmed CTR was not to have a direct effect on NPDES sources not typically subject to numeric water quality based effluent limits or urban runoff, instead finding, ***"compliance with water quality standards through the use of best management practices (BMPs) is appropriate."]***.

75 Exhibit 16, "*State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California*," also known as the "State Implementation Plan" or "SIP."

76 SIP, p. 1, n. 1, emph. added.

(1) 2009 Permit Subsections XVIII.B.1 through B.4 Require Compliance with a Series of Unfunded Mandates relating to Numeric Effluent Limitations for Various EPA Promulgated Toxic Pollutant TMDLs.

For the TMDLs described in the 2009 Permit as "Toxic Pollutants in San Diego Creek and Newport Bay, California, EPA-Region 9, established June 14, 2002," the 2009 Permit sets forth a number of numeric effluent limits in Tables 1 A/B/C, Table 2 A/B/C/D, and 3.[77] Specifically, for the numeric effluent limits set forth in Tables 1, 2, and 3,[78] the 2009 Permit requires the following:

> *The Permittees in the Newport Watershed shall comply with the waste load allocations specified in the established TMDLs and shown in Tables 1 A/B/C, 2 A/B/C/D, and 3. These wasteload allocations shall remain in effect unless and until alternative wasteload allocations are established in TMDLs approved by the Regional Board, State Board, Office of Administrative Law, and EPA.*[79]

However, as discussed at length above, it is clear from the plain language of the CWA and controlling case law, along with EPA-issued Guidance, CTR, EPA's Responses to Comments on CTR, and State-issued policies and orders, that federal law does not require NPDES Permits for municipal dischargers, such as the subject Permit, to include programs requiring compliance with numeric effluent limits. Instead, both EPA and the State Board have made clear that numeric effluent limits are not required to be complied with under federal law, and that an adaptive best management practices approach should instead be adhered to. (*See* discussion, *supra*.)

Accordingly, the numeric effluent limits set forth in Tables 1 A/B/C, Table 2 A/B/C/D and Table 3 and which are all derived from WLAs contained within various TMDLs, go beyond federal law and represent unfunded State mandated programs subject to reimbursement under the California Constitution.

(2) 2009 Permit Subsection XVIII.B.5 Requires Compliance With Numeric Effluent Limits for Organo-Chlorine Compounds Without Funding.

Under 2009 Permit Subsection XVIII.B.5:

> *Accordingly, upon approval of the Regional Board-adopted organo-chlorine compound TMDLs by the State Board and the Office of Administrative Law, the Permittee shall comply with both the EPA and Regional Board wasteload allocations specified in*

[77] Permit, Section XVIII.B.4, pp. 68-70

[78] Permit, Section XVIII.B.4, pp. 68-71.

[79] Permit, Section XVIII.B.4, p. 68-69.

> *Tables 2 A/B/C/D, and Table 4, respectively. In accordance with the Regional Board TMDLs, compliance with the allocations specified in Table 4 shall be achieved as soon as possible, but no later than December 31, 2015. Upon approval of the Regional Board-approved organo-chlorine compounds TMDLs by EPA, the applicable wasteload allocations shall be those specified in Table 4.*

The above-referenced 2009 Permit requirement thus imposes a series of unfunded State mandates. First, said Subsection would require compliance with the numeric effluent limits based on the WLAs set forth in EPA's organo-chlorine compound TMDL, as set forth in Table 2 A/B/C. Because, as discussed above, federal law does not require the use of numeric effluent limits to enforce WLAs contained within TMDLs, such a Permit requirement is a State mandate which goes beyond what is required under federal law.

Second, 2009 Permit Subsection XVIII.B.5 requires compliance with a State adopted TMDL even though it has not yet been ***"approved by EPA pursuant to 40 CFR § 130.7."***[80] Accordingly, any portion of a TMDL incorporated into the subject Permit where the TMDL has not yet been "approved by EPA," *i.e.*, a Regional Board organo-chlorine TMDL referenced in Subsection XVIII.B.5, constitutes a State program that is clearly not required by federal law, and thus is an unfunded State requirement.

Third, according to the requirement in Subsection XVIII.B.5, once the Regional Board's TMDL for organo-chlorine has been approved by EPA, then in accordance with the terms of the 2009 Permit, the numeric effluent limits contained in "*Table 4 shall be achieved as soon as possible but no later than December 31, 2015.*" Yet as discussed above, federal law does not require that numeric effluent limits from waste load allocations or otherwise, be incorporated into a municipal NPDES permit. This requirement of Subsection XVIII.B.5 is thus yet another TMDL-related mandate not required under federal law.

Accordingly, the requirements under XVIII.B.5 involving the organo-chlorine compound TMDLs constitute a series of requirements that go beyond the Clean Water Act, and as such, are all unfunded State mandates.

(3) The 2009 Permit's New Programs Under Subsections XVIII.B.7 and XVIII.B.8, Requiring Permittees Within the Newport Bay Watershed to "Participate in the Development and Implementation" of TMDLs for Metals and Selenium, are unfunded State Mandates.

Subsection XVIII.B.7 of the 2009 Permit provides that the Regional Board's staff, in collaboration with the stakeholders, is developing TMDLs for metals and selenium that will include implementation plans and monitoring programs and that are intended to replace the EPA TMDLs. This Subsection then requires as follows:

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[80] *See* 40 CFR § 122.44(d)(1)(vii)(B).

> *The Permittees within the Newport Bay Watershed shall continue to participate in the development and implementation of these TMDLs.*[81]

A requirement that the Permittees "participate in the development and implementation" of TMDLs, is not a requirement mandated by federal law. Specifically, nothing under federal law requires that Permittees develop or even participate in the "development" of a TMDL, and thus the requirements set forth in such Subsection XVIII.B.7 constitutes an unfunded State mandate.

In addition, under 2009 Permit Subsection XVIII.B.8, in connection with the Regional Board's proposed selenium TMDL, the Permittees must establish a "Cooperative Watershed Program" to meet the requirements of a Selenium TMDL Implementation Plan, and must thereafter implement this program where it provides as follows:

> *A proposed Cooperative Watershed Program that will fulfill applicable requirements of the Selenium TMDL Implementation Plan must be submitted by the stakeholders covered by this water within twenty-four (24) months of adoption of this order, or one month after approval of the selenium TMDLs by OAL, whichever is later. The program must be implemented upon Regional Board's approval.*[82]

Again, however, there is no requirement anywhere under federal law, either in connection with the TMDL requirements within the Clean Water Act or the regulations, or otherwise, that requires the Permittees to develop such a "Cooperative Watershed Program." Moreover, there is no requirement in federal law that the Permittees "implement" such a program to meet the requirements of a TMDL, particularly as discussed above, given that such a TMDL has not yet been "approved by EPA," and that a TMDL is not "self-executing." Further, the requirement to merely implement, sight unseen, a State adopted TMDL, is not a requirement that exists under federal law. The requirements set forth in Subsection XVIII.B.8 are yet additional TMDL-related unfunded State mandates.

(4) The 2009 Permit's New Programs under Subsection XVIII.B.9, Requiring Permittees to Develop and Implement a Constituent Specific Source Control Plan for Coyote Creek and San Gabriel River TMDL for Metals and Selenium, are Unfunded State Mandates.

Subsection XVIII.B.9 requires as follows:

> *The Permittees with discharges tributary to Coyote Creek or the San Gabriel River shall develop and implement a constituent-specific source control plan for copper, lead and zinc until a*

[81] Permit, Subsection XVIII.B.7, p. 72.

[82] Permit, Subsection XVIII.B.8, p. 73.

> *TMDL implementation plan is developed. The source control plan shall include a monitoring program and shall be completed within 12 months from the date of adoption of this order. The source control plan shall be designed to ensure compliance with the following waste load allocations:*
>
> **[Table 6 – Municipal Stormwater Waste Load Allocations – Coyote Creek]**[83]

Nothing in federal law, however, requires the subject Permittees to develop or implement a "constituent-specific source control plan," nor to implement a "monitoring program" as a part of such a constituent-specific source control plan.[84] In addition, nothing in federal law require the Permittees to develop and implement a "source control plan" to achieve compliance with specific numeric effluent limits contained within a particular TMDL, in this case for Coyote Creek. Because federal law does not require the inclusion within a Municipal NPDES Permit of a "constituent-specific source control plan," or a "monitoring program" in relationship thereto, nor compliance with particular waste load allocations contained in such a constituent-specific source control plan, all such requirements under Subsection XVIII.B.9 are plainly unfunded State mandates.

b. The 2009 Permit Program Under Subsection XVIII.C.1 Relating to Regional Board-Adopted TMDLs for Fecal Coliform/Bacteria For Newport Bay, is an Unfunded State Mandate.

2009 Permit Subsection XVIII.C.1 requires that the Permittees comply with a Regional Board-adopted TMDL for fecal coliform for bacteria in Newport Bay, where it requires as follows:

> *The permittees shall comply with the waste load allocations for urban runoff in Tables 8A and 8B in accordance with the deadlines in Tables 8A and 8B. Compliance determination for fecal coliform shall be based on monitoring conducted at representative sampling locations within San Diego Creek and Newport Bay. (The permittees may use the current sampling locations for compliance determination.)*[85]

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[83] Permit, Subsection XVIII.B.9, p. 73.

[84] Under the Clean Water Act and EPA's Regulations, states are to identify impaired water segments, rank the segments in order of priority, and thereafter establish TMDLs for the segments according to the ranking. The Upper Reach of Coyote Creek has not been listed as an impaired segment, nor has it been proposed for listing as impaired under Section 303(d) of the Act. Accordingly, no TMDL is even appropriate at this time for the Upper Reach of Coyote Creek, and therefore no TMDL requirement in any form in any NPDES Permit, is required under federal law.

[85] Permit, Subsection XVIII.C.1, p. 73.

The above-referenced requirement is an unfunded State mandate for two reasons. First, federal law only requires consistency with the assumptions and requirements of a TMDL ***"approved by EPA."***[86] Because the referenced TMDL has not yet been approved by EPA, federal law imposes no obligations of any kind upon the Permittees to take any action regarding such a TMDL. Therefore the inclusion of any requirement to comply with the fecal coliform TMDL for Newport Bay and San Diego Creek, is an unfunded State mandate.

Second and in addition, as discussed above, federal law does not require strict compliance with any numeric effluent limitations within a municipal NPDES Permit. Thus, beyond the fact the EPA has not approved the fecal coliform bacteria TMDL in question, this New Program in Subsection XVIII.C.1 of the 2009 Permit is an unfunded mandate as it goes beyond the requirement of federal law by attempting to impose particular numeric effluent limits, i.e., the waste load allocations from the fecal coliform TMDL, upon the Permittees.

c. The 2009 Permit Programs in Subsection XVIII.D.1 Relating to TMDLs for Diazinon and Chlorpyrifos are all Unfunded State Mandates.

Subsection XVIII.D.1 of the 2009 Permit requires Permittees to meet specific numeric limits from TMDLs for Diazinon and Chlorphyrifos for San Diego Creek, and Chlorphyrifos for Newport Bay, where it provides as follows:

> *The permittees in the Newport Bay Watershed shall comply with the allocations in Tables 9A and B.*
>
> ***[Table 9A Diazinon and Chlorpyrifos allocations for San Diego Creek].***
>
> ***[Table 9B Chlorpyrifos allocations for Upper Newport Bay].***

These new programs requiring compliance with specific numeric effluent limits are new unfunded State mandates given that, as discussed at length above, federal law does not require that wasteload allocations contained within TMDLs be incorporated into municipal NPDES Permits as numeric effluent limits. Again, instead, the development of Municipal Permit terms need only ensure consistency with the "assumptions and requirements" of wasteload allocations in TMDLs, through the use of adaptive best management practices. The new programs imposed under Subsection XVIII.D.1 of the Permit are, therefore, unfunded State mandates subject to reimbursement under the California Constitution.

6. CONCLUSION - TMDL-RELATED UNFUNDED MANDATED PROGRAMS

The 2009 Permit includes a whole new series of Permit requirements not found anywhere in the 2002 Permit relating to TMDLs.

The 2009 Permit specifically:

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[86] *See* 40 CFR § 122.44(d)(1)(vii)(B).

1) compels compliance with numeric limits taken from wasteload allocation within TMDLs;

2) requires compliance with numeric limits derived from TMDLs not "approved by EPA";

3) requires that the Permittees actually develop certain TMDLs (which is the responsibility of the State and/or the EPA); and

4) requires the Permittees to conduct various studies and monitoring, and develop and implement new programs and implementation plans, all in connection with the development of TMDLs.

All such TMDL-related programs are unfunded State Mandates not required under federal law. The costs to the Permittees to fund these numerous TMDL-related mandates will be in the tens of millions of dollars, and may be well in excess of one hundred million dollars.

B. THE 2009 PERMIT PROVISIONS REQUIRING PUBLIC PROJECTS TO COMPLY WITH LOW IMPACT DEVELOPMENT AND HYDROMODIFICATION REQUIREMENTS ARE UNFUNDED STATE MANDATES.

The 2009 Permit requires the Permittees to develop and implement a program to ensure that new development and significant redevelopment projects comply with strict low impact development and hydromodification prevention requirements. The issue of whether such 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).[87] The 2009 Permit includes low impact development and hydromodification requirements that are similar, and in many ways more stringent than those at issue in Test Claim 07-TC-09.

In its decision on Test Claim 07-TC-09, the Commission determined that the San Diego County large municipal stormwater permit's low impact development and hydromodification requirements exceed the requirements of federal law, and as such represent state mandates. The Commission determined, however, that because the County of San Diego and the other permittees retained the ability to assess fees for new development, that the requirements did not represent a reimbursable state mandate.[88]

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.[89] In support of

[87] A copy of the Commission's decision in Test Claim 07-TC-09, Discharge of Stormwater Runoff – Order No. R9-2007-0001 is included under Section 7 – Documentation to these Test Claims.

[88] Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 1.

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

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 undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement."[90]

In support of its 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 of Merced elected to take property by eminent domain. Then recent legislation required the City to compensate the property 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."[91]

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. It nonetheless requires the Permittees to take immediate mandatory actions, including updating the Permittees' model Water Quality Management Plan ("WQMP") to incorporate low impact development and hydromodification principles,[92] and developing feasibility criteria for project evaluation to determine the feasibility of implementing low impact development BMPs. Both requirements must be complete within 12 months of the 2009 Permit's effective date,[93] and both include elements that are specific to municipal projects.[94]

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 Permittees to incur costs related to low impact development and hydromodification on any municipal project.[95] This includes hospitals, laboratories, medical facilities, recreational facilities, airfields, parking lots, streets, roads, highways, and freeways. These projects are not optional. They are integral to the Permittee's function as municipal entities, and the failure to make necessary repairs, upgrades and extensions can expose the Permittees to liability.

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

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

[92] 2009 Permit section XII.C.1.

[93] 2009 Permit section XII.E.1.

[94] Including the "Green Streets" requirements of Permit section XII.B.2.

[95] 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.

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 Permittees to incur new, additional costs on every municipal project. Moreover, since issuing the *Kern High School Dist.* Decision, the California Supreme Court has rejected application of *City of Merced* in circumstances beyond those strictly 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 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 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.[96]

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 Permittees that are either wholly unrelated to voluntary action on the part of the Permittees, or are triggered by municipal projects that the Permittees implement with little to no discretion because they are integral to the Permittees' function as municipal entities, and/or the failure to undertake them would expose the Permittees to liability. As set forth above, and in greater detail below, these requirements exceed federal law and represent reimbursable state mandates.

1. CHALLENGED PROGRAM REQUIREMENT

The Permittees challenge Sections XII.B., through XII.E. of the 2009 Permit as they are applied to municipal projects. In sum, to comply with these sections, the Permittees will be required to invest significant resources developing a State-mandated program, and add requirements to municipal projects that will significantly increase the cost of design and construction,. This includes development of a model WQMP that incorporates low impact development and hydromodification BMPs. 2009 Permit section XII.C.1 states:

> Within 12 months of adoption of this order, the permittees shall update the model WQMP to incorporate LID principles (as per Section XII.C) and to address the impact of urbanization on downstream hydrology (as per Section XII.D) and a copy of the updated model WQMP shall be submitted for review and approval by the Executive Officer. As provided in Section XII.J, 90 days after approval of the revised model WQMP, priority development projects shall implement LID principles described in this section, Section XII.C. To the extent that the Executive Officer has not approved the feasibility criteria within 18 months of adoption of this order as provided in Section XII.E.1, the infeasibility of implementing LID BMPs shall be determined through project specific analyses, each of which shall be submitted to the Executive Officer, 30 days prior to permittee approval.

2009 Permit section XII.B.6 additionally requires the Permittees to develop project approval streamlining guidelines for priority development projects, including municipal projects. 2009 Permit section XII.B.6 states:

> Within 12 months from the date of adoption of this order, the principal permittee shall develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs. The recommendations should include information needed to be submitted to the Regional Board for consideration of

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

> regional treatment control BMPs. At a minimum, it should include: BMP location; type and effectiveness in removing pollutants of concern; projects tributary to the regional treatment system; engineering design details; funding sources for construction, operation and maintenance; and parties responsible for monitoring effectiveness, operation and maintenance.

2009 Permit section XII.E.1 includes a similar requirement that the Permittees develop an "in lieu" program for projects that cannot meet the Permit's other low impact development requirements. 2009 Permit section XII.E.1 states:

> Within 12 months of adoption of this order, the principal permittee, in collaboration with the co-permittees, shall develop technically-based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs (feasibility to be based in part, on the issues identified in Section XII.C). This plan shall be submitted to the Executive Officer for approval. Only those projects that have completed a vigorous feasibility analysis as per the criteria developed by the permittees and approved by the Executive Officer should be considered for alternatives and in-lieu programs. If a particular BMP is not technically feasible, other BMPs should be implemented to achieve the same level of compliance, or if the cost of BMP implementation greatly outweighs the pollution control benefits, a waiver of the BMPs may be granted. All requests for waivers, along with feasibility analysis including waiver justification documentation, must be submitted to the Executive Officer in writing, 30 days prior to permittee approval.

Once the model WQMP and the in lieu program are developed, municipal projects that qualify as "priority development projects" under the 2009 Permit will be required to implement low impact development and hydromodification BMPs. The requirements are very specific, and dictate which BMPs are required at different types of projects. For example, 2009 Permit section XII.B.2.h. requires specific requirements for road projects:

> Streets, roads, highways and freeways of 5,000 square feet or more of paved surface shall incorporate USEPA guidance, "Managing Wet Weather with Green Infrastructure: Green Streets" in a manner consistent with the maximum extent practicable standard. This category includes any paved surface used for the transportation of automobiles, trucks, motorcycles and other vehicles and excludes any routine road maintenance activities where the footprint is not changed.

In general, all priority development projects must implement low impact development BMPs. Notable requirements in Sections XII.C.3 through XII.C.6. require the following:

> The permittees shall require that each priority development project include site design BMPs during development of the preliminary and final WQMPs. The design goal shall be to maintain or replicate the pre-development hydrologic regime through the use of design techniques that create a functionally equivalent post-development hydrologic regime through site preservation techniques and the use of integrated and distributed micro-scale storm water infiltration, retention, detention, evapotranspiration, filtration and treatment systems as close as feasible to the source of runoff.
>
> The selection of LID principles shall be prioritized in the following manner (from highest to the lowest priority): (1) Preventative measures (these are mostly non-structural measures, e.g., preservation of natural features to a level consistent with the maximum extent practicable standard; minimization of runoff through clustering, reducing impervious areas, etc.) and (2) Mitigation (these are structural measures, such as, infiltration, harvesting and reuse, bio-treatment, etc. The mitigation or structural site design BMPs shall also be prioritized (from highest to lowest priority): (1) Infiltration (examples include permeable pavement with infiltration beds, dry wells, infiltration trenches, surface and sub-surface infiltration basins. All infiltration activities should be coordinated with the groundwater management agencies, such as the Orange County Water District); (2) Harvesting and Re-use (e.g., cisterns and rain barrels); and (3) Bio-treatment such as bio-filtration/bio-retention.
>
> * * *
>
> The LID BMPs shall be designed to mimic pre-development site hydrology through technically and economically feasible preventive and mitigative site design techniques. LID combines hydrologically functional site design with pollution prevention methods to compensate for land development impact on hydrology and water quality.

Lastly, the 2009 Permit requires the Permittees to analyze and mitigate downstream impacts related to the volume of water leaving completed priority development projects. 2009 Permit sections XII.D.1. through XII.D.4. require the following:

> Each priority development project shall be required to ascertain the impact of the development on the site's hydrologic regime and include the findings in the WQMP, including the following for a two-year frequency storm event impacts downstream hydrology.
>
> * * *

> If a hydrologic condition of concern exists, then the WQMP shall include an evaluation of whether the project will adversely impact downstream erosion, sedimentation or stream habitat. If the evaluation determines adverse impacts are likely to occur, the project proponent shall implement additional site design controls, on-site management controls, structural treatment controls and/or in-stream controls to mitigate the impacts. The project proponent should first consider site design controls and on-site controls prior to proposing in-stream controls; in-stream controls must not adversely impact beneficial uses or result in sustained degradation of water quality of the receiving waters.
>
> The project proponent may also address hydrologic conditions of concern by mimicking the pre-development hydrograph with the post-development hydrograph, for a two year return frequency storm. Generally, the hydrologic conditions of concern are not significant, if the post-development hydrograph is no more than 10% greater than pre-development hydrograph. In cases where excess volume cannot be infiltrated or captured and reused, discharge from the site must be limited to a flow rate no greater than 110% of the pre-development 2-year peak flow.

2. LID AND HYDROMODIFICATION REQUIREMENTS UNDER FEDERAL LAW

No federal statute, regulation, or policy specifically requires municipal stormwater permits to include the low impact development and hydromodification requirements present in the 2009 Permit. Title 40, section 122.26(d)(2)(iv)(A) of the Code of Federal Regulations provides a general requirement that large municipal stormwater permits include programs to reduce the discharge of pollutants from the MS4 that originate in areas of new development.[97] It does not require design elements such as low impact development, or management practices to control the volume of water leaving a newly developed site.

As stated in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, "[i]f the state freely chooses to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[98] Federal law does not require the 2009 Permit to include low impact development and hydromodification programs, yet the state has exercised its discretion to include them in the permit. For that reason, those aspects of the 2009 Permit exceed the requirements of federal law and represent a state mandated program for which the Permittees are entitled to reimbursement.

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[97] 40 C.F.R. § 122.26(d)(2)(iv)(A) requires Large MS4 permits to include "a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment."

[98] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593.

3. REQUIREMENTS FROM 2002 PERMIT

The 2009 Permit represents a significant increase in the permanent BMPs and other controls that the Permittees' must implement for municipal projects. The 2002 Permit's requirements were minimal in comparison.[99] The relevant portions of the 2002 Permit are as follows:

- 2002 Permit section XII.A.2.
- 2002 Permit section XII.A.9.
- 2002 Permit section XII.B.

The requirements from the 2002 Permit were very general compared to the prescriptive requirements in the 2009 Permit. For example, 2002 Permit section XII.B. simply defined which priority development projects were subject to the requirements, and included a general requirement that the Permittees incorporate BMPs for source control, pollution prevention, and/or structural treatment BMPs into their model WQMPs.

4. MANDATED ACTIVITIES

To comply with the low impact development and hydromodification requirements in the 2009 Permit, the Permittees will need to develop and implement low impact development and hydromodification prevention design principles on municipal projects. Projects that are subject to these requirements include municipal yards, recreation centers, civic centers, and road improvements. To date, the Permittees have already incurred significant costs developing the "Green Streets" low impact development program elements that will be applied exclusively to municipal projects. The specific requirements are set forth in sections XII.B. through XII.E. of the 2009 Permit, however, in sum, the Permittees will be required to add the following requirements to municipal projects that qualify as "priority development projects" under the 2009 Permit:

- Develop a program to ensure that water quality protection, including LID principles and "Green Streets" requirements, are incorporated into priority development projects, and implement the program within 18 months of adoption of this 2009 Permit.
- Incorporate EPA guidance, "Managing Wet Weather with Green Infrastructure: Green Streets" for all streets, roads, highways and freeways of 5,000 square feet or more of paved surface.
- Include BMPs for source control, pollution prevention, site design, LID implementation and structural treatment control BMPs.

[99] A copy of the 2002 Permit is included under Section 7 - Documentation to these Test Claims.

- Infiltrate, harvest and re-use, evapotranspire, or bio-treat the 85th percentile storm event at completed project sites.

- Maintain or replicate the pre-development hydrologic regime through the use of design techniques that create a functionally equivalent post-development hydrologic regime through site preservation techniques and the use of integrated and distributed micro-scale storm water infiltration, retention, detention, evapotranspiration, filtration and treatment systems as close as feasible to the source of runoff.

- Limit disturbance of natural water bodies and drainage systems; conserve natural areas; preserve trees; minimize compaction of highly permeable soils; protect slopes and channels; and minimize impacts from storm water and urban runoff on the biological integrity of natural drainage systems and water bodies.

- Minimize changes in hydrology and pollutant loading; require incorporation of controls, including structural and non-structural BMPs, to mitigate the projected increases in pollutant loads and flows; ensure that post-development runoff durations and volumes from a site have no significant adverse impact on downstream erosion and stream habitat; minimize the quantity of storm water directed to impermeable surfaces and the MS4s; minimize paving, minimize runoff by disconnecting roof leader and other impervious areas and directing the runoff to pervious and/or landscaped areas, minimize directly connected impervious areas; design impervious areas to drain to pervious areas; consider construction of parking lots, walkways, etc., with permeable materials; minimize pipes, culverts and engineered systems for storm water conveyance thereby minimizing changes to time of concentration on site; utilize rain barrels and cisterns to collect and re-use rainwater; maximize the use of rain gardens and sidewalk storage; and maximize the percentage of permeable surfaces distributed throughout the site's landscape to allow more percolation of storm water into the ground.

- Preserve wetlands, riparian corridors, vegetated buffer zones and establish reasonable limits on the clearing of vegetation from the project site.

- Use properly designed and well maintained water quality wetlands, bio-retention areas, filter strips and bio-filtration swales; consider replacing curbs gutters and conventional storm water conveyance systems with bio-treatment systems, where such measures are likely to be effective and technically and economically feasible.

- Evaluate whether the project will adversely impact downstream erosion, sedimentation or stream habitat, and develop a hydrograph with pre- and post-development time of concentration for a 2-year frequency storm event. If the evaluation determines adverse impacts are likely to occur,

implement additional site design controls, on-site management controls, structural treatment controls and/or in-stream controls to mitigate the impacts.

- If site conditions do not permit infiltration, harvesting and re-use, and/or evapotranspiration, and/or bio-treatment of the design capture volume at the project site as close to the source as possible, implement an in lieu/mitigation project, in addition to treating the storm water on site.

5. ACTUAL AND ESTIMATED REIMBURSABLE COSTS

To comply with 2009 Permit's low impact development and hydromodification requirements on municipal projects, the Permittees will be required to expend time in Fiscal Year ("FY") 2009-10, and each year thereafter, to develop, administer and maintain a costly program. To date, the Permittees have retained private consultants to develop the program, and plan to expend significant resources in future fiscal years. The Permittees' increase in costs to comply with these mandated activities in FY 2009-10 are set forth in Exhibit A to this Narrative Statement and in the attached declarations from the Permittees that are parties to this Test Claim. The cost allocations set forth in Exhibit A are based on the allocations described in the Program Implementation Agreement enclosed with this Narrative Statement as Exhibit B. The cost of future compliance will vary depending on each municipal project that will be subject to the 2009 Permit's low impact development and hydromodification requirements.

C. SECTION XIII OF THE 2009 PERMIT MANDATES NEW PUBLIC EDUCATION REQUIREMENTS THAT GO BEYOND THE FEDERAL LAW REQUIREMENT THAT AN MS4 PERMIT INCLUDE AN EDUCATION COMPONENT WITHOUT SPECIFYING THE ELEMENTS OF THAT PROGRAM.

1. CHALLENGED PROGRAM REQUIREMENT

The 2009 Permit increases the public education requirements imposed on the Permittees, creating at least six new program requirements. The relevant portions of the 2009 Permit require the Permittees to implement the following:

XIII. PUBLIC EDUCATION AND OUTREACH

1. The permittees shall continue to implement the public education efforts already underway and shall implement the most effective elements of the comprehensive public and business education strategy contained in the Report of Waste Discharge/DAMP. By July 1, 2012, the permittees shall complete a public awareness survey to determine the effectiveness of the current public and business education strategy and any need for changes to the current multimedia public education efforts. The findings of the survey and any proposed changes to the current program shall be included in the annual report for 2011-2012.

2. The permittees shall sponsor or staff a storm water table or booth at community, regional, and/or countywide events to distribute public education materials to the public. Each permittee shall participate in at least one event per year.

3. The permittees shall continue to participate in the Public Education Committee to review and update existing guidance for the implementation of the public education program. The Public Education Committee shall meet at least twice per year. The Public Education Committee shall continue to make recommendations for any changes to the public and business education program including: how to make the multimedia efforts more effective; a reevaluation of audiences and key messages for targeted behaviors; and opportunities for participation in regional and statewide public education efforts. The goal of the public and business education program shall be to target 100% of the residents, including businesses, commercial and industrial establishments. Through use of local print, radio and television, the permittees must ensure that the public and business education program makes a minimum of 10 million impressions per year and that those impressions measurably increase the knowledge and measurably change the behavior of the targeted groups.

4. The permittees shall continue their outreach and other public education activities. Each permittee should try to reach the following sectors: manufacturing facilities; mobile service industry; commercial, distribution and retail sales industry; residential/commercial landscape construction and services industry; residential and commercial construction industry; and residential and community activities. Individual workshops (or regional workshops) for each of the aforementioned elements shall be administered by each permittee (or on a countywide basis) by July 1, 2010 and on an annual basis thereafter. Commercial and industrial facility inspectors shall distribute developed educational information (Fact Sheets) to these facilities during inspections. Further, for restaurant, automotive service centers and gasoline service station corporate chains, new information or that which has been previously developed shall be provided to corporate environmental managers during outreach visits that should take place twice during the permit term. Some of these outreach activities could be conducted through the chamber of commerce or other similar establishments. The outcomes from all outreach requirements contained herein shall be reported in the applicable annual reports.

5. The permittees shall further develop and maintain public education materials to encourage the public to report illegal dumping and unauthorized, non-storm water discharges from residential, industrial, construction and commercial sites into public streets, storm drains and to surface waterbodies and their tributaries; clogged storm drains; faded or missing catch basin stencils and general storm water and BMP information. Hotline and web site information shall be included in the public and business education program and shall be listed in the governmental pages of all regional phone books and on the permittees' website.

6. Within 12 months from the date of adoption of this order, the permittees shall further develop and maintain BMP guidance for the control of those potentially polluting activities identified during the previous permit cycle, which are not otherwise regulated by any agency, including guidelines for the household use of fertilizers, pesticides, herbicides and other chemicals, and guidance for mobile vehicle maintenance, carpet cleaners, commercial landscape maintenance, and pavement cutting. These guidance documents shall be distributed to the public, trade associations, etc., through participation in community events, trade association meetings and/or by mail.

7. The principal permittee, in collaboration with the Co-permittees, shall develop and implement a mechanism for public participation in the updating and implementation of the Drainage Area Management Plans, monitoring plans, Water Quality Management Plan guidance and Fact Sheets for various activities. The public shall be informed of the availability of these documents through public notices in local

newspapers, County and/or city websites, local libraries/city halls and/or courthouses.

2. REQUIREMENTS OF FEDERAL LAW

Neither the 2009 Permit, nor any of its supporting documents, specifically identify any federal regulations as specific authority for the 2009 Permit's public education requirements, and no federal statute, regulation, or policy specifically requires large municipal stormwater permits to include the public education requirements present in the 2009 Permit. Title 40, sections 122.26(d)(2)(iv)(A)(6), (B)(6), and (D)(4) of the Code of Federal Regulations provide general public education requirements for large municipal stormwater permits,[100] they do not, however require anywhere near the level of specificity that the Santa Ana RWQCB has included in the 2009 Permit.

Where the state freely chooses to impose costs associated with a new program or higher level of service upon a local agency as a means of implementing a federal program, then the costs represent a reimbursable state mandate.[101] Federal law does not require the 2009 Permit to include the highly specific public education program in the 2009 Permit, yet the state has exercised its discretion to impose that program on the Permittees. For that reason, the public education requirements in the 2009 Permit exceed federal law and represent a state mandated program.

3. REQUIREMENTS FROM 2002 PERMIT

The 2009 Permit requires the Permittees to implement several new requirements that were not included in the 2002 Permit. The relevant portions of the 2002 Permit are as follows:

- Section XIII. Public Education

The Public Education requirements in the 2002 Permit were similar to those in the 2009 Permit. The 2002 Permit established many of the programs in the 2009 Permit. The 2009 Permit, however, includes several new requirements that were either suggested in the 2002

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[100] 40 C.F.R. § 122.26(d)(2)(iv)(A)(6) requires large municipal stormwater permits to include:

> [A] program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

40 C.F.R. § 122.26(d)(2)(iv)(B)(6) requires large municipal stormwater permits to include:

> [E]ducational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials.

40 C.F.R. § 122.26(d)(2)(iv)(D)(4) requires large municipal stormwater permits to include:

> Appropriate educational and training measures for construction site operators.

[101] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593; *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155.

Permit, or not included in the 2002 Permit. The new requirements are set forth in greater detail below.

4. MANDATED ACTIVITIES

The 2009 Permit imposes at least six new public education requirements on the Permittees. As these requirements exceed federal law, they represent state mandates for which the Permittees are entitled to reimbursement. The new program areas are as follows:

1. By July 1, 2012, the permittees shall complete a public awareness survey to determine the effectiveness of the current public and business education strategy and provide a future action plan any need for changes to the current multimedia public education efforts. The findings of the survey and any proposed changes to the current program shall be included in the annual report for 2011-2012. (2009 Permit section XIII.1.)

2. The Public Education Committee shall continue to make recommendations for any changes to the public and business education program, including: how to make the multimedia efforts more effective; a reevaluation of audiences and key messages for targeted behaviors; and opportunities for participation in regional and statewide public education efforts. (2009 Permit section XIII.3.)

3. The permittees shall continue their outreach and other public education activities. Each permittee should try to reach the following sectors: manufacturing facilities; mobile service industry; commercial, distribution and retail sales industry; residential/commercial landscape construction and services industry; residential and commercial construction industry; and residential and community activities. Individual workshops (or regional workshops) for each of the aforementioned elements shall be administered by each permittee (or on a countywide basis) by July 1, 2010 and on an annual basis thereafter. Commercial and industrial facility inspectors shall distribute developed educational information (Fact Sheets). (2009 Permit section XIII.4.)

4. The permittees shall further develop and maintain public education materials to encourage the public to report (including a hotline number and web site to report) illegal dumping and unauthorized, non-storm water discharges . . . (2009 Permit section XIII.5.)

5. Within 12 months from the date of adoption of this order, the permittees shall further develop and maintain BMP guidance for the control of those potentially polluting activities identified during the previous permit cycle, which are not otherwise regulated by any agency, including guidelines for the household use of fertilizers, pesticides, herbicides and other chemicals, and guidance for mobile vehicle maintenance, carpet cleaners, commercial

landscape maintenance, and pavement cutting. (2009 Permit section XIII.6.)

6. The principal permittee, in collaboration with the Co-permittees, shall develop and implement a mechanism for public participation in the updating and implementation of the Drainage Area Management Plans, monitoring plans, Water Quality Management Plan guidance and Fact Sheets for various activities. The public shall be informed of the availability of these documents through public notices in local newspapers, County and/or city websites, local libraries/city halls and/or courthouses. (2009 Permit section XIII.7.)

5. ACTUAL AND ESTIMATED REIMBURSABLE COSTS

To comply with 2009 Permit's public education requirements, the Permittees have expended time and resources in FY 2009-10, and will continue to do so each year thereafter, to develop, administer and maintain the program. The Permittees' costs to comply with these mandated activities are set forth in Exhibit A to this Narrative Statement and in the attached declarations from the Permittees that are parties to this Test Claim. The cost allocations set forth in Exhibit A are based on the allocations described in the Program Implementation Agreement enclosed with this Narrative Statement as Exhibit B.

D. SECTION XI OF THE 2009 PERMIT MANDATES THAT THE PERMITTEES DEVELOP A PROGRAM TO REDUCE DISCHARGES OF POLLUTANTS FROM RESIDENTIAL FACILITIES AND MANDATES VERY SPECIFIC ELEMENTS OF THAT PROGRAM. THESE PROVISIONS GO BEYOND THE REQUIREMENTS OF FEDERAL LAW AND ARE UNFUNDED STATE MANDATES.

1. CHALLENGED PROGRAM REQUIREMENT

The 2009 Permit requires the Permittees to develop and implement a new program to regulate discharges from residential areas. The relevant portions of the 2009 Permit require the Permittees to implement the following:

XI. RESIDENTIAL PROGRAM

1. Each permittee shall develop and implement a residential program to reduce the discharge of pollutants from residential facilities to the MS4s consistent with the maximum extent practicable standard so as to prevent discharges from the MS4s from causing or contributing to a violation of water quality standards in the receiving waters.

2. The permittees should identify residential areas and activities that are potential sources of pollutants and develop Fact Sheets/BMPs. At a minimum, this should include: residential auto washing and maintenance activities; use and disposal of pesticides, herbicides, fertilizers and household cleaners; and collection and disposal of pet wastes. The permittees shall encourage residents to implement pollution prevention measures. The permittees should work with sub-watershed groups (e.g., the Serrano Creek Conservancy) to disseminate latest research information, such as the UC Master Gardeners Program46 and USDA's Backyard Conservation Program.

3. The permittees, collectively or individually, shall facilitate the proper collection and management of used oil, toxic and hazardous materials, and other household wastes. Such facilitation should include educational activities, public information activities, and establishment of curbside or special collection sites managed by the permittees or private entities, such as solid waste haulers.

4. Within 18 months of adoption of this order, the permittees shall develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. The permittees should evaluate the applicability of programs such as the Landscape Performance Certification Program48 to encourage efficient water use and to minimize runoff.

5. The permittees shall enforce their Water Quality Ordinance for all residential areas and activities. The permittees should encourage new developments to use weather-based evapotranspiration (ET) irrigation controllers50.

6. Each permittee shall include an evaluation of its Residential Program in the annual report starting with the first annual report after adoption of this order.

2. REQUIREMENTS OF FEDERAL LAW

No federal statute, regulation, or policy specifically requires large municipal stormwater permits to include a residential program as required by the 2009 Permit. Code of Federal Regulations, Title 40, sections 122.26(d)(2)(iv)(A) generally requires large municipal stormwater permits to include:

> structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls.

Federal regulations do not, however require anywhere near the level of specificity that the Santa Ana RWQCB has included in the 2009 Permit. As stated above, where the state freely chooses to impose costs associated with a new program or higher level of service upon a local agency as a means of implementing a federal program, then the costs represent a reimbursable state mandate.[102] Federal law does not require the 2009 Permit to include the highly specific residential program in the 2009 Permit, yet the state has exercised its discretion to impose that program on the Permittees. For that reason, the residential program requirements in the 2009 Permit exceed federal law and represent a state mandated program.

3. REQUIREMENTS FROM 2002 PERMIT

The 2002 Permit does not require the Permittees to develop and implement a Residential program. The closest the 2002 Permit comes to requiring the Permittees to implement such a program is to require the Permittees to include a residential reporting component in paragraph 4 of the Section XIII. Public Education.

4. MANDATED ACTIVITIES

Because the 2002 Permit did not require the Permittees to develop and implement a Residential program, the entire Residential program from the 2009 Permit represents a State mandate for which the Permittees are entitled to reimbursement. The requirements are as follows:

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[102] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593.

1. Each permittee shall develop and implement a residential program to reduce the discharge of pollutants from residential facilities to the MS4s consistent with the maximum extent practicable standard so as to prevent discharges from the MS4s from causing or contributing to a violation of water quality standards in the receiving waters.

2. The permittees should identify residential areas and activities that are potential sources of pollutants and develop Fact Sheets/BMPs. At a minimum, this should include: residential auto washing and maintenance activities; use and disposal of pesticides, herbicides, fertilizers and household cleaners; and collection and disposal of pet wastes. The permittees shall encourage residents to implement pollution prevention measures. The permittees should work with sub-watershed groups (e.g., the Serrano Creek Conservancy) to disseminate latest research information, such as the UC Master Gardeners Program46 and USDA's Backyard Conservation Program.

3. The permittees, collectively or individually, shall facilitate the proper collection and management of used oil, toxic and hazardous materials, and other household wastes. Such facilitation should include educational activities, public information activities, and establishment of curbside or special collection sites managed by the permittees or private entities, such as solid waste haulers.

4. Within 18 months of adoption of this order, the permittees shall develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. The permittees should evaluate the applicability of programs such as the Landscape Performance Certification Program48 to encourage efficient water use and to minimize runoff.

5. The permittees shall enforce their Water Quality Ordinance for all residential areas and activities. The permittees should encourage new developments to use weather-based evapotranspiration (ET) irrigation controllers.

6. Each permittee shall include an evaluation of its Residential Program in the annual report starting with the first annual report after adoption of this order.

5. ACTUAL AND ESTIMATED REIMBURSABLE COSTS

To comply with 2009 Permit's residential program requirements, the Permittees have expended time and resources in FY 2009-10, and will continue to do so each year thereafter, to develop, administer and maintain the program. The Permittees' costs to comply with these mandated activities are set forth in Exhibit A to this Narrative Statement and in the attached declarations from the Permittees that are parties to this Test Claim. The cost allocations set forth in Exhibit A are based on the allocations described in the Program Implementation Agreement enclosed with this Narrative Statement as Exhibit B.

E. SECTIONS IX (MUNICIPAL INSPECTIONS OF INDUSTRIAL FACILITIES) AND X (MUNICIPAL INSPECTIONS OF COMMERCIAL FACILITIES) OF THE 2009 PERMIT MANDATE THAT THE PERMITTEES DEVELOP A GEOGRAPHICAL INFORMATION SYSTEM (GIS) FOR INDUSTRIAL FACILITIES AND NEWLY SPECIFIED COMMERCIAL FACILITIES WHICH GOES BEYOND THE REQUIREMENTS OF FEDERAL LAW AND IS AN UNFUNDED STATE MANDATE.

The 2009 Permit mandates that the Permittees develop a Geographic Information System ("GIS") as part of both the inspection program for industrial facilities (Section IX) and the inspection program for commercial facilities (Section X). This requirement goes beyond the requirements of Federal Law.

MUNICIPAL INSPECTIONS OF INDUSTRIAL FACILITIES

1. CHALLENGED PROGRAM REQUIREMENT

Section IX.1 (MUNICIPAL INSPECTIONS OF INDUSTRIAL FACILITIES) of the 2009 Permit provides as follows:

> "Each permittee shall continue to maintain an inventory of industrial facilities within its jurisdiction. All sites that have the potential to discharge pollutants to the MS4 should be included in this inventory regardless of whether the facility is subject to business permits, licensing, the State's General Industrial Permit or other individual NPDES permit. This database must be updated on an annual basis. This inventory must be maintained in an computer-based database system and must include relevant information on ownership, SIC code(s), General Industrial Permit WDID # (if any), size, location, etc. Inclusion of a Geographical Information System (GIS) is required, with latitude/longitude (in decimals) or NAD83/WGS84[103] compatible formatting is required."

Section IX.1 of page 41 of 2009 Permit (emphasis added).

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 IX.1 of the 2009 Permit. Moreover, the CWA does not specifically require the use of GIS as a part of a municipal inventory of industrial facilities. 40 C.F.R. 122.26(d)(2)(ii) states

[103] NAD 83/WGS84 = North American Datum of 1983 and World Geodetic System of 1984 are systems to define three-dimensional coordinates of a single physical point. See footnote 38 of page 39 of 2009 Permit.

that the following should be provided in the permit: "[A]n inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity."

40 C.F.R. 122.26(d)(2)(ii)does not, however, expressly require or mention the use of GIS as part of municipal inspection of industrial facilities. Thus, the 2009 Permit's requirement for the inclusion of a GIS as part of a municipal inventory of industrial facilities is an unfunded state mandate.[104]

3. REQUIREMENTS FROM 2002 PERMIT

The 2002 Permit provided that each Permittee:

- Develop an inventory of the industrial facilities within its jurisdiction and maintain such inventory in a computer-based database system.
- Include relevant information on ownership, SIC code(s), General Industrial Permit WDID # (if any), size, location, etc. in the computer-based database system.
- Update the inventory computer-based database on an annual basis

The 2002 Permit did not require, that Permittees include a GIS as part of its inventory of industrial facilities in a computer-based database system. The 2002 Permit merely recommended, as opposed to required, that a GIS be included. *See* Section IX.1 of page 22 of the 2002 Permit for complete text.

4. MANDATED ACTIVITIES

Section IX.1 of the 2009 Permit requires Permittees to perform the following activities that are **not** required under either federal law or the 2002 Permit:

- In the inventory of industrial facilities, include a Geographical Information System, with latitude/longitude (in decimals) or NAD83/WGS8442 compatible formatting.

To comply with the GIS requirement set forth in Section IX.1, many of the Permittees have or will need to perform the following activities to comply with the new GIS requirement:

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[104] The test claimants further note that a slightly more recent Water Board stormwater permit issued by this same region (Santa Ana) does not include the GIS mandate for a database of municipal inspections of industrial or commercial facilities. *See, e.g.*, Exhibit 17, California Regional Water Quality Control Board (Santa Ana Region), Order No. R8-2010-0033 (Jan. 29, 2010), Sections XI.C. and XI.D (inspection requirements), and Section XI.A (General requirement of database inventory of active industrial and commercial facilities within their jurisdiction). Thus, the Santa Ana Board's decision to mandate GIS in this case clearly goes beyond not only federal law but also the Santa Ana Board's own understanding of federal law mandates based upon its January 29, 2010 stormwater permit issued to a different group of permittees.

1. Purchase computer server and operating software compatible with GIS;

2. Hire a consultant to prepare aerial digital photographs of the Permittees' jurisdictions;

3. Hire a consultant to develop a GIS browser;

4. Purchase the Orange County Assessor database;

5. Hire a consultant to digitize all stormdrain systems and develop a storm drain system digital map; and

6. Hire a consultant to develop a GIS layer that includes all commercial, industrial and restaurant facilities that are inspected for stormwater compliance.

5. ACTUAL AND ESTIMATED REIMBURSABLE COSTS

To comply with Section IX.1 of the 2009 Permit, the Permittees will be required to expend time in FY 2009-10, and each year thereafter, to develop, administer and maintain a costly Geographical Information System. The Permittees' costs to comply with these mandated activities are set forth in Exhibit A to this Narrative Statement and in the attached declarations from the Permittees that are parties to this Test Claim. The cost allocations set forth in Exhibit A are based on the allocations described in the Program Implementation Agreement enclosed with this Narrative Statement as Exhibit B.

F. MUNICIPAL INSPECTIONS OF COMMERCIAL FACILITIES

1. CHALLENGED PROGRAM REQUIREMENT

Section X.1. of the 2009 Permit provides as follows:

"X. MUNICIPAL INSPECTIONS OF COMMERCIAL FACILITIES

1. Each permittee shall continue to maintain and update quarterly an inventory of the types of commercial facilities/businesses listed below within its jurisdiction. As required under the third term permit, this inventory must be maintained in a computer-base database system (Commercial Database) and must include relevant information on ownership, size, location, etc. For fixed facilities, inclusion of a Geographical Information System (GIS), with latitude/longitude (in decimals) or NAD83/WGS84 compatible formatting is required. For water quality planning purposes, the permittees should consider using a parcel-level GIS that contains an inventory of the types of facilities/discharges listed below.

Commercial facilities may include, but may not be limited to:

a) Transport, storage or transfer of pre-production plastic pellets;

b) Automobile mechanical repair, maintenance, fueling or cleaning;

c) Airplane maintenance, fueling or cleaning;

d) Marinas and boat maintenance, fueling or cleaning;

e) Equipment repair, maintenance, fueling or cleaning;

f) Automobile impound and storage facilities;

g) Pest control service facilities;

h) Eating or drinking establishments, including food markets and restaurants;

i) Automobile and other vehicle body repair or painting;

j) Building materials retail and storage facilities;

k) Portable sanitary service facilities;

l) Painting and coating;

m) Animal facilities such as petting zoos and boarding and training faculties;

n) Nurseries and greenhouses;

o) Landscape and hardscape installation;

p) Pool, lake and fountain cleaning;

q) Golf courses;

r) Other commercial sites/sources that the permittee determines may contribute a significant pollutant load to the MS4; and

s) Any commercial site or sources that are tributary to and within 500 feet of an area defined by the Ocean Plan as an Area of Special Biological Significance."

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 requirements set forth in Section X.1 of the 2009 Permit. Although 40 C.F.R. § 122.26(d)(2)(iv)(A) provides that management programs describe "structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system", it does not specifically require quarterly municipal inspection of the commercial

facilities specified in the 2009 Permit. Moreover, there is no express requirement or mention of the use of GIS as part of municipal inspection of commercial facilities in the CWA or the federal regulations. As such, the 2009 Permit's requirement for the inclusion of a GIS as part of a municipal inventory of commercial facilities is an unfunded state mandate.

3 REQUIREMENTS FROM 2002 PERMIT

The 2002 Permit provided that each Permittee:

- Develop an inventory of the specified commercial facilities and companies within its jurisdiction and maintain such inventory in a computer-based database system.
- Include relevant information on ownership, size, location, etc. in the computer-based database system.
- Update the inventory computer-based database on an annual basis

The 2002 Permit did not, however, require, that Permittees include a GIS as part of its inventory of commercial facilities and businesses in a computer-based database system. The 2002 Permit merely recommended, as opposed to require, that a GIS be included. *See* Section X.1 of the 2002 Permit for complete text.

Moreover, the 2002 Permit only required that the computer-based database for the inventory of commercial facilities be updated on annual basis, as opposed to a quarterly basis as set forth in the 2009 Permit.

In addition, Section X.1 of the 2009 Permit adds 11 new categories[105] of commercial facilities that are subject to municipal inspections that were not in the 2002 Permit. The Regional Board provides no legal justification or authority stating that these 11 new categories pose a significant water quality threat to the MS4. There appears to be no legal authority warranting the inclusion of these 11 new categories of commercial facilities and no evidence that these 11 categories are significant non-point source polluters.

4 MANDATED ACTIVITIES

Section X.1 of the 2009 Permit requires Permittees to perform the following activities that are **not** required under either federal law or the 2002 Permit:

[105] These 11 new categories of commercial facilities are: (a) Transport, storage or transfer of pre-production plastic pellets; (c)Airplane maintenance, fueling or cleaning; (d) Marinas and boat maintenance, fueling or cleaning; (e) Equipment repair, maintenance, fueling or cleaning; (f) Automobile impound and storage facilities; (g) Pest control service facilities; (h) Eating or drinking establishments, including food markets and restaurants; (j) Building materials retail and storage facilities; (k) Portable sanitary service facilities; (m) Animal facilities such as petting zoos and boarding and training faculties; and (q) Golf courses. See Section X.1 on page 43 of the 2009 Permit.

- Include a Geographical Information System, with latitude/longitude (in decimals) or NAD83/WGS8442 compatible formatting that contains an inventory of the following types of facilities and discharges:
    - Transport, storage or transfer of pre-production plastic pellets;
    - Automobile mechanical repair, maintenance, fueling or cleaning;
    - Airplane maintenance, fueling or cleaning;
    - Marinas and boat maintenance, fueling or cleaning;
    - Equipment repair, maintenance, fueling or cleaning;
    - Automobile impound and storage facilities;
    - Pest control service facilities;
    - Eating or drinking establishments, including food markets and restaurants;
    - Automobile and other vehicle body repair or painting;
    - Building materials retail and storage facilities;
    - Portable sanitary service facilities;
    - Painting and coating;
    - Animal facilities such as petting zoos and boarding and training faculties;
    - Nurseries and greenhouses;
    - Landscape and hardscape installation;
    - Pool, lake and fountain cleaning;
    - Golf courses;
    - Other commercial sites/sources that the permittee determines may contribute a significant pollutant load to the MS4; and
    - Any commercial site or sources that are tributary to and within 500 feet of an area defined by the Ocean Plan as an Area of Special Biological Significance.

Lastly, to comply with the requirements of Section IX.1, many of the Permittees have or will need to perform the following activities to comply with the new GIS requirement:

1. Purchase computer server and operating software compatible with GIS;

2. Hire a consultant to prepare aerial digital photographs of the Permittees' jurisdictions;

3. Hire a consultant to develop a GIS browser;

4. Purchase the Orange County Assessor database;

5. Hire a consultant to digitize all stormdrain systems and develop a storm drain system digital map; and

6. Hire a consultant to develop a GIS layer that includes all commercial, industrial, and restaurant facilities that are inspected for stormwater compliance.

5 ACTUAL AND ESTIMATED REIMBURSABLE COSTS

To comply with Section X.1 of the 2009 Permit, the Permittees will be required to expend time in FY 2009-10, and each year thereafter, to develop, administer and maintain a costly Geographical Information System. The Permittees' costs to comply with these mandated activities are set forth in Exhibit A to this Narrative Statement and in the attached declarations from the Permittees that are parties to this Test Claim. The cost allocations set forth in Exhibit A are based on the allocations described in the Program Implementation Agreement enclosed with this Narrative Statement as Exhibit B.

VII. STATEWIDE COST ESTIMATE

The 2009 Permit only relates to the portions of Orange County within the Santa Ana Region and therefore the cost estimates provided relate only to the portions of Orange County within the Santa Ana Region. Those costs are detailed in the declarations submitted in support of this Test Claim and in Exhibit A to this Narrative Statement.

VIII. FUNDING SOURCES

The Permittees are not aware of any State, federal or non-local agency funds that are or will be available to fund these new activities. The Permittees do not have fee authority to offset these costs.

IX. 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 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.

X. CONCLUSION

The 2009 Permit imposes many new mandated activities and programs on the Permittees. As detailed above the costs to develop and implement these new programs and activities are substantial. The Permittees believe that the costs incurred and to be incurred satisfy all the criteria for reimbursable mandates and respectfully requests that the Commission make such findings as to each of the mandated programs and activities set forth herein.2

EXHIBIT A

SUMMARY OF PROGRAM COSTS

UNFUNDED MANDATES TEST CLAIM
Cost Sharing Summary For Countywide Program/Region Specific Elements
NPDES Santa Ana Permittees
Fiscal Year 2009-10

Permittee	Residential Program	Pub Ed Workshops	Public Education Survey	Public Particpation	LID/WQMP	TOTAL
Anaheim	$0.00	$745.09	$6,623.01	$206.97	$4,967.26	**$12,542.33**
Brea	$0.00	$122.79	$1,091.48	$34.11	$818.61	**$2,066.99**
Buena Park	$0.00	$170.07	$1,511.74	$47.24	$1,133.80	**$2,862.86**
Costa Mesa	$0.00	$244.04	$2,169.26	$67.79	$1,626.94	**$4,108.04**
Cypress	$0.00	$103.15	$916.85	$28.65	$687.64	**$1,736.29**
Fountain Valley	$0.00	$128.83	$1,145.18	$35.79	$858.89	**$2,168.69**
Fullerton	$0.00	$309.76	$2,753.45	$86.05	$2,065.08	**$5,214.34**
Garden Grove	$0.00	$331.56	$2,947.18	$92.10	$2,210.38	**$5,581.22**
Huntington Beach	$0.00	$420.03	$3,733.64	$116.68	$2,800.23	**$7,070.58**
Irvine	$0.00	$665.34	$5,914.13	$184.82	$4,435.60	**$11,199.88**
La Habra	$0.00	$124.65	$1,107.97	$34.62	$830.97	**$2,098.21**
La Palma	$0.00	$31.57	$280.61	$8.77	$210.46	**$531.41**
Laguna Hills (17.77% in SAR)	$0.00	$14.65	$130.26	$4.07	$97.69	**$246.68**
Laguna Woods (51.97% in SAR)	$0.00	$22.58	$200.68	$6.27	$150.51	**$380.03**
Lake Forest (68.68% in SAR)	$0.00	$137.65	$1,223.59	$38.24	$917.69	**$2,317.17**
Los Alamitos	$0.00	$27.67	$245.93	$7.69	$184.45	**$465.74**
Newport Beach	$0.00	$257.82	$2,291.69	$71.62	$1,718.77	**$4,339.89**
Orange	$0.00	$335.43	$2,981.60	$93.17	$2,236.20	**$5,646.40**
Placentia	$0.00	$106.21	$944.11	$29.50	$708.08	**$1,787.91**
Santa Ana	$0.00	$620.87	$5,518.85	$172.46	$4,139.13	**$10,451.32**
Seal Beach	$0.00	$57.24	$508.83	$15.90	$381.62	**$963.59**
Stanton	$0.00	$69.24	$615.46	$19.23	$461.60	**$1,165.53**
Tustin	$0.00	$162.52	$1,444.63	$45.14	$1,083.47	**$2,735.77**
Villa Park	$0.00	$20.42	$181.48	$5.67	$136.11	**$343.69**
Westminster	$0.00	$179.88	$1,598.94	$49.97	$1,199.21	**$3,028.00**
Yorba Linda	$0.00	$205.64	$1,827.92	$57.12	$1,370.94	**$3,461.62**
County of Orange (48.15% in SAR)	$0.00	$573.94	$5,101.68	$159.43	$3,826.26	**$9,661.30**
OCFCD	$0.00	$900.00	$8,000.00	$250.00	$6,000.00	**$15,150.00**
TOTALS	**$0.00**	**$7,088.64**	**$63,010.14**	**$1,969.07**	**$47,257.61**	**$119,325.45**

UNFUNDED MANDATES TEST CLAIM
Cost Sharing Summary For Countywide Program/Region Specific Elements
NPDES Santa Ana Permittees
Fiscal Year 2010-11

Permittee	Residential Program	Pub Ed Workshops	Public Education Survey	Public Particpation	LID/WQMP	TOTAL
Anaheim	$3,311.51	$827.88	$0.00	$206.97	$6,209.07	**$10,555.42**
Brea	$545.74	$136.44	$0.00	$34.11	$1,023.26	**$1,739.55**
Buena Park	$755.87	$188.97	$0.00	$47.24	$1,417.26	**$2,409.33**
Costa Mesa	$1,084.63	$271.16	$0.00	$67.79	$2,033.68	**$3,457.26**
Cypress	$458.43	$114.61	$0.00	$28.65	$859.55	**$1,461.24**
Fountain Valley	$572.59	$143.15	$0.00	$35.79	$1,073.61	**$1,825.13**
Fullerton	$1,376.72	$344.18	$0.00	$86.05	$2,581.36	**$4,388.31**
Garden Grove	$1,473.59	$368.40	$0.00	$92.10	$2,762.98	**$4,697.06**
Huntington Beach	$1,866.82	$466.70	$0.00	$116.68	$3,500.29	**$5,950.49**
Irvine	$2,957.06	$739.27	$0.00	$184.82	$5,544.49	**$9,425.64**
La Habra	$553.98	$138.50	$0.00	$34.62	$1,038.72	**$1,765.82**
La Palma	$140.31	$35.08	$0.00	$8.77	$263.08	**$447.23**
Laguna Hills (17.77% in SAR)	$65.13	$16.28	$0.00	$4.07	$122.12	**$207.60**
Laguna Woods (51.97% in SAR)	$100.34	$25.08	$0.00	$6.27	$188.13	**$319.83**
Lake Forest (68.68% in SAR)	$611.80	$152.95	$0.00	$38.24	$1,147.12	**$1,950.10**
Los Alamitos	$122.97	$30.74	$0.00	$7.69	$230.56	**$391.96**
Newport Beach	$1,145.85	$286.46	$0.00	$71.62	$2,148.46	**$3,652.38**
Orange	$1,490.80	$372.70	$0.00	$93.17	$2,795.25	**$4,751.92**
Placentia	$472.06	$118.01	$0.00	$29.50	$885.11	**$1,504.68**
Santa Ana	$2,759.42	$689.86	$0.00	$172.46	$5,173.92	**$8,795.66**
Seal Beach	$254.41	$63.60	$0.00	$15.90	$477.03	**$810.95**
Stanton	$307.73	$76.93	$0.00	$19.23	$576.99	**$980.89**
Tustin	$722.32	$180.58	$0.00	$45.14	$1,354.34	**$2,302.38**
Villa Park	$90.74	$22.69	$0.00	$5.67	$170.14	**$289.24**
Westminster	$799.47	$199.87	$0.00	$49.97	$1,499.01	**$2,548.32**
Yorba Linda	$913.96	$228.49	$0.00	$57.12	$1,713.67	**$2,913.24**
County of Orange (48.15% in SAR)	$2,550.84	$637.71	$0.00	$159.43	$4,782.82	**$8,130.80**
OCFCD	$4,000.00	$1,000.00	$0.00	$250.00	$7,500.00	**$12,750.00**
TOTALS	**$31,505.07**	**$7,876.27**	**$0.00**	**$1,969.07**	**$59,072.01**	**$100,422.41**

EXHIBIT B

PROGRAM IMPLEMENTATION AGREEMENT

AMENDMENT AND RESTATEMENT OF NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM STORMWATER PERMIT IMPLEMENTATION AGREEMENT

This AGREEMENT, for purposes of identification numbered D02-048, entered into this 25th day of June, 2002, by the County of Orange, (herein called the COUNTY), the Orange County Flood Control District (herein called DISTRICT) and the cities of Aliso Viejo, Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Dana Point, Fountain Valley, Fullerton, Garden Grove, Huntington Beach, Irvine, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods Lake Forest, La Habra, La Palma, Los Alamitos, Mission Viejo, Newport Beach, Orange, Placentia, Rancho Santa Margarita, San Clemente, San Juan Capistrano Santa Ana, Seal Beach, Stanton, Tustin, Villa Park, Westminster, and Yorba Linda (herein called CITIES) restates the agreement provisions made previously by the COUNTY, DISTRICT and CITIES with respect to compliance with the National Pollutant Discharge Elimination System (NPDES) municipal stormwater permits issued for Orange County and amends specified provisions to add three additional cities, revises participant share calculations and allows participant share calculations on a countywide and regional basis The COUNTY, DISTRICT and CITIES may be referred to collectively as PERMITTEES or individually as a PERMITTEE in this AGREEMENT

RECITALS

WHEREAS, Congress in 1987 through the Water Quality Act (herein called WQA) amended Section 402 of the Federal Clean Water Act (33 U.S.C.A 1342(p) to require the federal Environmental Protection Agency to promulgate regulations for applications for permits for stormwater discharges; and

WHEREAS, these permit regulations will require the control of pollutants from stormwater discharges by requiring a National Pollutant Discharge Elimination System permit which would allow the lawful discharge of stormwaters into waters of the United States; and

WHEREAS, these EPA regulations require NPDES permits for discharges from municipal storm sewers on a system-wide or jurisdiction-wide basis; and

WHEREAS, the Legislature, in enacting the Orange County Flood Control Act, created the Orange County Flood Control District to provide for the control of flood and storm waters; and

WHEREAS, the powers granted to the DISTRICT include carrying on technical and other investigations, examinations, or tests of all kinds, making measurements, collecting data, and making analyses, studies, and inspections pertaining to water supply, control of floods, use of water, water quality, nuisance, pollution, waste, and contamination of water, both within and without the DISTRICT; and

WHEREAS, the COUNTY, the DISTRICT and the CITIES desire to develop an integrated stormwater discharge management program with the objective of improving water quality in the County of Orange; and

WHEREAS, the California State Water Resources Control Board (CSWRCB) as designee of the EPA has delegated authority to the Regional Water Quality Control Boards-Santa Ana Region (RWQCB-SAR) and San Diego Region (RWQCB-SDR) (collectively, the RWQCBs) for administration of the NPDES stormwater permit application process within the boundaries of their Regions; and

WHEREAS, the COUNTY, DISTRICT and CITIES have been designated as PERMITTEES by the RWQCBs; and

WHEREAS, the COUNTY has been designated as the Principal PERMITTEE on the permits; and

WHEREAS, cooperation between the CITIES, the COUNTY and the DISTRICT to jointly file applications for NPDES Stormwater permits and implement common programs to the extent feasible, is in the best interests of the CITIES, the COUNTY and the District; and

WHEREAS, the COUNTY is willing to share the expertise of its staff with the CITIES so that they can join in seeking and implementing certain requirements of the NPDES Stormwater permits; and

WHEREAS, the PERMITTEES approved a Stormwater Permit Implementation Agreement to memorialize program cooperation based on the above recitals on December 18, 1990 which was subsequently amended on October 26, 1993 by Amendment No 1 (the December 18 1990 Agreement as Amended by Amendment No 1 will be referred to collectively hereinafter as the ORIGINAL AGREEMENT); and

WHEREAS Section X of the ORIGINAL AGREEMENT provided that the ORIGINAL AGREEMENT may be amended by consent of a majority of the PERMITTEES which represent a majority of the percentage contributions as described in Section IV of the ORIGINAL AGREEMENT and

WHEREAS, Section VI of the ORIGINAL AGREEMENT states that any city which becomes signatory to this ORIGINAL AGREEMENT after the applications for the initial NPDES stormwater permits have been approved shall comply with all of the provisions of the ORIGINAL AGREEMENT; and,

WHEREAS pursuant to Sections VI and X of the ORIGINAL AGREEMENT, the PERMITTEES approved Amendment No 1 to the ORIGINAL AGREEMENT (herein called AMENDMENT NO 1) on October 26 1993 to add two newly incorporated cities, provide participant share calculations based on thirty-three PERMITTEES and establish a Technical Advisory Committee; and

WHEREAS, the PERMITTEES now desire to restate those provisions in the ORIGINAL AGREEMENT that remain unchanged and amend specified provisions to add three additional

cities, revise participant share calculations and allow participant share calculations on a countywide and regional basis

NOW THEREFORE: The PERMITTEES hereto do mutually agree to add the cities of Aliso Viejo, Laguna Woods and Rancho Santa Margarita as PERMITTEES under this AGREEMENT, to restate those provisions in the ORIGINAL AGREEMENT that remain unchanged and amend Sections II, III.A., III.B., III.C., IV, VIII, IX, XI and XV in their entirety as follows:

I. FILING STATUS

The COUNTY, DISTRICT and CITIES will file the applications for stormwater permits as PERMITTEES The COUNTY, the DISTRICT and each individual City will be a PERMITTEE.

II. INCORPORATION OF FEDERAL GUIDELINES

The terms of all applicable Federal and State water quality regulations and guidelines under the Clean Water Act and Water Quality Act, as presently written or as changed during the life of this agreement are hereby incorporated by reference and made a part of this AGREEMENT and take precedence over any inconsistent terms of this AGREEEMENT.

III. DELEGATION OF RESPONSIBILITIES

The responsibilities of each of the parties shall be as follows:

A. The COUNTY, on a cost-shared basis, shall administer system compliance by:

1 Preparing implementation and annual operating budgets. The budget year shall coincide with the fiscal year of the COUNTY, July 1 - June 30.

a. The participants shall be permitted to review and approve the annual operating budget and work plan for the forthcoming year. Criteria for approval shall be

affirmative responses from a majority of the PERMITTEES which represent a majority of the percentage contribution as described in Section IV. The COUNTY and the DISTRICT will represent one voting PERMITTEE with their percentage contribution equal to the total of the COUNTY and the DISTRICT as described in Section IV The review period shall be from January 1 to January 31 of each year with approval of the final budget to be completed by February 15.

b. The annual operating budget shall not be exceeded without prior consent of the majority of the PERMITTEES which represent a majority of the percentage contribution.

2 Consulting with the city managers and any committees established by the city managers when preparing budgets and major program elements.

3 Preparing compliance reports to the Regional Board and providing copies to the PERMITTEES

4 Preparing a model system-wide Best Management Practices (BMP) Program report

5 Monitoring the implementation and ensuring the effectiveness of system-wide BMPs. This will include field reconnaissance to evaluate structural and procedural BMPs. An annual report to the RWQCBs will be prepared presenting the results of these evaluations.

6. The COUNTY as Principal PERMITTEE may retain the services of professional consultants and may fund, or contribute to

funding technical and/or economic studies conducted by professional organizations such as the American Public Works Association

B The DISTRICT shall to the maximum extent practicable, and on a cost-shared basis except as set forth in subparagraph 4 below:

1. Perform the water quality and hydrographic monitoring for permit compliance

2 Administer the water pollution control program by enforcing the Orange County Water Quality Ordinance

3 Develop uniform criteria for annual inspection of drainage facilities

4 Perform inspections, at no cost to the CITIES or the COUNTY, on those facilities owned by the DISTRICT and on municipal separate storm sewers in unincorporated County. Contracts for such inspections within CITIES may be undertaken at the sole expense of the requesting city.

C The CITIES shall, to the maximum extent practicable, and at no cost to COUNTY or DISTRICT:

1 Implement a facility inspection program in accordance with the uniform criteria developed by the DISTRICT, for all municipal separate storm sewers as defined by the stormwater permit and within the jurisdictional boundaries of that city

2. Submit to the COUNTY stormwater drain maps with periodic revisions which reflect the modifications that were made to the storm drain system

3 Prepare watershed characterizations, including

a. Zoning designations, and

b Identification of areas where hazardous materials presently are or are suspected to have been stored, manufactured, or disposed. This shall include sites at which a hazardous material spill has occurred.

4. Review, approve, and implement system-wide BMPs

5. Eliminate, or have eliminated, illegal/illicit connections to the storm drain system.

6 Identify the legal authority for control of discharges to the storm drain system.

7. Provide to the COUNTY annual reports (on forms provided by the COUNTY) and any other information needed to satisfy annual reporting requirements of the RWQCBs.

8. Adopt and enforce, or name DISTRICT as enforcer of a water pollution control ordinance, which prohibits non-NPDES permitted discharges to the municipal separate storm sewer system.

D The COUNTY shall, to the maximum extent practicable and at no cost to the CITIES or the DISTRICT, undertake in the unincorporated areas of the COUNTY all activities required above of the CITIES that are not responsibilities of the DISTRICT as outlined in Section III B.

E. The PERMITTEES hereby establish a Technical Advisory Committee (herein called COMMITTEE) consisting of five members chosen by the Orange County City Engineers Association, and one member representing the COUNTY The COMMITTEE shall prepare by-laws for the Technical Advisory Committee and submit same to PERMITTEES for approval The COMMITTEE will act in an advisory role to the

PERMITTEES and implement policy previously established by the PERMITTEES.

IV. PROGRAM COSTS

The responsibilities for payment of all shared costs of equipment, services, contracted analytical services, and the cost of the Regional Board permits, shall be distributed among the COUNTY, DISTRICT, and CITIES as follows:

Participants	Percentage Contribution
DISTRICT	10
CITIES + COUNTY	90

The individual percentage contributions from each city and the COUNTY shall be functions of their respective areas and population relative to those of the entire County Each area shall be calculated as one half of the sum of the area and population fractions, multiplied by 90%. Excluded are national forests, state parks, airports, landfills, oceans, harbors, tidal bays and military installations (Exhibit A-1). The contribution of the COUNTY shall be calculated from unincorporated areas and their respective populations.

Share in percent for City #1 = $\{(X_1/X_{tot}) + (Y_1/Y_{tot})\}/2 \times (90)$

X = area

Y = population

tot = total population or area

90 = total percentage excluding Flood Control District contribution

The percentage share shall be calculated by the COUNTY Public Facilities and Resources Department Environmental Resources Section from population and area data. These calculations shall be completed by January 1 of each year and shall be included in the annual budget proposal The annual budget proposal shall be recomputed for the thirty-six PERMITTEES based on the following percentage share computation methods:

A Countywide costs as provided in Exhibit B-1.

B. Regional costs specific to only one RWQCB permit as provided in Exhibits B-2A and B-2B.

C. In the event of a regulatory directive issued to PERMITTEES, the COUNTY shall provide immediate notice to the affected PERMITTEES and meet and confer with them with respect to responding to the directive and funding the immediate response

Amended calculations and computation method for fiscal year 2002-03 are provided in Exhibits B-1, B-2A and B-2B, which are made a part hereof

If at any time during a given fiscal year the program costs exceed the sum of the deposits, the COUNTY shall submit invoices to the CITIES to recover the deficit, following the approval process described in Section III.A.1.b above The share for each city shall be prorated according to the formula above Each city shall pay the invoice within 45 days of the billing date

The COUNTY shall prepare a fiscal year end accounting within 60 days of the end of the fiscal year. If the fiscal year end accounting results in costs (net of interest earnings) exceeding the sum of the deposits, the

COUNTY shall invoice each city for its prorated share of the excess cost Each city shall pay the billing within 45 days of the date of the invoice. If the fiscal year end accounting results in the sum of the deposits exceeding costs (net of interest earnings), the excess deposits will carry forward to reduce the billings for the following year.

The COUNTY shall invoice each city for its annual deposit at the beginning (July 1 of each fiscal year. Each city shall pay the deposit within 45 days of the date of the invoice. Each city's deposit shall be based on their prorated share of the approved annual budget, reduced for any surplus identified in the prior fiscal year end accounting

Interest earned on the CITIES' deposits will not be paid to the CITIES, but will be credited against the CITIES' share of the program costs.

Upon termination of the program a final accounting shall be performed by the COUNTY If costs (net of interest earnings) exceed the sum of the deposits, the COUNTY shall invoice each city for its prorated share of the excess Each city shall pay the invoice within 45 days of the date of the invoice. If the sum of the deposits exceeds the costs, the COUNTY shall reimburse to each city its prorated share of the excess, within 45 days of the final accounting. Interest earnings are used to offset the CITIES' share of program costs and will not be refunded to the CITIES.

Each city and the COUNTY shall bear the financial responsibility for implementing the Program, within its jurisdictional boundaries, as outlined in Section III. C. and D.

V. LIFE OF THE AGREEMENT

The life of the AGREEMENT shall be indefinite or as long as the WQA mandates compliance

VI. ADDITIONAL PARTIES

Any city which becomes signatory to this AGREEMENT after the applications for the initial NPDES stormwater permits have been approved and any city which becomes incorporated shall become a PERMITTEE on the NPDES stormwater permit issued by its respective RWQCB and shall comply with all of the provisions of this AGREEMENT. The date of initiation, for determining participant costs for newly incorporated CITIES shall be the date of incorporation, and for a city signing after NPDES stormwater permit approval it shall be the date of the initial application for the NPDES Stormwater permit. The costs for adding the additional parties to the program, including additional permit and processing fees, shall be paid by the added party. Monies to be reimbursed to the existing PERMITTEES shall be credited to their respective annual program operating fees for the following budget year.

VII WITHDRAWAL FROM THE AGREEMENT

A participant may withdraw from the AGREEMENT 60 days subsequent to written notice to the COUNTY. The COUNTY will notify the remaining PERMITTEES within 10 business days of receipt of the withdrawal notice The withdrawing participant shall agree to file for a separate permit and to comply with all of the requirements established by the RWQCB(s). In addition, withdrawal shall constitute forfeiture of the withdrawing participant's deposit for the budget year of withdrawal. The withdrawing participant shall be responsible for all lawfully assessed penalties as a

consequence of withdrawal. The cost allocations to the remaining members will be recalculated in the following budget year.

VIII NON-COMPLIANCE WITH PERMIT REQUIREMENTS

Any PERMITTEE found in non-compliance with the conditions of the permit within their jurisdictional responsibilities shall be solely liable for any lawfully assessed penalties, pursuant to Section 13385 of the Water Code and the Federal Clean Water Act Common penalties shall be calculated according to the formula outlined in Section IV.

IX. LEGAL ACTION/ COSTS/ ATTORNEY FEES

Where any legal action is necessary to enforce any provision hereof for damages by reason of an alleged breach of any provisions of this AGREEMENT, the prevailing party shall be entitled to receive from the losing party all litigation and collection expenses, administrative costs, witness fees and court costs including reasonable attorneys fees

X AMENDMENTS TO THE AGREEMENT

This AGREEMENT may be amended by consent of a majority of the PERMITTEES which represent a majority of the percentage contributions as described in Section IV. The COUNTY and the DISTRICT will represent one voting PERMITTEE with a percentage contribution equal to the sum of the individual contributions of the COUNTY and DISTRICT as described in Section IV No amendment to this AGREEMENT shall be effective unless it is in writing and signed by the duly authorized representatives of the majority of PERMITTEES

XI AUTHORIZED SIGNATORIES

The County Director of the Public Facilities and Resources Department and the respective City Managers, shall be authorized to execute the application(s) for NPDES municipal stormwater permit(s) and take all other

procedural steps necessary to file the application(s) for NPDES municipal stormwater permit(s).

XII. NOTICES

All notices shall be deemed duly given if delivered by hand; or three (3) days after deposit in the U.S Mail, postage prepaid

XIII. GOVERNING LAW

This AGREEMENT will be governed and construed in accordance with laws of the State of California If any provision or provisions of this AGREEMENT shall be held to be invalid illegal or unenforceable the validity, legality and enforceability of the remaining provisions shall not any way be affected or impaired hereby

XIV CONSENT TO BREACH NOT WAIVER

No term or provision hereof shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by the PERMITTEE to have waived or consented. Any consent by any PERMITTEE to, or waiver of, a breach by the other, whether express or implied, shall not constitute a consent to, waiver of or excuse for any other different or subsequent breach.

XV APPLICABILITY OF PRIOR AGREEMENTS

This document restates and amends the provisions in prior agreements and constitutes the entire AGREEMENT between the PERMITTEES with respect to the subject matter; all prior agreements, representations, statements, negotiations and undertakings are superseded hereby

XVI EXECUTION OF THE AGREEMENT

This AGREEMENT may be executed in counterparts and the signed counterparts shall constitute a single instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the dates opposite their respective signatures:

ORANGE COUNTY FLOOD CONTROL DISTRICT
A body corporate and politic

By Cynthia P. Coad
Chairman of the Board of Supervisors

COUNTY OF ORANGE
A body corporate and politic

Date 06-25-02

By Cynthia P. Coad
Chairman of the Board of Supervisors

SIGNED AND CERTIFIED THAT A COPY OF THIS AGREEMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD

Date: 06-25-02

By Robin Stieler
DARLENE J. BLOOM 6/25/02
Clerk of the Board of Supervisors of
Orange County, California

APPROVED AS TO FORM
COUNTY COUNSEL
ORANGE COUNTY, CALIFORNIA

By
Geoffrey K. Hunt, Deputy

Date: 6/12

///

///

///

CITY OF ANAHEIM

Date: 6-18-02, 2002

By: Tom Daly
Mayor

ATTEST:

Sheryll Schroeder
City Clerk

APPROVED AS TO FORM:
JACK L. WHITE, CITY ATTORNEY

A Katt
By: ALISON M. KOTT, DEPUTY CITY ATTORNEY

CITY OF BREA

Date: 6/19, 2002

By: _____
Mayor

ATTEST

_____
City Clerk

APPROVED AS TO FORM:

_____
City

CITY OF BUENA PARK

Date: June 25, 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM

_____
City Attorney

CITY OF COSTA MESA

Date: June 18, 2002

By: Hal W. Dixon
Mayor

ATTEST:

Kitty Delaney, Acting
City Clerk

APPROVED AS TO FORM:

Linda Nguyen, DCA for
City Attorney

Deputy

CITY OF CYPRESS

Date: July 10, 2002

By: Lynda Smith
Mayor

ATTEST:

Jill R. Ingram-Guertin
City Clerk

APPROVED AS TO FORM:

W. Wyatt
City Attorney

CITY OF DANA POINT

Date: June 25, 2002

By: Joe Snyder
Mayor

ATTEST:

Cathy Cattett
City Clerk

APPROVED AS TO FORM:

City Attorney

CITY OF FOUNTAIN VALLEY

Date: June 4, 2002

By: Lauranne Cook
Mayor

ATTEST:

Jane Irwin
City Clerk - Deputy

APPROVED AS TO FORM:

Alan Burns
City Attorney

CITY OF FULLERTON

Date: June 19, 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

APPROVED AS TO CONTENT:

_____
Director of Engineering

CITY OF GARDEN GROVE

Date: June 24, 2002

By: _____
Mayor

ATTEST

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF HUNTINGTON BEACH

Date: June 21, 2002

By: Debbie Cook
Mayor

ATTEST:

Connie Brockway
City Clerk 6/24/02

APPROVED AS TO FORM

P.L. Dixon 6-7-02
City Attorney
6-6-02

CITY OF IRVINE

Date: June 27 2002, 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF LA HABRA

Date: 6-17, 2002

BY: _____
Mayor / Pro Tem

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF LA PALMA

Date: 7/8, 2002

By:

ATTEST:

~~City Clerk~~
Deputy City Clerk

APPROVED AS TO FORM:

City Attorney

CITY OF LAGUNA BEACH

Date: 7/16 2002

By: Kenneth Frank
City Manager

ATTEST:

Verna L. Rollinger
City Clerk

APPROVED AS TO FORM:

City Attorney

CITY OF LAGUNA BEACH INCORPORATED JUNE 29, 1927 ORANGE COUNTY, CALIFORNIA

CITY OF LAGUNA HILLS

Date: June 11, 2002

By: _____
Mayor R. Craig Scott

ATTEST:

_____
City Clerk Mary A. Carlson

APPROVED AS TO FORM:

_____
City Attorney Lois E. Jeffrey

CITY OF LAGUNA NIGUEL

Date: June 24, 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

6/20/02

CITY OF LAGUNA WOODS

Date: 6-20-02, 2002

By: _____
Mayor

ATTEST:

Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF LAKE FOREST

Date: _____, 2002

By: Richard T. Dixon
Richard T. Dixon, Mayor

ATTEST:

Sherry A.F. Hentz, City Clerk

APPROVED AS TO FORM:

Thomas W. Allen, City Attorney

CITY OF LOS ALAMITOS

Date: June 24, 2002

By: _____
Mayor Ronald Bates

ATTEST:

_____
City Clerk C. D. Cordova

APPROVED AS TO FORM:

_____
City Attorney Fred Galante

CITY OF MISSION VIEJO

Date: 7-2-02, 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF NEWPORT BEACH

Date: June 25, 2002

By: Tod W. Ridgeway
Mayor

ATTEST:

LaVonne M. Harkless
City Clerk

APPROVED AS TO FORM:

City Attorney

CITY OF ORANGE

Date: _____, 2002

By: _____
Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

_____
Attorney

CITY OF PLACENTIA

Date: June 18, 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF RANCHO SANTA MARGARITA

Date: June 20, 2002

By: _____
Mayor James M. Ihor

ATTEST:

_____
City Clerk Debbie Zumwalt

APPROVED AS TO FORM:

_____
City Attorney John E. Cavanaugh

CITY OF SAN CLEMENTE

Date: JUNE 19, 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORMS

/s/ Jeff Oderman
City Attorney

CITY OF SAN JUAN CAPISTRANO

Date: _____, 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF SANTA ANA

Date: July 1, 2002

By: [signature]
Mayor

ATTEST:

[signature]
City Clerk

APPROVED AS TO FORM:

[signature]
City Attorney

CITY OF SEAL BEACH

Date: June 24, 2002

By: David H. Ellis
Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

CITY OF STANTON

Date: June 25, 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF TUSTIN

Date: 7-1-02, 2002

By: _____
Mayor

ATTEST

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF VILLA PARK

Date: June 27, 2002 2002

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

CITY OF WESTMINSTER

Date: June 24, 2002

By: Margaret L. Rice
Mayor

ATTEST:

Marian Contreras
City Clerk

APPROVED AS TO FORM:

City Attorney

CITY OF YORBA LINDA

By: _____
Mayor Allen Castellano

Date: June 18, 2002

APPROVED AS TO FORM:

ATTEST:

_____
City Clerk

_____
City Attorney
Best, Best & Krieger, LLP

EXHIBIT

LAND AREA DEDUCTED FROM JURISDICTIONS

Landfills	Area sq miles	Jurisdiction
Olinda	0.89	County
Santiago	0.25	County
Prima Descheca	2.34	County
Bee Canyon	1.13	County
Coyote Canyon	1.09	County
State Parks		
Alamitos State Beach	0.002	Seal Beach
Bolsa Chica State Beach	0.27	Huntington Beach
Chino Hills State Park	4.09	County
Corona Del Mar State Beach	0.05	Newport Beach
Crystal Cove State Park	6.30	County
Doheney State Beach	0.40	Dana Point
Huntington State Beach	0.20	Huntington Beach
San Clemente State Beach	0.18	San Clemente
Airports		
Fullerton	0.11	Fullerton
John Wayne	0.78	County
Military facilities		
MCAS Tustin	2.40	Tustin
MCAS El Toro	6.25	County
Los Alamitos Armed Svs. Center	2.07	Los Alamitos
Seal Beach Weapons Station	2.17	Seal Beach
National Forests		
Cleveland National Forest	86.75	County

EXHIBIT B - 1
Cost Sharing For Region Specific Elements
NPDES Permittee Shares of Revenue
Fiscal Year 2002/2003

Permittee	Population *	Area (sq. mi.) **	Weighted Average Share of Revenue (%)	Budget Share FY 2002-2003
Aliso Viejo***	40,166	7.15	1.168548686	$70,114
Anaheim	336,300	49.761	9.005630974	$540,344
Brea	36,100	10.954	1.399038534	$83,943
Buena Park	80,100	10.064	2.007224432	$120,435
Costa Mesa	110,900	15.480	2.898146677	$173,891
Cypress	47,150	6.925	1.258634332	$75,519
Dana Point	35,800	6.440	1.046705013	$62,803
Fountain Valley	55,900	9.553	1.595652357	$95,740
Fullerton	129,200	22.536	3.723143526	$223,391
Garden Grove	169,200	17.900	3.981247954	$238,877
Huntington Beach	193,700	27.283	5.080856025	$304,855
Irvine	150,100	46.148	5.863460245	$351,811
La Habra	60,800	7.313	1.498466857	$89,909
La Palma	15,700	2.014	0.396615551	$23,797
Laguna Beach	24,150	7.820	0.973824935	$58,430
Laguna Hills	33,900	6.626	1.031809811	$61,909
Laguna Niguel	63,200	15.003	2.127750971	$127,656
Laguna Woods***	16,750	3.050	0.492569562	$29,554
Lake Forest	76,700	16.795	2.473428382	$148,407
Los Alamitos	11,750	4.256	0.508566627	$30,514
Mission Viejo	96,600	17.427	2.828184924	$169,693
Newport Beach	72,000	27.740	3.244247595	$194,657
Orange	132,800	23.329	3.839599305	$230,378
Placentia	47,600	6.606	1.240982586	$74,460
Rancho Santa Margarita***	48,350	13.080	1.751218729	$105,074
San Clemente	52,500	17.697	2.170701556	$130,243
San Juan Capistrano	34,600	14.054	1.614764803	$96,887
Santa Ana	348,100	27.349	7.460695499	$447,646
Seal Beach	24,500	10.660	1.197977061	$71,879
Stanton	38,300	3.131	0.830259739	$49,816
Tustin	69,200	10.992	1.911061605	$114,665
Villa Park	6,125	2.068	0.255047196	$15,303
Westminster	89,900	10.190	2.167659672	$130,061
Yorba Linda	60,000	19.918	2.45714216	$147,430
County of Orange	117,634	86.846	8.499136117	$509,953
OCFCD	0	0.000	10	$600,006
TOTALS	**2,925,775**	**584.178**	**100.00000**	**$6,000,063**

* Source: State of California, Department of Finance, *E-1 City/County Population Estimates with Annual Percent Change January 1, 2000 and 2001*, Sacramento, California, May 2001.

** Source: Public Facilities and Resources Department - Geomatics. Area was calculated in miles using the dry land area figures and subtracting areas in each jurisdiction for national forests, state parks, airports, landfills and military installations as determined in the NPDES Implementation Agreement.

*** Source: County of Orange will cover the program costs until the cities are added onto the Implementation Agreement.