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August 25, 2023

Via Drop Box

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

Re: Claimants' Comments on Draft Proposed Decision on *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-002*, 10-TC-11

Dear Ms. Halsey:

Attached please see the comments of Claimants County of Orange, Orange County Flood Control District and the Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, and San Juan Capistrano ("Claimants") on the Draft Proposed Decision issued by Commission staff on the above-referenced Joint Test Claim. The documents enclosed consist of the Comments and declarations, exhibits and evidence in support thereof.

Please let me know if you have any questions. Thank you.

I declare under penalty of perjury that the foregoing, signed on August 25, 2023, is true and correct to the best of my personal knowledge, information, or belief.

Howard Gest
Claimant Representative
Address, phone and e-mail set forth above

CLAIMANTS' COMMENTS ON DRAFT PROPOSED DECISION

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2.; C.; D.; F.1.d.; F1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; K.1.b.4.n.; K.3.a.; and Attachment D, Adopted December 16, 2009

10-TC-11

CLAIMANTS' COMMENTS ON DRAFT PROPOSED DECISION

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2.; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; K.1.b.4.n.; K.3.a.; and Attachment D,
adopted December 16, 2009
10-TC-11

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I. INTRODUCTION

Claimants County of Orange, Orange County Flood Control District ("District"), and the Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, and San Juan Capistrano ("Claimants") herewith submit their comments on the Draft Proposed Decision ("DPD") issued by staff of the Commission on State Mandates ("Commission") on June 30, 2023 regarding the above-referenced test claim ("Test Claim").

While Claimants agree with the DPD that San Diego Regional Water Quality Control Board ("San Diego Regional Board") Order No. R9-2009-0002 (the "Test Claim Permit") includes some state-mandated new programs or higher level of service, Claimants disagree with other conclusions in the DPD, as set forth in these comments.

Each section of the Test Claim Permit at issue is discussed in the order presented in the DPD.[1] Claimants respectfully submit that the arguments and evidence already submitted in support of the Test Claim and the additional arguments set forth in these comments establish that a subvention of funds is required for elements of the Test Claim Permit at issue in the Test Claim. Claimants also incorporate herein their comments made in the Section 5 Narrative Statement and Rebuttal Comments on the Test Claim.

II. COMMENTS ON BACKGROUND SECTION OF DPD: THE 2009 PERMIT CAN AND DOES IMPOSE MANDATES THAT GO BEYOND THE "MEP" STANDARD OF COMPLIANCE

While the "Background" section of the DPD (at 51-76) notes that operators of municipal separate storm sewer systems ("MS4s") covered by a National Pollutant Discharge Elimination System ("NPDES") permit are required to reduce pollutant discharges "to the maximum extent practicable" (DPD at 54), there is no further discussion as to how the Clean Water Act ("CWA") leaves substantial discretion to the states in adopting MS4 permit requirements which go beyond CWA requirements.

This feature was noted in *Defenders of Wildlife v. Browner,* 191 F.3d 1159 (9th Cir. 1999) ("*Defenders*"), which addressed whether MS4 operators were subject to the same standard of strict compliance with water quality standards mandated for industrial dischargers in 33 U.S.C. § 1311. The Ninth Circuit found that they were not, holding that in adopting 33 U.S.C. § 1342(p)(3)(B) (the subsection relating to municipal discharges), Congress "*replaces* the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable . . . .'"[2]

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[1] These comments address the conclusions set forth in the DPD (pages 34-378) and to avoid repetition, do not separately address those in the Executive Summary (DPD at 1-33). To the extent required, the arguments and evidence set forth in these Comments are similarly directed to the conclusions in the Executive Summary.

[2] 191 F.3d at 1165 (emphasis in original). Thus, the statement in the Background section at 61 that Section 1311 standards apply to all NPDES permits is incorrect. As set forth in *Defenders,* under the CWA, MS4 permittees do not have to comply with section 1311. Instead, MS4 permittees are required to "reduce the discharge of pollutants to the maximum extent practicable." *Id.*

Of relevance to these comments, *Defenders* held that the Environmental Protection Agency ("EPA") Administrator or a state (like California) authorized to carry out the NPDES program pursuant to 33 U.S.C. § 1342(b) has the *discretion* to impose "such other provisions" as the Administrator or the state determines appropriate for the control of such pollutants. As the court held, "[33 U.S.C. § 1342(p)(3)(B)(iii)] gives the EPA discretion to determine what pollution controls are appropriate."[3]

Thus, California has the discretion to include in its MS4 permits compliance with water quality standards or other MS4 permit requirements that go beyond the MEP standard, but when the state does so, those requirements are state, not federal, mandates. *Department of Finance v. Comm. on State Mandates* (2016) 1 Cal. 5th 749 ("*Dept. of Finance (LA County Permit Appeal I)*").[4] As state mandates, these discretionary requirements are subject to state constitutional requirements, and in particular article XIII B, section 6 of the California Constitution.[5] In so holding, the Supreme Court expressly rejected an argument raised by the Department of Finance and the water boards that because a provision was in a stormwater NPDES permit, it was "ipso facto, required by federal law."[6]

III. COMMENTS ON DISCUSSION SECTION OF DPD

A. Timely Filing of Test Claim

Claimants concur with the DPD's conclusion that the Test Claim was timely filed.

B. The Water Boards' Argument that the Permit Provisions Were Proposed by the Claimants in their ROWD

Claimants concur with the DPD's conclusion that it was the Regional Board, not the permittees, that determined the conditions and requirements that were included in the Test Claim Permit.

C. Permit Sections

1. The Prohibition on Landscape Irrigation, Irrigation Water, and Lawn Watering (2009 Permit, Section B.2) is a Reimbursable State Mandate

Test Claim Permit Section B.2 removed landscape irrigation, irrigation water and lawn water from the non-stormwater categories that are allowed to enter the MS4. As the DPD recognizes, the CWA requires MS4 permits to "effectively prohibit" non-stormwater discharges into the MS4[7]. The federal regulations exempt certain categories of discharges from this

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[3] 191 F.3d at 1166.

[4] 1 Cal. 5th at 766.

[5] 1 Cal 5th at 769-771 (provisions in the 2001 Los Angeles County MS4 permit constituted state mandates eligible for subvention).

[6] 1 Cal. 5th at 768.

[7] 33 U.S.C. § 1342(p)(3)(B)(ii).

prohibition.[8] As the DPD further recognizes, landscape irrigation, irrigation water and lawn water were exempt from this prohibition under the prior 2002 permit. The Test Claim Permit removed this exemption, resulting in these three categories of discharges now being prohibited from being discharged into the MS4 (DPD at 91-92). This removal required Claimants to undertake several new tasks, including (1) the adoption of new ordinances to address these flows; (2) the creation of new public education and outreach materials; (3) tracking, monitoring, and responses to incidents of irrigation runoff; and (4) improvement of municipal irrigation systems and landscaping.[9]

Nevertheless, the DPD finds that this new requirement was not a new program or higher level of service. It does so on the basis that federal regulations required a MS4 permit to prohibit non-stormwater discharges identified by the municipality as a source of pollutants to waters of the United States, that such identification was purportedly done here, and that, in any event, the removal of this exclusion only increased costs, it did not increase the service to the public (DPD at 98-103). This finding is incorrect.

Preliminarily, the DPD asserts that the Regional Board could exempt categories of non-stormwater discharge as opposed to individual, specific discharges (DPD at 97-98). The DPD, however, fails to acknowledge the United States Environmental Protection Agency's Guidance Manual,[10] where these exempt discharges are specifically addressed on a case-by-case as opposed to category-by-category basis. The EPA's Guidance Manual specifically states:

> If an applicant knows ... that landscape **irrigation water from a particular site** flows through and picks up pesticides or excess nutrients from fertilizer applications, there may be a reasonable potential for a storm water discharge to result in a water quality impact. In such an event, the applicant should contact the NPDES permitting authority to request that the authority order the discharger to the MS4 to obtain a separate NPDES permit (or in this case, the [water from the particular site] be controlled through the storm water management program of the MS4).[11]

More significantly, the Regional Board's wholesale withdrawal of the exemption usurped the Claimants' discretion as to how to address these three categories of non-stormwater discharges. The federal regulations do *not* provide that these categories of discharges must be prohibited from entering the MS4 when they are identified as sources of pollutants; the federal regulations provide that these discharges of flows "shall be addressed."[12] These regulations thus

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[8] 40 C.F.R. § 122.26(d)(2)(iv)(B)(1).

[9] See Declaration of Chris Crompton on Behalf of the County of Orange, ¶ 6.a, submitted in conjunction with the Revised Test Claim.

[10] Guidance Manual for the Preparation of Part 2 of the NPDES permit Applications for Discharges from Municipal Separate Storm Sewer Systems (November 1992).

[11] Exhibit: "1", Part 2 Guidance Manual at p.6-33 (emphasis added), submitted on June 30, 2011, in support of original test claim.

[12] 40 C.F.R. §122.26(d)(2)(iv)(B)(1)

give Claimants discretion as to how the discharges are to be "addressed." Here, when the Regional Board ordered the wholesale prohibition of landscape irrigation, irrigation water and lawn water from being discharged into the MS4, the Regional Board usurped the Claimants' ability to address these discharges through less-costly means such as public education and information or on a case-by-case basis when a site discharge is determined to be a source of pollution. Where a state agency usurps the discretion of a local government agency and mandates specific requirements, a state mandate is created.[13]

It is erroneous to find that the removal of these three categories of non-stormwater discharges did not result in a higher level of service to the public. Contrary to the DPD (at pages 102-103), the actual level and quality of government services were increased as a result of their removal. Prior to the Test Claim Permit, these irrigation discharges were permissible. As a result of the Test Claim Permit, Claimants were required to change their citizen's conduct. Claimants were required to adopt new ordinances,[14] create new public education and outreach programs, and address these new types of discharges. Certainly, the removal of these exemptions caused Claimants to review their own municipal irrigation systems and landscaping to comply with these new requirements. These activities were more than just an increase in cost, they were new activities that increased the level of pollution prevention services to the public. (If they did not, there would have been no purpose in adding this requirement.).

Finally, the DPD's conclusion (DPD at 103) that the removal of these three items did not constitute a new program or increased level of service because federal law has required dischargers in general to effectively prohibit non-stormwater discharges is contrary to the holding in *Dept. of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535 ("*Dept. of Finance (San Diego County Permit Appeal II*"). In that case the state argued that a MS4 permit requirement was not new because the requirement did not increase the permittee's underlying obligations, in this instance with respect to the obligation to reduce the discharge of pollutants to the maximum extent practicable. The state argued, "the condition ensures compliance with the same standard that has applied since 1990 when permittees obtained their first permit." *Id.* at 559.

The Court of Appeal rejected that argument, holding that the right to a subvention of funds under section 6 "does not turn on whether the underlying obligations to abate pollution remain the same. It applies if any executive order, which each permit is, requires permittees to provide a new program or a higher level of existing services." *Id.* at 559.

That rule applies here. The underlying obligation to effectively prohibit non-stormwater discharges existed prior to the Test Claim Permit, but that does not mean that new requirements to implement that obligation are not new. As the court held in *County of Los Angeles v. Comm. on State Mandates* (2003) 110 Cal.App.4th 1176, 1189 "[a] "program is 'new' if the local

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

[14] *See* Certified Copy of Orange County Board of Supervisors Minute Order, including Agenda Staff Report, County of Orange, March 22, 2011.

government had not previously been required to institute it." *See also San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878.

The removal of landscape irrigation, irrigation water and lawn water from the non-stormwater categories that were allowed to enter the MS4 was new. Claimants did not have to incur the cost of prohibiting these categories of non-stormwater discharges prior to the Test Claim Permit. The removal resulted in a new program and a higher level of service. The DPD should be revised to find this to be a reimbursable state mandate.

2. The Development and Implementation of Monitoring, Investigation and Compliance Programs to Meet Non-Stormwater Action Levels is a Reimbursable State Mandate (2009 Permit, Sections C, F.4.d. and F.4.e.)

Sections C, F.4.d and F.4.e of the Test Claim Permit require Claimants to comply with a number of new requirements triggered by the imposition of "non-stormwater dry weather action levels ("NALs")." Under these Test Claim Permit requirements, for the first time, Claimants are required to routinely monitor outfalls and, if an exceedance of a NAL is identified, Claimants are required to investigate, identify the source of the exceedance, and report the results of that investigation. If an illicit discharge or connection is the cause of the exceedance, the Claimant must eliminate that discharge or submit a plan and timeline to eliminate the source of the exceedance.[15]

None of these NAL requirements were contained in the 2002 Permit. Nevertheless, the DPD proposes to find them non-reimbursable on the grounds that they are not new, but purportedly simply implementing existing federal law (DPD at 103, 138, 141). The DPD also proposes to find that sections C, F.4.d and F.4.e do not constitute a new program or higher level of service because they do not increase the level or quality of government services provided (DPD at 142). These conclusions are incorrect.

a. The NAL Provisions are not Federally Mandated

The DPD does not explicitly find that the NAL requirements are federal mandates. It cannot because even if a permit provision reflected a requirement of federal law, if "federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated." *Dept. of Finance (LA County Permit Appeal I)*, 1 Cal. 5th at 765. *See also Dept. of Finance v. Comm. on State Mandates* (2017) 18 Cal.App.5th 661, 683 ("*Dept. of Finance (San Diego Permit Appeal I)*") (to constitute "a federal mandate for purposes of section 6 . . . the federal law or regulation must 'expressly' or 'explicitly' require the condition contained in the permit.").

Here, the federal requirements cited in the DPD (DPD at 137) are general in nature and relate to what must be included in an application for an MS4 permit. They do not specify the specific NAL requirements at issue here. The Regional Board, using its independent power to act under California law, had a true choice in how it chose to impose those requirements in the

[15] 2009 Permit, Section C.

context of the Test Claim Permit, and exercised that discretion in imposing the new requirements relating to NALs.

As the Court of Appeal held in *Dept. of Finance (San Diego Permit Appeal I),* where the federal regulations relate to the MS4 Permit application and do not require the specific MS4 requirements at issue, those requirements are state, not federal mandates. In *San Diego Permit I,* the state contended that requirements for street sweeping and storm sewer cleaning were federal mandates because federal regulations required permittees to describe in their permit applications procedures for operating and maintaining streets and procedures for reducing the impact of discharges from storm sewer systems. The Court rejected that argument, holding, "This regulation does not expressly require the scope and detail of street sweeping and facility maintenance the permit imposes. Because the State imposed those specific requirements, they are not federal mandates and must be compensated under section 6."[16]

While stopping short of concluding that federal law compelled the NAL requirements, the DPD asserts that the federal illicit discharge requirements support a conclusion that the NAL requirements are not "new" since these underlying federal requirements had been in place long before the Test Claim Permit (DPD at 142-143).

Ignoring recent case law, the DPD's conclusion falls short. In *Dept. of Finance (San Diego Permit Appeal II)*, the Third District Court of Appeal rejected this argument in the appeal of a test claim concerning the 2007 San Diego County MS4 Permit.

b. The NAL Requirements Were "New" and Represented a "Higher Level of Service"

In *Dept. of Finance (San Diego Permit Appeal II)*, the state argued, inter alia, that various MS4 permit requirements were not "new" because permittees had an underlying obligation, dating from the adoption of the CWA's provisions addressing MS4 discharges and permittees' first MS4 permit, to "reduce the discharge of pollutants from their MS4s to the maximum extent practicable."[17]

The Court of Appeal squarely rejected that argument. As noted above, the court held:

> "The application of [article XIIIB] Section 6 . . . does not turn on whether the underlying obligations to abate pollution remains the same. It applies if any executive order, which each permit is, requires permittees to provide a new program or a high level of existing services."[18]

The court held that in determining "whether a program imposed by the permit is new, we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective."[19] The court found that this "is so even though the [new] conditions

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[16] 18 Cal. App. 5th at 684.

[17] 85 Cal.App.5th at 559.

[18] *Id.*

[19] *Id.*

were designed to satisfy the same standard of performance."[20]

Here, while the underlying obligations set forth in the CWA and in the cited MS4 permit application regulations have governed previous MS4 permits, the prior existence of these "underlying obligations," does not mean that the specific NALs requirements in the Test Claim Permit are not "new." To determine that question, the inquiry must focus on whether the specific NAL requirements in the Test Claim Permit were required in the 2002 Permit. *See San Diego Unified,* 33 Cal. 4th at 878; *Lucia Mar Unified School Dist. V. Honig* (1988) 44 Cal.3d 830, 835 . That comparison shows that the NAL requirements in the Test Claim Permit were not present in the 2002 Permit.

Section II.C.a.(1) of the Test Claim Permit Monitoring and Reporting Program (Attachment E to the Test Claim Permit) ("Test Claim Permit MRP") required that permittees "must" sample "at major outfalls" and "[o]ther outfall sampling points . . . identified by the Copermittees as potential high risk sources of polluted effluent . . . ." The Test Claim Permit also required permittees to develop monitoring plans "to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. At a minimum, outfalls that exceed any NALs once during any year must be monitored in the subsequent year."[21] Where exceedances were identified as coming from a natural source or illicit discharge or connection, immediate reporting (within 14 days) was required.[22] The program was a year-round program, and the monitoring was required to assess compliance with the NALs, as well as adopted dry weather TMDL waste load allocations and assessment of the contribution of dry weather flows to 303(d) listed impairments.[23] Test Claim Permit sections F.4.d and e reiterated this obligation to perform dry weather field screening and to investigate and inspect portions of the MS4 that, based on the results of field screening, analytical monitoring, or other appropriate information, indicate a reasonable potential of containing illicit discharges, illicit connections, or other sources of pollutants in non-stormwater.

In contrast, the 2002 Permit had given the permittees much more flexibility in designing and implementing their program. The 2002 Permit did not direct which outfalls or types of outfalls had to be monitored but instead left it to the permittees' selection. And whereas the permit called for a follow-up investigation to be performed to identify the source of an exceedance, the permit did not include all the requirements that were included in the Test Claim Permit once a NAL exceedance was identified. Reporting was allowed in the annual reports.[24] The Test Claim Permit afforded Claimants no such discretion; all sampling stations were required to be monitored and sampled as directed under the Permit and for multiple analytes not required under the previous 2002 Permit.[25]

Although conceding that the Test Claim Permit had monitoring, reporting and investigation requirements that were not present in the 2002 Permit, the DPD asserts these were

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[20] *Id.* (emphasis supplied).

[21] Test Claim Permit, Section C.4.

[22] Test Claim Permit, Section C.2.a and b.

[23] Test Claim Permit, Attachment E, Section II.C.

[24] 2002 Permit, Attachment E, Section E.4 and 5.

[25] Test Claim Permit, Section C.

not new because federal regulations always required a program to detect and remove illicit discharges and monitoring to determine permit compliance (DPD at 138, 141). However, those regulations did not require the actions the Test Claim Permit required with respect to non-stormwater investigation and monitoring, and make no mention of NALs or response thereto. In *Dept. of Finance* (*LA County Permit Appeal I), supra,*[26] the Supreme Court held that general federal NPDES management plan regulations did not create a federal mandate with respect to specific MS4 permit requirements. That holding applies here. Under applicable case law, the NAL requirements in the Test Claim permit were in fact "new."

Contrary to the DPD's assertion (DPD at 142-143), the dry weather monitoring and NALs requirements in the Test Claim permit also constituted a "higher level" of service. They required new activities, designed to result in more effective pollution prevention. This was an increase of services rendered to the public. These additional steps required by the Test Claim Permit represent a "higher level" of service under the test set forth in *Dept. of Finance (San Diego Permit Appeal II), supra,*[27] and are not, as the DPD concludes (at 142-43), merely increases in costs to provide the same services.

Claimants are entitled to a subvention of funds with respect to the NALs requirements set forth in the Test Claim.

3. Use of Geographic Information Systems (GIS) for MS4 Mapping to Implement the Illicit Discharge Detection and Elimination Program (Permit Section F.4.b.)

Claimants concur in the DPD's conclusion (DPD at 143-144, 148-150) that updating the map of the entire MS4 system in GIS format is a state-mandated new program or higher level of service.

4. Requirements in Section D Relating to Storm Water Action Levels

Like Section C, Section D of the 2009 Permit requires Claimants to comply with a number of new requirements triggered by the presence of "Stormwater Action Levels" ("SALs"). Beginning in year three, when a running average of twenty percent or greater discharges exceed the designated SALs, Claimants were required to adopt additional control measures to reduce the levels of pollutants in the discharges. Claimants also were required to develop a monitoring plan to sample discharges from major outfalls, including those at which the SALs have been exceeded, and to conduct that monitoring. These requirements are ongoing (Id., Section D.2 and 4).[28]

Neither the SALs nor these requirements were contained in the 2002 Permit. Nevertheless, the DPD concludes that the requirements of Section D of the Test Claim Permit did not mandate a new program or higher level of service. This is error.

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[26] *Dept. of Finance,* 1 Cal 5th at 760, 770.

[27] 85 Cal.App.5th at 559.

[28] The DPD summarizes these requirements on pages 151 and 161 through 163.

As with its analysis of the NAL requirements, the DPD focuses not on the specific requirements of the Test Claim Permit, which under applicable caselaw is the appropriate starting place to determine whether a program is "new," *San Diego Unified, supra; Lucia Mar, supra,* but rather on general, underlying legal requirements that applied to the Test Claim Permit and previous MS4 permits.

The DPD cites federal requirements that NPDES permittees monitor their discharges to determine whether they are meeting water quality standards. DPD at 166-167. The DPD also cites as authority 2002 Permit language requiring permittee discharges to not cause or contribute to the exceedance of water quality standards or receiving water objectives, for permittees to assess compliance with the permit, and to suggest additional BMPs if compliance was not being attained (DPD at 167-168).

The DPD then concludes that since federal law sets forth general underlying requirements regarding stormwater discharges (*e.g.,* requirements to monitor discharges, report exceedances, meet water quality standards, adjust BMPs, etc.), the specific SAL requirements in the Test Claim Permit were not new but "simply implements existing federal law "[29] The DPD concludes further that instead of increasing the level or quality of service to the public, Section D "simply helps the claimants comply with existing law imposed on all discharges to meet water quality standards."[30]

Claimants disagree. First, as *Dept. of Finance (San Diego Permit Appeal II)* and other cases have held, when an executive order contains a requirement not found in a previous order, that additional requirement represents a "new" program. *San Diego Permit Appeal II* held that in order to determine "whether a program imposed by the permit is new, we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective."[31] The court found that this "is so even though the [new] conditions *were designed to satisfy the same standard of performance*."[32]

Thus, the arguments presented in the DPD (at 169) that the *upgraded* monitoring requirements in the Test Claim Permit were not "new" because monitoring, in some form, was required previously conflicts with the holding in *San Diego Permit Appeal II*, as the new monitoring requirements were not present in the 2002 Permit. Again, the question that must be addressed is, does the requirement in the executive order at issue appear in previous permits? If not, it is "new," regardless of whether it is directed to satisfying the same or similar standard of performance.

Second, it is error to equate the monitoring and subsequent activities required pursuant to Test Claim Permit Section D when SALs are exceeded with federal requirements. The specific

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[29] DPD at 169. Significantly, as with the DPD's analysis of the NAL requirements in the Test Claim Permit, the DPD does not conclude that the SALs were mandated by federal law. Given governing case law, this is correct.

[30] DPD at 173.

[31] 85 Cal.App.5th at 559.

[32] *Id.* (emphasis supplied).

monitoring and specific activities required by Section D are not expressly set forth in the federal regulations. Thus, the DPD's findings that federal law required this monitoring and these activities is contrary to the holding in *Dept. of Finance (San Diego Permit Appeal I).* In that case the court specifically held that, "to be a federal mandate for purposes of section, 6, however, the federal law or regulation must 'expressly" or 'explicitly require the condition imposed in the permit."[33]

Third, the DPD cites various "standards of performance" contained in federal law and regulations or prior permits to support its conclusion that the SAL requirements are not "new."[34] These citations, however, do not rebut the fact that the above-mentioned specific requirements of Section D were not present or required under the 2002 Permit. Under the test laid down in *Dept. of Finance* (*San Diego Permit Appeal II)*, "the application of [article XIII B] Section 6 does not turn on whether the underlying obligation to abate pollution remains the same. It applies if any executive order . . . requires permittees to provide a new program or higher level of service."[35] Here, it is undisputed that the wet weather monitoring and the responses required to SAL exceedances were new requirements, not previously required under the 2002 Permit.

The DPD also asserts that Section D of the Test Claim Permit "does not increase the level or quality of service to the public; it simply helps the claimants comply with existing law imposed on all dischargers to meet water quality standards." DPD at 173. This assertion (which, under *Defenders, supra,* is incorrect) nevertheless errs in setting forth the analysis that the Commission is required to make. It can be argued that *any* provision in an MS4 permit is intended to "help" permittees to comply with the CWA, but that does not mean that those provisions are not state mandates, where they are not required by federal law or regulation but imposed by as a matter of discretion by the Regional Board. *See Dept. of Finance* (*LA County Permit Appeal I,); Dept. of Finance* (*San Diego Permit Appeal I); and Dept. of Finance* (*San Diego Permit* Appeal *II), supra.*

Finally, the DPD asserts that Section D does not impose a new program or higher level of service because it does not increase the actual level or quality of governmental services provided.[36] This assertion is incorrect. The DPD itself recognizes that the requirement in Section D to conduct wet weather monitoring of MS4 outfalls was not included in the 2002 Permit.[37] There is no question that this increased the actual level and quality of governmental services. Whereas in the past these services were provided only during dry weather or/and for coastal storm drains, now they are also provided during wet weather and for "all major outfalls."[38] For the reasons discussed above, the general federal requirements requiring Claimants to have a monitoring program do not negate the fact that these particular monitoring requirements, imposed pursuant to the Regional Board's discretion, were new and additional.

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[33] 18 Cal.App.5th at 683. *See also Dept. of Finance (LA County Permit Appeal I),* 1 Cal.5th at 770-771.

[34] DPD at 169, 170.

[35] 85 Cal.App.5th at 559.

[36] DPD at 169-170.

[37] DPD at 169.

[38] Test Claim Permit, section D.2.

The DPD's analysis also errs because it bases many of its conclusions on the assertion that the Test Claim Permit was required to include provisions requiring Claimants' discharges to meet water quality standards. *See, e.g.*, DPD at 166-167 ("The Clean Water Act requires an NPDES permittee to monitor discharges into the waters of the United States in a manner sufficient to determine whether it is meeting water quality standards"); at 170 ("As indicated above, federal law already required the claimants to comply with water quality standards . . . ."); at 173 ("Therefore, section D., does not increase the level or quality of service to the public; the SALs simply helped the claimants comply with existing law to meet water quality standards").

It is well established, however, that federal law does not require municipal stormwater permittees, including Claimants, to comply with water quality standards, that MS4 permits are not required to include a provision that discharges meet water quality standards.[39] Thus, *the fact that these provisions are included in order to cause Claimants to meet water quality standards, even though this is not federally required, establishes that these SAL obligations are in fact state, not federal, mandates and thus are a new program or higher level of service.*

In summary, implementation of Test Claim Permit Section D required Claimants to undertake a new program and provide a higher level of service. The DPD itself acknowledges that permittees were not required to perform wet weather monitoring of MS4 outfalls under the prior permit.[40] Nor were permittees required under the 2002 Permit to develop a year-round watershed-based wet weather MS4 discharge monitoring program; to present a plan with the rationale, locations, frequency and analyses identified; to conduct monitoring at a "representative percent" of the major outfalls within each hydrologic subarea; to conduct source identification monitoring to identify sources of pollutants causing the priority water quality problems within each hydrologic subarea; to respond to SAL exceedances by taking them into consideration when adjusting and executing annual work plans; to sample for a broader suite of constituents obtained from monitoring; and, if a SAL exceedance was believed to be from natural causes, to demonstrate that the "likely and expected" cause of the exceedance was not "anthropogenic in nature."[41]

These requirements were not in the 2002 Permit and thus represent "new" programs which trigger article XIII B, section 6 and as to which a subvention of funds is required. These requirements similarly represent the provision of a "higher level of service" to the public through the enhanced monitoring and required responses to exceedances of water quality standards in stormwater.

5. The Test Claim Permit's TMDL Provisions are Reimbursable State Mandates

As set forth in Claimants' Narrative Statement at Section IV.B, the Test Claim Permit requires the Claimants in the Baby Beach watershed, the County of Orange and the City of Dana

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[39] Compare 33 U.S.C. §1342 (p)(3)(A) with 33 U.S.C. §1342 (p)(3)(B); *Defenders,* 191 F.3d at 1164-1165, 1166.

[40] DPD at 169.

[41] *Compare* 2009 Permit, Section D and Attachment E, Section B *with* 2002 Permit, Section P and Attachment B.

Point, to comply with the Baby Beach Bacterial Indicator TMDL. These requirements include (1) implementing Best Management Practices ("BMPs")[42] capable of achieving interim and final bacterial waste load allocations ("WLAs"), (2) conducting monitoring and submitting annual reports reflecting permittees' monitoring and activities, (3) meeting final bacterial WLAs by 2014 and 2019, and (4) meeting numeric targets in Baby Beach "receiving waters" by 2014 and 2019.[43] *See generally* DPD at 195-196.

There is no dispute that these specific activities were not included in the 2002 Permit; the Baby Beach Bacterial Indicator TMDL in fact did not exist in 2002. *See* DPD at 175, 189. The DPD nevertheless proposes to find that the incorporation into the Test Claim Permit of these TMDL requirements is not a new program or higher level of service on two grounds: (1) federal law required Claimants to comply with the water quality standards implemented by the TMDL; and (2) the 2002 Permit required Claimants to comply with these water quality standards by prohibiting discharges that cause or contributed to exceedances of water quality objectives (standards). DPD at 199. The DPD also asserts that the imposition of these new TMDL requirements only increased cost of compliance; it did not result in an increased level of service to the public (DPD at 202-03). These conclusions are erroneous.

a. Federal Law Does Not Require MS4 Discharges to Comply with Water Quality Standards

The DPD's argument that the Baby Beach TMDL requirements are not "new" is premised on a fundamentally incorrect assertion, that Claimants are required to comply with federal or state water quality standards (or as referenced under state law, "water quality objectives."[44]) *See* DPD at 199 ("federal law has long required claimants to meet water quality objectives in receiving waters . . . .") This is not a requirement under the CWA,[45] and therefore, if it is included, it is included as a matter of discretion and therefore a state mandate. *A fortiori,* because the TMDL and its WLAs are included for the purpose of meeting water quality standards, their imposition on Claimants through the Test Claim Permit is a discretionary Regional Board action, and thus also a state mandate.

(1) TMDLs, Including the WLAs Incorporated Therein, are Adopted to Attain Compliance with Water Quality Standards

The CWA requires states to adopt "water quality standards" for "waters of the United States" that exist within the state.[46] Water quality standards set forth the designated use or uses to be made of a waterbody (termed "beneficial uses" in California Water Code § 13050) and the

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

[43] Test Claim Permit Section I.

[44] Water Code § 13050((h).

[45] *Defenders,* 191 F. 3d at 1164-1165.

[46] 33 U.S.C. § 1313(a) and (c).

criteria that protect those designated uses.[47] A water quality standard for a particular pollutant in a waterbody sets forth the criteria, i.e., the amount of that pollutant, that can be present in the waterbody without impairing a designated use.[48]

Under the CWA, a state is also required to identify those water bodies for which effluent limitations are not stringent enough to result in the waterbody meeting its water quality standards.[49] These water bodies are known as "water quality limited segments" or "impaired" waterbodies.[50] A TMDL is a planning device that sets forth the amount of a pollutant allowable in a waterbody that will allow that waterbody to attain and maintain water quality standards necessary to support the waterbody's beneficial uses.[51] As the DPD recognizes (DPD at 58-59, 189-190), TMDLs are adopted for the purpose of meeting water quality standards.

A TMDL must be established for each pollutant causing the impairment in each impaired waterbody at a level "necessary to attain and maintain the applicable narrative and numerical *WQS [water quality standard]* with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and *water quality parameters*."[52]

A TMDL is "[t]he sum of the individual WLAs for point sources and LAs [Load Allocations] for nonpoint sources and natural background."[53] A WLA, in turn, is "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution."[54] A LA is "[t]he portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources."[55] "Loading capacity" is "[t]he greatest amount of loading that a water can receive *without violating water quality standards*."[56]

By definition, therefore, TMDLs and their WLAs are adopted "to attain and maintain" water quality standards.

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[47] 33 U.S.C. § 1313(c)(2)(A); 40 CFR §§ 131.2 and 131.3(i).

[48] 40 CFR§ 131.3(b).

[49] 33 U.S.C. § 1313(d).

[50] 40 CFR §§ 130.2(j) and 131.3(h).

[51] 40 CFR §§ 130.2(i) and 130.7(c)(1); *see* DPD at 58.

[52] 40 CFR § 130.7(c)(1) (emphasis added).

[53] 40 CFR § 130.2(i).

[54] 40 CFR § 130.2(h).

[55] 40 CFR § 130.2(g).

[56] 40 CFR § 130.2(f) (emphasis added).

(2) MS4 Permittees are Not Required to Attain Water Quality Standards and the Inclusion of TMDLS and WLAs in MS4 Permits Such as the Test Claim Permit is Not Mandated By Federal Law But is a Discretionary Decision By the San Diego Regional Board

The DPD's conclusion that the obligations to monitor, implement BMPs, and revise those BMPs to comply with numeric WLAs are required by federal law is premised on the erroneous assertion that federal law, specifically 33 U.S.C. § 1342(p)(3)(B)(iii) and 40 CFR § 122.44(d)(1), *required* the San Diego Regional Board to include in the Test Claim Permit effluent limitations consistent with the WLAs in those TMDLs. DPD at 199 n. 717.

This conclusion is in error. It is well established that, in contrast to industrial stormwater dischargers such as oil refineries or chemical plants, the CWA does *not* require municipal stormwater permittees, such as Claimants, to meet water quality standards, and also does not mandate that municipal stormwater permittees be subject to the mechanisms (including WLAs) adopted to achieve those water quality standards.[57]

The Ninth Circuit held in *Defenders, supra,* that while Congress imposed this obligation on industrial stormwater dischargers, it specifically exempted municipal stormwater dischargers: For industrial dischargers, Congress required that industrial storm-water discharges comply with 33 U.S.C § 1311(c)[58] and thus *"shall . . . achieve . . . any more stringent limitation,* including those necessary to meet water quality standards . . . ."[59]

Congress chose not to include a similar provision for municipal storm-sewer dischargers. Instead, Congress required municipal storm-sewer dischargers to "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). *Defenders,* 191 F.3d at 1164-65.

The State Water Resources Control Board ("State Board") itself recognized that the requirement to comply with water quality standards in MS4 permits is imposed as a matter of discretion.[60] In Order WQ 2015-0075, which addressed the issue of whether an iterative, BMP-based process in an MS4 permit could constitute compliance with water quality standards (there, compliance with receiving water limitations imposed in the 2012 Los Angeles MS4 permit), the State Board found that:

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[57] See, e.g. *Defenders, supra,* 191 F.3d at 1164-1165; *Building Industry Assn. of San Diego v. State Water Resources Control Board* (2004) (*"BIA"*) 124 Cal.App.4th 866, 886.

[58] 33 U.S.C. § 1342(p)(3)(A).

[59] *Defenders, supra,* 191 F.3d at 1164-1165.

[60] *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements For Municipal Separate Storm Sewer System (MS4) Discharges Within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating From the City of Long Beach MS4,* State Board Order WQ 2015-0075 (June 16, 2015) ("Order WQ 2015-0075")

> In the context of NPDES permits for MS4s, however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, *but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency.*" *Id.* at 10 (emphasis added).[61]

There is thus no federal requirement that MS4 permits impose requirements for permittees to strictly comply with water quality standards. Any such requirements are imposed as a matter of discretion. *A fortiori*, this principle applies to the imposition of a permit requirement to comply with any vehicle to achieve those water quality standards, including TMDL WLAs, since WLAs are a component of TMDLs and are adopted "to attain and maintain the applicable narrative and numerical *WQS [water quality standard].*"[62] In other words, if it is not a requirement of federal law that MS4 discharges comply with water quality standards, then federal law also does not require MS4 dischargers to comply with permit requirements, such as WLAs, designed to attain those standards. Any requirement to do so is imposed as a matter of discretion by the permitting authority, here the San Diego Regional Board.

The DPD also cites one federal regulation issued under the authority of the CWA, 40 CFR § 122.44(d)(1), for its assertion that MS4 permittees must meet water quality objectives (DPD at 199 n. 717). This conclusion is also incorrect for several reasons.

First, the conclusion is inconsistent with the governing law and regulations discussed above. If compliance with water quality standards is not required of MS4 permittees, a regulation purporting to require such compliance is similarly inapplicable to MS4 permits. The courts and the State Board could not have concluded that MS4 discharges were not required to meet water quality standards if Section 122.44 in fact imposed such a requirement.

Second, the DPD's conclusion is inconsistent with the language of Section 122.44 itself. 40 CFR § 122.44 explicitly states that its provisions apply to NPDES permits only "when applicable." Section 122.44 is intended to address a wide range of NPDES permits. Because not all of its provisions apply to all NPDES permits, the regulation specifically provides that its provisions apply only "when applicable."

The plain language in Section 122.44 illustrates this point. Section 122.44 provides, in pertinent part:

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[61] A copy of relevant portions of Order WQ 2015-0075 is attached as Exhibit 1 to the Declaration of Howard Gest filed herewith ("Gest Decl."). The Commission is requested to take administrative notice of this order pursuant to Evidence Code § 452(c) as an "official act of the . . . executive . . . .departments of . . . any state of the United States"; Govt. Code § 11515; and Cal. Code Regs., tit. 2, § 1187.5(c).

[62] 40 CFR § 130.7(c)(1) (emphasis added)

> In addition to the conditions established under §122.43(a), each NPDES permit shall include conditions meeting the following requirements *when applicable*.
>
> . . . .
>
> (d) *Water quality standards and State requirements*: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of CWA necessary to:
>
> (1) *Achieve water quality standards* established under section 303 of the CWA, including State narrative criteria for water quality.
>
> . . . .

(Emphasis added.)

In construing a regulation, one must first look to the text of the regulation itself. *Price v. Starbucks Corp.* ("The rules of statutory construction apply to the interpretation of regulations. The chosen words of the regulation are the most reliable indicator of intent. We give the regulatory language its plain, commonsense meaning." (citations omitted)).[63] Here that text is explicit: the requirements of 40 CFR § 122.44 apply to NPDES permits only "*when applicable.*"

Indeed, proof that not all subsections of Section 122.44 are applicable to MS4 permits is that many subsections of Section 122.44 are simply missing from the Test Claim Permit. For example, the permit does not reference Sections 122.44(j) and (m), which address pretreatment for publicly owned treatment works and privately owned treatment works. These subsections are not applicable because MS4 discharges of stormwater have nothing to do with discharges of treated sewage effluent from a treatment plant. Other subsections of Section 122.44 missing from the Test Claim Permit include subsections (b)(2), (b)(3), (c), (g), and (i)(1)(i) and (ii), addressing standards for sewage sludge, requirements for cooling water intake structures, reopener clauses for treatment works treating domestic sewage, and measuring the mass of each pollutant discharged under the permit and the volume of effluent discharged from each outfall.

In fact, the only subsections of Section 122.44 that mention stormwater discharges are Sections 122.44(k) and (s), which address BMPs and construction activity. Neither, however, requires compliance with water quality standards or inclusion of TMDL WLAs in MS4 permits.

Third, the language of section 122.44(d) itself indicates that it is not applicable to MS4 permits. Subsection (d) is entitled and addresses "Water Quality Standards and State Requirements." Subsection (d)(1) states that it is to "achieve water quality standards." As set forth above, however, MS4 permits are *not* required to contain provisions to achieve water quality standards but only to contain permit provisions that "reduce the discharge of pollutants to the maximum extent practicable."[64] Accordingly, the TMDL provisions of Section 122.44(d)(1), which address compliance with water quality standards, are not "applicable" to MS4 permits.

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[63] (2011) 192 Cal.App.4th 1136, 1145-1146

[64] *Defenders,* 191 F.3d at 1164-65; *BIA,* 124 Cal.App.4th at 886.

This does not mean that the San Diego Regional Board cannot require MS4 discharges to comply with WLAs. It means, however, that there is no requirement in *federal law or regulation* that it do so. Rather, where a water board decides to do so, such requirements are *imposed as a matter of the Water Board's discretion.* Federal law did not require Claimants to meet water quality standards. As the Supreme Court held in *Dept. of Finance (LA County Permit Appeal I)*:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[65]

Here, the Water Board had a true choice as to whether to require compliance with WLAs in the Test Claim Permit. Neither the applicable federal statute, 33 U.S.C. § 1342(p)(3)(B), nor the regulation, 40 CFR § 122.44(d)(1), required this obligation to be imposed in an MS4 permit. *See also* Order WQ 2015-0175 at 11 ("[S]ince the State Water Board has *discretion* under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, the State Water Board may also utilize the flexibility under the Porter-Cologne Act *to decline to require strict compliance with water quality standards* for MS4 discharges.") (emphasis added.).

The DPD also cites 40 C.F.R. § 122.48.[66] This regulation, however, just requires monitoring and reporting for requirements otherwise included in a permit. It does not address compliance with water quality standards.

The Test Claim Permit's requirement for permittees to comply with WLAs to attain water quality standards was imposed as an exercise of the San Diego Regional Board's discretion. It was not required by federal law.[67]

(3) The Test Claim Permit's Requirement to Comply with Numeric Effluent Limitations Implementing a TMDL WLA Is Not Required by Federal Law

The DPD acknowledges that the TMDL WLAs were incorporated as numeric effluent limitations.[68] The CWA, however, does not require permittees to comply with such limitations. As discussed above, the Act requires MS4 permits to include "controls to reduce the pollutants to the maximum extent practicable" and further grants the state authority to impose "such other

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[65] 1 Cal. 5th at 765.

[66] DPD at 199 n. 717.

[67] As the Supreme Court held in *Dept. of Finance*, the issue before the Commission is not whether the regional board had the authority to impose the obligations at issue. The question is whether those obligations constituted a state mandate. 1 Cal. 5th at 769. In this case, because the Regional Board was exercising its discretion in incorporating the TMDL requirements, each such requirement constitutes a state mandate.

[68] DPD at 190.

provisions as the Administrator or the State determines appropriate for the control of such pollutants."[69] The Ninth Circuit in *Defenders* held that this provision did not require the inclusion of numeric effluent limits to meet water quality standards in MS4 permits, but that EPA or a State had the discretion to include them.[70] *See also BIA, supra* ("With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce a discharge of pollutants to the maximum extent practicable.'")[71] *See also* Order WQ-2015-0075 ("requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency.") Order at 10.

Three EPA guidance memoranda, issued over a period of 12 years, illustrate this point further. On November 22, 2002, EPA issued a guidance memorandum on "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements based on Those WLAs" ("2002 EPA Guidance"). EPA noted therein that because stormwater discharges are due to storm events "that are highly variable in frequency and duration and are not easily characterized, only in rare cases would it be feasible or appropriate to establish numeric limits" for municipal stormwater discharges. 2002 EPA Guidance at 4. EPA concluded that, in light of the language in 33 U.S.C. § 1342(p)(3)(B)(iii), "for NPDES-regulated municipal and small construction discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits." *Id.*[72]

On November 12, 2010, EPA updated its 2002 guidance with a new memorandum, which recommended that, "where feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations to meet water quality standards."[73] In doing so, however, EPA reiterated that such inclusion would be an action of the permitting agency "[exercising] *its discretion.*"[74] On November 26, 2014, EPA issued another revision to the 2002 EPA Guidance, which replaced the 2010 memorandum. In this memorandum, EPA recommended that "the NPDES permitting authority *exercise its discretion* to include . . . where feasible, numeric effluent limitations as necessary to meet water quality standards."[75]

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[69] 33 U.S.C. § 1342(p)(3)(B)(iii).

[70] 191 F.3d at 1165-66.

[71] 124 Cal.App.4th at 874.

[72] Gest Decl., Exhibit 2.

[73] Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" at 2 (emphasis added), attached to the Gest Declaration as Exhibit 3.

[74] *Id.* (emphasis added).

[75] "Revisions to the November 22, 2002, Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,'" November 26, 2014, at 4 (emphasis added), attached as Exhibit 4 to the Gest Declaration. The Commission is requested to take administrative notice of these memoranda pursuant to Evidence Code § 452(c) as an "official act of the . . . executive . . . departments of the United States"; Govt. Code § 11515; and Cal. Code Reg., tit.2, § 1187.5(c).

What is noteworthy about these guidance memoranda is that EPA, over the course of 12 years, consistently maintained that if numeric limitations were contained in an MS4 permit, *it would be as a result of the permitting agency exercising its discretion.* They are not, however, *required* by federal law.

b. The Programs Required as a Result of the Inclusion of the TMDL are New and Provide Additional Public Services

The DPD also asserts that the TMDL requirements in the Test Claim Permit are not new because the 2002 Permit required Claimants to comply with water quality standards by prohibiting discharges that caused or contributed to an exceedance of water quality objectives.[76] The DPD asserts that "the only difference between the prior permit and the test claim permit is that the test claim permit now identifies the wasteload allocations for the bacterial indicators calculated in the TMDL so that claimants know the percentage of bacterial loads that need to be reduced to meet the existing water quality objectives for Baby Beach."[77]

This characterization is incorrect, both legally and factually. As a legal matter, incorporation of a TMDL constitutes the imposition of additional pollution control requirements for permittees. The court in *City of Arcadia v. U.S. EPA*[78] recognized how TMDL incorporation spawns additional requirements when it identified TMDLs as "planning devices" which "forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant dischargers and waterbodies."[79] *See also Pronsolino v. Nastri* ("TMDLs are primarily informational tools that allow the states to proceed from the identification of water requiring additional planning to the required plans");[80] *Idaho Sportsmen's Coalition v. Browner* ("TMDLs inform the design and implementation of pollution control measures.").[81]

As a factual matter, the TMDL incorporation was a new program or higher level of service not previously required. As set forth in the Declaration of Rita Abellar ("Abellar Decl.") filed herewith, this new program and higher level of service included TMDL-related supplemental monitoring and reporting, a Microbial Source Tracking study, a Dye study, and a Sewer Investigation/Sanitary Survey/BMP Investigation study, all to identify bacterial indicator sources, determine BMP effectiveness, and determine the TMDL WLA compliance required by the Test Claim Permit (Abellar Decl. ¶6).

None of these activities were required under the prior permit.[82] The supplemental monitoring and reporting were not required pursuant to the prior permit's language regarding

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[76] DPD at 199.

[77] DPD at 202.

[78] 265 F. Supp.2d 1142 (N.D. Cal. 2003).

[79] 265 F.Supp.2d at 1145.

[80] 291 F.3d 1123, 1129 (9th Cir. 2002).

[81] 951 F. Supp. 962, 996 (W.D. Wash. 1996).

[82] See R9-2002-0001, Parts A.1, 2 and 4, C.1. and 2, and Attachment A.

compliance with water quality standards, which made no mention of them. Instead, this monitoring and reporting were specifically added by Test Claim Permit Section I.1.b.

Likewise, the Microbial Source Tracking Study, Dye study, and Sewer Investigation/Sanitary Survey/BMP Investigation were not required under the prior permit; the prior permit had no obligation to identify bacterial sources and no TMDL compliance to be measured. Instead, these programs were caused by the Test Claim Permit's requirement to achieve or show compliance with Test Claim Permit Section I.1.a and c.

Thus, as a factual matter, this TMDL-related monitoring and reporting and these TMDL studies were new, they were not required until the TMDL was incorporated into the Test Claim Permit, and their costs, in excess of $250,000, would not have been incurred but for the TMDL's inclusion (Abellar Decl., ¶ 7 and 8).

The DPD also asserts that the programs required to implement the TMDL requirements were not an increase in public services. As the DPD itself acknowledges, however, the receiving waters at Baby Beach were not meeting water quality standards under the 2002 Permit.[83] The TMDL was included for the very purpose of improving the water quality at the beach. There thus was a reduction in the pollution present. This is clearly an increase in the level and quality of pollution prevention services being provided. As the Court said in *Dept. of Finance (San Diego Permit Appeal II),* "[The permit conditions] required permittees to implement a new program of providing pollution abatement services to the public in addition to the stormwater drainage services."[84]

c. The Test Claim Permit's TMDL Obligations Are a New Program and Higher Level of Service

As noted above, the DPD concludes that the Test Claim Permit's TMDL obligations do not constitute new programs or a higher level of service on the ground that the prior 2002 Permit required permittees to comply with receiving water limitations, and that compliance with the WLAs established under the Test Claim Permit simply continued that obligation. DPD at 199. Claimants have demonstrated that both factually and legally the Test Claim Permit in fact required new programs and a higher level of service. See Section III.C.5.b above. If, however, it still was to be concluded that such requirements "carried over" from the 2002 Permit, that would not preclude Claimants from reimbursement for these TMDL requirements under this Test Claim.

This is so because even if certain TMDL obligations were carried forward into the Test Claim Permit, they still are "new" obligations and a "higher level of service" because: (1) the Test Claim Permit's obligations cannot be compared with those in the 2002 Permit because the permittees were legally precluded from filing a test claim with respect to the obligations in the 2002 Permit; and (2) the permittees had no obligation to continue to implement BMPs in compliance with the receiving water limitations in the 2002 Permit once the 2002 Permit terminated.

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[83] DPD at 175, 188-189.

[84] 85 Cal.App.5th at 555.

In 2002 the San Diego Water Board issued the "third term" permit. DPD at 72. The permittees then had twelve months following the effective date of that permit, or twelve months after incurring increased costs as a result of mandates in that 2002 Permit, in which to file a test claim. Govt. Code §17551(c).

In those years (2002 and 2003), however, permittees were legally precluded from filing a test claim because the term "Executive Order" (a category of state action giving rise to "costs mandated by the State")[85] was then defined to exclude any "order, plan, requirement, rule or regulation issued by the State Water Resources Control Board or by any Regional Water Quality Control Board pursuant to Division 7 (commencing with Section 13000) of the Water Code."[86] Since the 2002 Permit was issued under that division of the Water Code,[87] permittees were precluded from filing a test claim. In 2007, a court found this provision unconstitutional[88] and effective January 1, 2011, the Legislature eliminated this exclusion.

Thus, in 2002 and 2003, Claimants could not file a test claim seeking reimbursement for obligations imposed by the 2002 Permit. It is well established that a party is not precluded from pursuing a claim in a current proceeding where that party could not have pursued the claim in the past. For example, with respect to "issue preclusion"[89] if an issue was not within a court's power to decide the issue in the first action, it is not precluded in a later action. *Strangman v. Duke*[90] ("The rule of res judicata does not apply to causes or issues which were not and could not be before the court in the first proceeding.") *See also State Compensation Insurance Fund v. ReadyLink Healthcare, Inc.*[91] (defendant not precluded from litigating amount of premium due where such issue could not have been brought in prior administrative proceeding because insurance commissioner lacked power to hear that issue); *Hong Sang Market, Inc. v. Peng*[92] ("Thus, in a situation in which a court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground . . . then a second action in a competent court presenting an omitted theory or ground should be held not precluded"), quoting *Merry v. Coast Community College Dist.*[93]

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[85] Govt. Code § 17514.

[86] Former Govt. Code § 17516.

[87] *See* 2002 Permit, at 8 ("**IT IS HEREBY ORDERED** that the permittees, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder . . .")(Emphasis in original.)

[88] *County of Los Angeles v. Comm. on State Mandates* (2007) 150 Cal.App.4th 898, 920.

[89] "Issue preclusion prohibits the litigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. *State Comp Insurance Fund v. ReadyLink*, 50 Cal.App.5th at 447. Issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who is a party in the first suit or one in privity with that party. *DKN Holdings LLC v. Faerber* (2015) 61 Cal. 4th 813, 825.

[90] (1956) 140 Cal.App.2d 185, 191.

[91] (2020) 50 Cal.App.5th 422, 458-460.

[92] (2018) 20 Cal.App.5th 474, 491.

[93] (1979) 97 Cal.App.3d 214, 229.

An analogous principle applies with respect to the exhaustion of administrative remedies. Where a party is precluded from exhausting its administrative remedies, or to do so would be futile, the exhaustion requirement is not a bar to further proceedings. Moreover, it is well established that the exhaustion requirement is not applicable where an effective administrative remedy is wholly lacking. *Glendale City Employees' Association, Inc. v. City of Glendale*[94] (exhaustion of administrative remedies does not apply if the remedy is inadequate). *See also Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*[95] (where pursuing administrative remedies would not provide class-wide relief, failure to pursue administrative remedy does not bar such relief). Indeed, "[a] party is not required to exhaust a remedy that was not in existence at the time the action was filed.[96]

The same principle applies here. Because Claimants could not lawfully file a test claim seeking reimbursement for requirements imposed by the 2002 Permit, they should not be precluded from seeking reimbursement for requirements that might be deemed to be similar on the grounds that they are not "new."

Additionally, with the expiration of the 2002 Permit and the commencement of the Test Claim Permit, permittees were presented with new Test Claim Permit TMDL obligations which constituted a higher level of service. The permittees' 2002 Permit obligations to monitor, assess and revise BMPs to comply with receiving water limitations ended when that permit expired and was replaced with the Test Claim Permit. The Test Claim Permit then reimposed those obligations anew (with new specific requirements), for the life of the Test Claim permit, *i.e.* it increased the level of services that Claimants must provide by extending these obligations to the end of the Test Claim Permit.

"Higher level of service" refers to "state mandated increases in the services provided by local agencies in existing programs." *Dept. of Finance (LA County Permit Appeal II).*[97] Here, the permittees' 2002 Permit obligations ended when that permit expired and the Test Claim Permit took effect. The Test Claim Permit then obligated permittees to continue to provide those services for the term of the Test Claim Permit. Thus, even if those services were not considered "new," the Test Claim Permit created an increase of state-mandated services, *i.e.,* permittees were required to provide services to the expiration of the Test Claim Permit that they would have otherwise not been required to provide. By requiring services for obligations that terminated upon the 2002 Permit's termination, the Test Claim Permit obligated permittees to undertake a "higher level of service."

6. Requirements in Sections F.1.d., F.1.h. and F.3.d. Relating to Low Impact Development, Hydromodification Plans, Best Management Practices for Priority Development Projects and Retrofitting of Existing Development

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[94] (1975) 15 Cal. 3d 328, 342.

[95] (2019) 42 Cal.App.5th 918, 930-932.

[96] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 549.

[97] (2021) 59 Cal.App.5th 546, 556.

The DPD concludes that the requirements in Sections F.1.d., F.1.h., and F.3.d. of the Test Claim Permit generally impose state-mandated new programs or higher levels of service, but that Sections F.1.d, F.1.h., and F.3.d, as they apply to Claimants' own municipal projects, do not. DPD at 204. The DPD concludes that such costs were incurred at the discretion of the local agency, are not unique to government, and do not provide a governmental service to the public. DPD at 238-250. Claimants' comments focus on those conclusions. Claimants agree with the Commission's finding that the Test Claim Permit provisions as set forth on pages 258-260 of the DPD are new programs or higher levels of service.

a. The Low Impact Development (LID), Hydromodification Plan (HMP) and BMPs for Priority Development Projects Impose Mandates on Claimants; Claimants Do Not Have True Discretion as to the Sizing of Municipal Projects that Constitute PDPs

The DPD concludes that, like private developers, local governments construct Priority Development Projects ("PDPs") at their discretion; thus, the imposition of Low Impact Development ("LID") and Hydromodification Management Plan ("HMP") requirements on such projects is not a state mandate. DPD at 204. Whether these LID and HMP requirements apply depends on the size of the project. Claimants submit, however, that when local governments undertake a PDP, it is because they must build that project in the public interest. Local governments do not have the same ability as a private developer to adjust the size of the project so as to avoid the LID and HMP requirements, since the size of the project must reflect civic requirements and needs.

The DPD cites *City of Merced v. State* (1984) 153 Cal.App.3d 777 and *Dept. of Finance v. Commission on State Mandates* (2003) 30 Cal. 4th 727 *("KHSD")* in support of its position.[98] *City of Merced* involved the question of whether a local government, when it exercised the power of eminent domain, must include the loss of business goodwill as part of the compensation for the taking.[99] The court held that it did, given that the city was not required to exercise its eminent domain powers and by choosing to do so, was liable for resulting costs.[100]

KHSD concerned whether a local school district being required to comply with notice and agenda requirements in conducting certain public committee meetings was a state mandate. The Court held that since the committees in question were part of separate grant-funded programs in which the district chose to participate and that such costs were incidental to such programs, the notice and agenda requirements were not a state mandate.

Neither case is controlling here. *KHSD* is inapposite because, in that case, the district chose to accept the grants to fund those meetings. Similarly, *City of Merced* is inapposite because the city chose to exercise its power of eminent domain. Claimants here do not "choose" to build public projects in the same sense. They must either build such projects to fulfill their

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[98] The Commission also cites the recent Supreme Court case *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal. 5th 800. In that case, the Court set forth the test for when a program is legally or practically compelled. *Id* at 815.

[99] 153 Cal.App.3d at 782.

[100] *Id.* at 783.

civic obligations or they or their constituents could face "certain and severe penalties or consequences" for not providing necessary public services. *Dept. of Finance (San Diego Permit Appeal II), supra.*[101] Thus, the projects are "practically compelled."

The *San Diego Permit Appeal II* court discussed this issue in response to an argument by the state that permittees "chose" to obtain an NPDES permit to discharge stormwater. The court rejected that argument:

> In urbanized cities and counties such as permittees, deciding not to provide a stormwater drainage system is no alternative at all. It is "so far beyond the realm of practical reality that it left permittees "without discretion" not to obtain a permit. Permittees were thus compelled as a practical matter to obtain an NPDES permit and fulfill the permit's conditions.[102]

In *Dept. of Finance v. Comm. On State Mandates* (2009) 170 Cal.App.4th 1358 ("*POBRA*"), the court provided further guidance in setting forth whether a state requirement was "practically compelled," holding that the question was whether the action "is the only reasonable means to carry out [the local agency's] core mandatory functions."[103]

Here, in similarly urbanized areas of Orange County, the construction of essential infrastructure is the only reasonable means by which core mandatory governmental functions can be carried out; Claimants were "compelled as a practical matter" to construct that infrastructure.

The Commission's conclusion that claimants have discretion as to whether to construct a project the size of a priority project is essentially a conclusion that a Claimant for police, fire, safety or cost-effective administrative purposes will never have to build a project the size of a PDP. The Commission has no evidence or other basis for concluding that a Claimant will *never* be practically compelled to build such a project. For this reason alone, the Commission's conclusion is erroneous.

The same principal applies to when a Claimant must retrofit an existing building and, as a result, comply with Section F.3. In that case, its obligation to meet the retrofitting requirements is a state mandate.

b. The LID and HMP Requirements Provide a Service to the Public

The DPD also concludes that the LID and HMP requirements did not impose a new program or higher level of service because the requirements "are not unique to government and do not provide a governmental service to the public." DPD at 246-251. It is not in dispute that those requirements apply to both private and public PDPs. However, the DPD errs in its conclusion that they do not provide a benefit to the public.

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[101] 85 Cal.App.5th at 558.

[102] *Ibid.* (citations omitted).

[103] 170 Cal.App.4th at 1368.

The three cases cited in the DPD pre-date the recent decision of the Second District Court of Appeal in *Dept. of Finance (LA County Permit Appeal II), supra.* In that case, the court was presented with the question of whether, *inter alia,* a requirement to place trash receptacles at transit stops represented a "program" compensable under article XIII B, section 6. The court first noted that there were two separate tests to determine the existence of a "program," those of providing services to the public and those which impose unique requirements on local governments, noting that the "two parts are alternatives; either will trigger the subvention obligation unless an exception applies."[104]

With regard to the trash receptacle requirement, the court held that receptacle placement met the requirement of providing services to the public, noting that even if the placement itself did not result in a higher level of stormwater drainage and flood control, "trash collection is itself a governmental function that provides a service to the public by producing cleaner transit stops, sidewalks, streets, and, ultimately, stormwater drainage systems and receiving waters."[105]

Here, the LID and HMP requirements, which were developed by the permittees in an exercise of their governmental function as operators of a stormwater drainage system, provided benefits to the public through the reduction of runoff carrying potential pollutants and the reduction of high flows that caused erosion. Therefore, under the test set forth in *Dept. of Finance (LA County Permit Appeal II),* the LID and HMP requirements constitute a "program." *See also Dept. of Finance (San Diego County Permit Appeal II,* 85 Cal.App.5th at 555 ("[The permit conditions] required permittees to implement a new program of providing pollution abatement services to the public in addition to the stormwater drainage services."

7. Requirements in Section F.1.f. Relating to BMP Maintenance Tracking

Test Claim Permit Section F.1.f. contained requirements relating to the tracking of BMP maintenance. The DPD concludes that some of these requirements were "new" while others were not (DPD at 261).

The DPD also concludes that requirements in Section F.1.f applicable to municipal projects were not mandated by the state, and thus are not eligible for a subvention of funds, stating: "Nothing in state statute or case law imposes a legal obligation on local agencies to construct, expand, or improve municipal projects. Nor is there evidence in the record that the claimants would suffer certain and severe penalties such as 'double . . . taxation' or other 'draconian' consequences if they fail to comply with the permit's annual reporting requirements for municipal projects." DPD at 273-274.

Claimants disagree. There *was* a legal obligation imposed here on Claimants – it was the obligation to create a BMP maintenance tracking database for completed development projects, whether they be industrial/commercial, residential *or* municipal. It was the *creation of the database and the other Section F.1.f. requirements* that constituted the legal compulsion on Claimants, not the allegedly discretionary decision to construct a municipal project in the first

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[104] 59 Cal.App.5th at 557.

[105] *Id.* at 558-59.

place. Claimants were legally compelled to perform the requirements in Section F.1.f., and the reference in the DPD (at 273) to "certain and severe penalties," one test for requirements that may be "practically compelled," is irrelevant.

Moreover, the question of how far the applicability of a determination that a requirement was discretionary, not mandated, should extend was raised by the Supreme Court in *San Diego Unified, supra.* There, the Court expressed concern regarding the scope of *City of Merced:*

> [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.

The Court cited *Carmel Valley, supra,* as an example of a case where a strict application of *City of Merced* would prohibit reimbursement for the costs of protective clothing and safety equipment because the local agency used its discretion to determine how many firefighters were needed to be employed. Yet in that case, a "new program" was found.[106] The Court concluded:

> 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.

33 Cal. 4th at 887-88 (emphasis supplied).

Here, the BMP tracking database requirements were unconnected to the original "initial discretionary decision" to build a municipal project that required those BMPs. The projects were built and the BMPs were installed. Section F.1.f. made the tracking of those BMPs mandatory, not discretionary. Claimants had *no* discretion as to whether to include their completed municipal projects in the database and otherwise follow the requirements of Section F.1.f. The Test Claim Permit compelled it. Extension of the *City of Merced* rule to such requirements is not appropriate.

8. The DPD Correctly Finds That Section J Mandates a New Program or Higher Level of Service.

Section J of the Test Claim Permit sets forth program effectiveness and reporting requirements. The DPD finds that many of these are new and constitute a new program or higher level of service. Claimants concur in the DPD's conclusion that the activities identified on pages 298-299 of the DPD are a state-mandated new program or higher level of service.

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[106] (1987) 190 Cal.App.3d 521, 534.

For the reasons set forth in Section III.C.5.c above, the Claimants do not concur in the conclusion that the program assessment and reporting obligations that were carried over from the 2002 Permit should not also be considered as new (DPD at 287-289). As addressed in Section III.C.5.c, Claimants were legally precluded from filing a test claim in the year following the adoption of the 2002 Permit and therefore the Test Claim Permit should not be compared to the 2002 with respect to those obligations in the 2002 Permit for determining if the obligations are new.

Claimants also would have no legal obligation to continue these assessments and this reporting but for the adoption of the Test Claim Permit. Because claimants would have no legal obligation to perform the program assessment or reporting that was carried over from the 2002 Permit but for the adoption of the Test Claim Permit, the inclusion of these additional requirements in the Test Claim Permit, thereby extending the time during which that assessment and reporting would be performed, constitutes a higher level of service.

9. Certain Requirements Imposed by Sections F.1.d.7.i., F.3.a.4.c., K.3.a. and Attachment D are State-Mandated New Programs or Higher Levels of Service

The DPD finds that certain requirements imposed by sections F.1.d.7.i, K.3.a. and Attachment D are state-mandated new programs or higher levels of service (DPD at 300-301). Claimants concur in that conclusion.

The DPD asserts that the activities required by section F.3.a.4.c. are not new, these being the evaluation of flood control devices to (1) identify whether they cause or contribute to a condition of pollution, (2) identify measures to reduce or eliminate the structures' effect on pollution, and (3) evaluate the feasibility of retrofitting the structural flood control devices. The DPD asserts that these requirements are not new because flood management projects and flood control devices were required to be evaluated under the federal regulations and Sections F.3.a.(3)(b)(ii) and F.3a.(4)(b)(i) of the 2002 Permit (DPD at 301-302, 306). This conclusion is incorrect.

Under the federal regulations and the 2002 Permit, flood management projects and flood control devices were to be evaluated only with respect to their threat to water quality and retrofitting. There was not, however, a requirement to identify measures to reduce or eliminate the structure's general effect on pollution.[107] It is erroneous, therefore, to conclude that the requirement to identify measures to reduce or eliminate the structure's effect on pollution was previously required. This requirement is new.

The DPD also finds that the new annual reporting requirements are not mandated for Claimants' own municipal projects on the grounds that these are not legally or practically compelled and therefore discretionary. The DPD makes this finding with respect to priority development projects *and all other municipal projects*. (DPD at 312 ("Nothing . . . imposes a legal obligation on local agencies to construct, expand, or improve municipal projects").

[107] See 2002 Permit, section F.3.a.(3)(a) and (b)(ii)

This assertion is unreasonable. It is essentially saying that Claimants, in providing for the health, safety and welfare of their citizens will never be required to build any building, a priority development project or not, or that the flood control district will never be required to build any flood control structure or device, that all such decisions are discretionary.

There is no evidence to support such a finding. The Commission is requested to and can take administrative notice that municipalities must have facilities to house their employees; they must have police and fire stations. As for flood control, a flood control district is charged with protecting property from flooding and must build flood control devices for that purpose. If a flood control district did not, it could be held liable under inverse condemnation principles. *See Arreola v. Cnty. of Monterey (2002)* 99 Cal.App.4th 722, 730, 737-739, 744-746 (intentional failure to maintain flood control infrastructure rendered counties liable for inverse condemnation). A flood control district is thus "practically compelled" to maintain and where necessary upgrade its facilities.[108]

Municipalities must maintain their facilities and given growth in communities expand or replace those facilities. To say that constructing and maintaining municipal facilities is always just discretionary is not based on fact. The assertion that all such projects are discretionary is erroneous.

10. Public Notice and Meeting Requirements (Permit Sections G.6 and K.1.b.4.n)

The DPD finds that public notice and meeting requirements to review and update the watershed work plan constitutes a state-mandated new program or higher level of service (DPD at 316, 321-324). Claimants concur in this finding.

IV. COMMENTS ON FUNDING SOURCES

The DPD concludes that, with regard to certain activities it identified as new state-required mandates in the Test Claim Permit, Claimants are not entitled to a subvention of funds under article XIII B, section 6 of the California Constitution. These conclusions are:

1. There is no substantial evidence in the record that Claimants were required to use "proceeds of taxes" to pay for the requirements at issue in the Test Claim;

2. Claimants had the authority to charge "regulatory fees" sufficient to pay for certain mandates; and

3. Beginning on January 1, 2018, the adoption of new California legislation cut off the ability of Claimants to seek a subvention of funds after that date for mandates fundable through property-related fees, by re-defining the term "sewer" in a statute interpreting terms in the state Constitution to include storm drains, and thereby expanding the categories of projects for which a fee may be imposed without a majority vote of approval.

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[108] See *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

Each of these conclusions is addressed below.

A. "Proceeds of Taxes" Were Used to Fund Test Claim Permit Requirements

The DPD concludes that the Test Claim failed to present "substantial evidence in the record" that Claimants have been forced to spend their local 'proceeds of taxes' on the new state-mandated activities, and, thus, Claimants "have not established they are compelled to rely on proceeds of taxes to pay for the new state-mandated activities, as required under *County of Fresno,* or have incurred increased costs mandated by the state within the meaning of Government Code section 17514." DPD at 335-336.

This is not correct. First, even putting aside the evidence in Claimants' declarations submitted to accompany the Test Claim indicating sources of funds, the Reports of Waste Discharge (ROWDs) from 2006 and 2014 (which the DPD employs to question Claimants' assertions as to funding sources) reflect that "proceeds of taxes" (in the form of general fund and gas tax revenue) were in fact used for significant percentages of the costs of stormwater programs in Orange County. DPD at 337 (reflecting that, respectively, approximately 54% and 41% of funding sources for County permittees constituted "proceeds of taxes," e.g., general fund and gas tax revenue).

In any event, it is not necessary that Claimants show that they were required to pay for *all* Test Claim requirements through "proceeds of taxes" to recover a subvention of funds under article XIII B, section 6. Govt. Code § 17556(d) provides that costs are not deemed mandated by the state to the extent the "local agency or school district has the authority to levy service charges, fees, or assessments *sufficient to pay* for the mandated program or increased level of service." (emphasis added). *If* there are such service charges, etc. available to supplement general fund revenue, it serves as an offset for the amount of the subvention, not a bar to subvention. *E.g., Clovis Unified School Dist. v. Chiang* (2010).[109] *See also* 2 Cal. Code Reg. § 1183.7(g)(4) (providing that offsets to claims for subvention include fee authority).

Moreover, the DPD itself notes that the amount in the 2006 ROWD "is not broken down by individual city permittees, or by program area." DPD at 337. The 2014 ROWD, while covering the permittees under the Test Claim Permit, also reflects no breakdown as to source of funding for any permittee. Thus, the DPD is speculating as to the source of funds utilized by Claimants to pay for the new mandates in the Test Claim Permit.[110] The extensive discussion in

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[109] 188 Cal. App. 4th 794, 812 n.8.

[110] The DPD also cites to the fact that one of the Test Claim Permittees, the City of San Clemente, adopted a stormwater fee in 2014, near the end of the term of the Test Claim Permit, and concludes that the city "has no costs mandated by the state pursuant to Government Code section 17556(d) during that time period." This conclusion represents further speculation. The City of San Clemente had no stormwater fee in effect for most of the Test Claim Permit's term. Moreover, the City is not a Claimant. Whether it in fact qualifies for a subvention of funds as a result of this Test Claim will depend on any showing it may make of facts showing its eligibility for reimbursement after the Commission has issued its decision on the Test Claim.

the DPD (at 336-340), based solely on the ROWDs' very general categories of funding sources, does not provide a basis for the DPD to question the sources of funding used by Claimants.[111]

B. There is Substantial Evidence that Claimants used "Proceeds of Taxes" to Fund the Obligations in the Test Claim Permit

In contrast, there is substantial evidence in the form of reports required by the Test Claim Permit to be filled out and submitted by Claimants to the San Diego Water Board as to the source of funds for Permit programs. That evidence is discussed next.

1. Permittees, including Claimants, Were Required to Identify the Source of Funding for Test Claim Permit Activities

The Test Claim Permit required, in Section H, that all permittees prepare and submit an "annual fiscal analysis" to the San Diego Water Board. In that fiscal analysis, each permittee was required to "conduct an annual fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs required by this Order." Test Claim Permit at Section H.2. Each permittee was, in this analysis, also required to include "a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds." Test Claim Permit at Section H.2.a. Permittees were then required to submit this analysis with their annual Jurisdictional Runoff Management Plan Report (JRMP) report (Annual Report). Test Claim Permit at Section H.3.

Section K.3 of the Test Claim Permit also required that the Annual Report contain "Information required to be reported annually in Section H (Fiscal Analysis)." Section K, which contains the reporting requirements in the Test Claim Permit, also included a "Universal Reporting Requirements" section in K.5. which required all submittals, including the JRMP Annual Report containing information on funding sources, to include a "signed certified statement" by the permittee. *Ibid.*

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[111] In particular, this discussion contains speculation that erroneously characterizes mandates law. In noting that funding data in the 2014 ROWD reflected slightly lower overall costs paid for by general fund and gas tax monies during Fiscal Year 2011-2012 as compared to FY 2004-2005, the DPD states that "only the *increase* in costs under the test claim permit is of concern in a test claim analysis." DPD at 340 (emphasis in original). This is incorrect. As the Commission itself has held, it is not the permit as a whole which is at issue in a Test Claim, but only those sections of that permit which represent new programs or higher levels of service: "The issues are whether the parts of the permit in the test claim are federal mandates or state mandates, and whether they are a new program or higher level of service." Statement of Decision, 07-T-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001,* at 40. This Test Claim in fact has identified specified provisions of the Test Claim Permit as containing such requirements, and the DPD has confirmed that certain of those requirements are, in fact, new mandated programs or higher levels of service. DPD at 325-330. To the extent that Claimants use proceeds of taxes for the costs of complying with those provisions, they qualify for a subvention of funds. Claimants are submitting herewith additional substantial evidence that the cost of complying with the Test Claim Permit, including necessarily the programs at issue in the Test Claim, were paid for by "proceeds of taxes." See discussion in Section IV.B.2., below.

There is thus evidence available in the form of certified Annual Reports by the permittees, filed each year with the San Diego Water Board, which set forth the sources of funding for Test Claim Permit requirements.

2. The Fiscal Analyses Provided by Claimants in their Annual Reports Reflect, in Many Cases, Nearly Complete Reliance on General Funds to Pay For Test Claim Permit Requirements

The DPD concludes that the Commission cannot approve reimbursement for Test Claim Permit requirements determined to be mandated new programs or higher levels of service because "the Commission cannot find that these activities resulted in costs mandated by the state and approve reimbursement because there is not substantial evidence in the record that the claimants were forced to use their proceeds of taxes to pay for these requirements. Unless that evidence is provided, this Test Claim is denied." DPD at 377. In this section, Claimants further provide that evidence.

Permittees either submitted their Annual Reports, which included the financial analyses along with the funding source description to the County of Orange, the Principal Permittee under the Test Claim Permit, through its Public Works Department (OC Public Works), or directly to the San Diego Water Board. (Declaration of Cindy Rivers ("Rivers Decl."), ¶ 6). Where the submittal was made to OC Public Works, that agency consolidated and forwarded the Annual Reports to the San Diego Water Board. (*Ibid.*). Where the permittee submitted their Annual Report directly to the Water Board, a copy was provided to OC Public Works. (*Ibid.*). The County maintains copies of such reports in its files and records, where they are maintained in the ordinary course of business. (*Ibid.*).

In addition, each Annual Report was accompanied by a "Signed Certified Statement." (Rivers Decl., ¶ 7). Examples of such a statement as signed by representatives of the Cities of Dana Point, Laguna Hills and Laguna Niguel are attached as Exhibit 1 to the Rivers Declaration. The language of the Signed Certified Statement recites as follows:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

(Rivers Decl., Exhibit 1).

To demonstrate that Claimants have, in fact, used "proceeds of taxes," excerpts of Annual Reports submitted by Claimants Cities of Dana Point, Laguna Hills and Laguna Niguel are attached as Exhibits 2-4 to the Rivers Declaration. (Rivers Decl., ¶ 8.) These excerpts (which, as set forth in the Rivers Declaration, were true and correct copies of documents retrieved from OC

Public Works files) reflect that for all fiscal years represented (2009-10 to 2014-15) those cities' source of funding for Test Claim Permit requirements was entirely or almost entirely general fund revenue. As the DPD agrees, this funding stream constitutes "proceeds of taxes." DPD at 338. The dates on these exhibits reflect, moreover, that they were prepared contemporaneously with the expenditures of the funds (e.g., filed within months of the end of the requisite fiscal years. Exhibits 2-4.) Further, the exhibits were prepared by public employees within the scope of their duties, e.g., the compliance by permittees with the Test Claim Permit, and were submitted with signed certification statements indicating that the signer was certifying under "penalty of law." (Rivers Decl., ¶ 7.)

This documentary evidence is reinforced by the Declarations of Lisa G. Zawaski, Joseph Ames, and Trevor Agrelius, on behalf of Claimants Cities of Dana Point, Laguna Hills and Laguna Niguel (filed herewith), in which the declarants identify the Annual Report exhibits for their respective cities and confirm that expenditures for Test Claim Permit requirements were funded entirely or almost entirely by general fund revenues over the time periods relevant to the Test Claim.[112]

Thus, in light of the evidence that Claimants have, in fact, used general fund revenue to fund requirements under the Test Claim Permit, Claimants have satisfied the requirement in the DPD that they provide evidence of the use of "proceeds of taxes" to pay for those requirements. In light of that evidence, the Commission should find that Claimants are entitled to a subvention of state funds for requirements determined to be mandated new programs or higher levels of service.

C. Authority to Impose Regulatory Fees

The DPD concludes (at 341-360) that Claimants have regulatory fee authority within the meaning of Govt. Code § 17556(d) to obtain funding for certain Test Claim Permit provisions identified in the DPD as constituting new state mandates. Claimants respond to those allegations next below.

1. Non-Applicability of Regulatory Fee Authority to Public Facilities and Activities

Claimants obviously cannot charge fees for their own projects, making it impossible to recover costs through development or other regulatory fees. With respect to various Test Claim Permit provisions at issue in the Test Claim, the DPD has concluded that public development projects covered by such provisions are "discretionary" and thus not mandated by the state. In response, Claimants have demonstrated in Section III above that such projects are not "discretionary" as being legally or practically compelled. In addition, ancillary requirements associated with public projects, such as reporting, inventorying and others, are mandatory for permittees. *See* discussions at Sections III.C.6, 7 and 9, above.

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[112] Moreover, as set forth in Mr. Ames' Declaration, he indicates that the figure of 22% of General Fund revenues for the City of Laguna Hills for Fiscal year 2011-2012 was incorrect, based on his review of underlying files and his personal knowledge of city financing for stormwater activities. Mr. Ames estimates that the City of Laguna Hills in fact used General Fund revenues to fund an estimated 76% of 2009 Permit costs during that fiscal year. Declaration of Joseph Ames, ¶ 9.

Claimants submit that the requirements of the following Test Claim Provisions, as they apply to their public facilities or projects,[113] are eligible for reimbursement:

- Section F.1.d.
- Section F.1.f.
- Section F.1.h.
- Section F.3.d.
- Section K.3.
- Annual reporting requirements in Attachment D.

2. Claimants Lack Regulatory Fee Authority For Numerous Test Claim Permit Provisions

The DPD concludes that, with respect to a number of Test Claim Permit provisions, Claimants had regulatory fee authority to charge third parties for the costs of such provisions. However, an examination of the provisions in question rebuts that conclusion.

Article XI, section 7 of the California Constitution provides that a municipality "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Courts have traditionally interpreted this power to authorize "valid regulatory fees."[114] This fee-setting power is, however, limited by California caselaw as well as amendments to the Constitution adopted through the initiative process in Propositions 218 and 26. *Dept. of Finance (LA County Permit Appeal II), supra,* outlines these limitations:

> A regulatory fee is valid "if (1) the amount of the fee does not exceed the reasonable costs of providing the services for which it is charged, (2) the fee is not levied for unrelated revenue purposes, and (3) the amount of the fee bears a reasonable relationship to the burdens created by the fee payers' activities or operations" or the benefits the fee payers receive from the regulatory activity. (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1046, citing *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 881).[115]

Additional restrictions are contained in Proposition 26 (incorporated into the California Constitution as article XIII C) which provides that any levy, charge or exaction of any kind imposed by a local government is a "tax," except the following:

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

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[113] As discussed next below, Claimants also lack regulatory fee authority to assess fees from private developments or projects for certain of these provisions because they involved reporting or other obligations unrelated to the construction or development of the projects.

[114] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662.

[115] 59 Cal.App.5th at 562.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

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

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

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

Cal. Const. article XIII C, section 1.

While these constitutional provisions and case law authorize some regulatory costs, such as those for inspections, to be recovered as fees, that authority is limited by the requirements of the Constitution. It is within that framework that Claimants respond to the conclusions in the DPD concerning their ability to assess regulatory fees on the Test Claim Permit provisions identified in the DPD at 365.

a. Retrofitting Provisions in Section F.3.d.

The DPD concludes, without discussion, that Claimants can assess regulatory fees to pay costs relating to the retrofitting of existing development (DPD at 356-358). But in such a situation, there is no property owner or developer upon which fees can be assessed to pay costs such as identifying and inventorying existing areas of development (Section F.3.d.1.); costs to "evaluate and rank" the inventoried areas to prioritize retrofitting (Section F.3.d.2.); or, costs to consider the results of the evaluation in prioritizing Claimant work plans for the following year. (Section F.3.d.3.).

None of these requirements is related to potential future private development (for which development fees can be obtained), but rather to how Claimants must evaluate *existing* developments.[116] And, as the Test Claim Permit expressly provided, the work required of Claimants was not intended to benefit or burden any particular parcel but to improve water quality generally by addressing "the impacts of existing development through retrofit projects

[116] In this way, the factual situation can be distinguished from that present in *Dept. of Finance (San Diego Permit Appeal II),* where the question related to how the costs of preparing LID and HMP documentation was to be allocated amongst future development projects. 85 Cal.App.5th at 586-95.

that reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharge of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards." Test Claim Permit, Section F.3.d.

Fees for requirements which "redound to the benefit of all" are not recoverable as regulatory fees. *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451. *Newhall County* held that a charge imposed by a water agency for creating "groundwater management plans" as part of the agency's groundwater management program could not be imposed as a fee. The court reasoned that the charge was "not [for] specific services the Agency provides directly to the [payors], and not to other [non-payors] in the Basin. On the contrary, groundwater management services redound to the benefit of all groundwater extractors in the Basin – not just the [payors]."[117] *See also Dept. of Finance (LA County Permit Appeal II), supra,* holding that placing trash receptacles at transit stops benefitted the "public at large"[118] and that associated costs could not be passed on to any particular person or group.[119]

b. BMP Maintenance Tracking in Section F.1.f.

Section F.1.f.1 of the Test Claim Permit required permittees to maintain a database of all projects with a structural post-construction BMP implemented since July 2001. The creation of the database provided permittees with a way to track such BMPs but did not itself provide a benefit to the owners/operators of those BMPs. Moreover, the requirement to include BMPs implemented starting in 2001, some nine years before the effective date of the Test Claim Permit, meant that permittees were unable to recover costs of entering those pre-Test Claim Permit BMPs on the database through the development process, if that were even possible.

Similarly, the requirements in Section F.1.f.2, requiring permittees to establish a "mechanism" to ensure that appropriate easements and ownerships are recorded in public records, and that the information is conveyed to all appropriate parties when there is a change in project or site ownership, is not related to any development project or inspection for which costs could be recovered. As such, those requirements represent a mandate whose costs cannot be recovered through regulatory fees.

3. Other Test Claim Permit Requirements as to Which Claimants Lack Regulatory Fee Authority

In Section III of these comments, Claimants have identified additional Test Claim Permit requirements which constitute state mandates. These are:

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[117] *Ibid.*

[118] 59 Cal.App.5th at 569.

[119] *See also* Calif. Const. article XIII D, section 6(b)(5), which prohibits fees "for general governmental services . . . where the service is available to the public at large in substantially the same manner as it is to property owners."

- Section B.2., removing categories of irrigation-related discharges from the list of exempt non-stormwater discharges.
- Sections C., F.4.d. and e., relating to NALs.
- Section D, relating to SALs.
- Section F.3.a.4.c., relating to the evaluation of flood control devices.
- Section I., relating to the Baby Beach Bacterial Indicator TMDL.

None of the costs of these requirements could be recovered as regulatory fees, as the provisions constitute property-related fees subject to the majority vote requirement in Calif. Const. article XIII D, section 6(c). Because of that voter approval requirement, the Commission has in past MS4 permit test claims determined that Claimants did not have the authority to charge or assess such fees as a matter of law. This determination was confirmed in the DPD. DPD at 374.

D. SB 231, Which Claims to "Correct" a Court's Interpretation of article XIII D, section 6 of the California Constitution, Misinterprets Proposition 218 and the Historical Record and Should Not Be Relied Upon by the Commission

Howard Jarvis Taxpayers Assn. v. City of Salinas (2002) 98 Cal.App.4th 1351 *("City of Salinas")* determined that the exclusion from the majority taxpayer vote requirement for property-related fees for "sewer services" in article XIII D, section 6(c) of the California Constitution, did not cover storm sewers or storm drainage fees.[120]

In 2017, fifteen years after *City of Salinas,* the Legislature enacted SB 231, which amended Govt. Code § 53750 to define the term "sewer" (which is contained in Calif. Const. article XIII D, section 6(c)):

> "Sewer" includes systems, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including lateral and connecting sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or works, drains, conduits, outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters. "Sewer system" shall not include a sewer system that merely collects sewage on the property of a single owner.

Govt. Code § 53750(k).

SB 231 also added Govt. Code § 53751, which sets forth findings as to the legislative intent in amending § 53750 to include storm sewers and drainage in the definition of "sewer." Section 53751 states that the Legislature intended to overrule *City of Salinas* because that court failed, among other things, to recognize that the term "sewer" had a "broad reach" encompassing the provision of clean water and then addressing the conveyance and treatment of dirty water, whether that water is rendered unclean by coming into contact with sewage or by flowing over the built-out human environment and becoming urban runoff." Govt. Code § 53751(h).

[120] 98 Cal.App.4th at 1358-359.

The Legislature also included a finding that "[n]either the words 'sanitary' nor 'sewerage' are used in Proposition 218, and the common meaning of the term 'sewer services' is not 'sanitary sewerage.' In fact, the phrase 'sanitary sewerage' is uncommon." Govt. Code § 53751(g). SB 231 further cites a series of pre-Proposition 218 statutes and cases which, the legislation asserts, "reject the notion that the term 'sewer' applies only to sanitary sewers and sanitary sewerage." Govt. Code § 53751(i). The DPD concludes that the adoption of SB 231, combined with the decision of the court in *Paradise Irrigation Dist. v. Commission on State Mandates*[121] renders any costs incurred by Claimants after January 1, 2018 (the effective date of SB 231) not eligible for reimbursement. DPD at 374.[122]

1. SB 231 Does Not Apply Retroactively

The DPD correctly concludes that the statutory provisions in SB 231 operate *prospectively* from January 1, 2018 and do not have retroactive effect. DPD at 375. This is in accord with the holding by the Third District Court of Appeal in *Dept. of Finance (San Diego Permit Appeal II).*[123]

2. The Plain Language and Structure of Proposition 218 Do Not Support SB 231's Definition of "Sewer" in Govt. Code § 53750

When it comes to the validity of any statute purporting to interpret the California Constitution, it is undisputed that the final word is left to the courts.[124] For this reason, the ultimate validity of SB 231 is not before the Commission. It would be error, however, for the Commission to cite SB 231 to deny Claimants a subvention of funds for costs expended after January 1, 2018. This is so because in seeking to overrule *City of Salinas,* SB 231 attempts to reinterpret the Constitution in contradiction of the intent of the voters when they adopted Proposition 218. Because the Constitution cannot be modified by a legislative enactment,[125] SB 231 is unconstitutional on its face, and should not be relied upon by the Commission.

SB 231 attempted to re-define the meaning of a Constitutional provision, article XIII D, section 6, through an amendment to the Proposition 218 Omnibus Implementation Act, Govt. Code § 53750 *et seq.* ("Implementation Act"). The Legislature made no attempt to define "sewer" when it adopted the original Act in 1997, nor in subsequent amendments prior to SB

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[121] (2019) 33 Cal.App.5th 205.

[122] The applicability of *Paradise Irrigation Dist.* to the Test Claim depends on whether SB 231 is valid. If it is not, as Claimants assert, a local government cannot assess a fee without it being subject to a majority vote.

[123] 85 Cal.App.5th at 577.

[124] *Cf. City of San Buenaventura v. United Water Conservation Dist.* (2017 Cal. 5th 1191, 1209 n.6 ("the ultimate constitutional interpretation must rest, of course, with the judiciary."); *see also County of Los Angeles v. Comm'n on State Mandates, supra,* 150 Cal.App.4th at 921 (overruling statute that purported to shield MS4 permits from article XIII B section 6 and holding that a "statute cannot trump the constitution.")

[125] *County of Los Angeles, supra,* 150 Cal.App.4th at 921.

231, which was adopted 21 years after passage of Proposition 218. Notably, the Legislature waited 15 years after the allegedly erroneous holding in *City of Salinas* to enact a "correction."

In Govt. Code § 53751(f), the Legislature found that *City of Salinas* "failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term "sewer." In so finding, the Legislature itself ignored these principles. In construing voter initiatives, courts are charged with determining the intent of the voters. *Professional Engineers in California Government v. Kempton* (2007) 40 Cal. 4th 1016, 1037. To ascertain that intent, courts turn first to the initiative's language, giving words their ordinary meaning as understood by "the average voter." *People v. Adelmann* (2018) 4 Cal. 5th 1071, 1080. The initiative must also be construed in the context of the statute as a whole and the scheme of the initiative. *People v. Rizo* (2000) 22 Cal. 4th 681, 685. In addition, if there is ambiguity in the initiative language, ballot summaries and arguments may be considered as well as reference to the contemporaneous construction of the Legislature. *Professional Engineers, supra;*[126] *Los Angeles County Transportation Comm. v. Richmond* (1982) 31 Cal.3d 197, 203.

In construing a statute or initiative, every word must be given meaning. *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, 617. If the Legislature (or the voters) use different words in the same sentence, it must be assumed that their intent was that the words have different meanings. *K.C. v. Superior Court* (2018) 24 Cal.App.5th 1001, 1011 n.4.

In the case of Proposition 218, the word "sewer" is used both in article XIII D, section 5 and in article XIII D, section 6. Section 5 exempts from the majority protest requirement in article XIII D, section 4 "[a]ny assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, *sewers*, water, flood control, *drainage systems* or vector control." Calif. Const. article XIII D, section 5(a) (emphasis added). There, the term "sewer" is set forth separately from "drainage systems," which the Legislature defined as "any system of public improvements that is intended to provide for erosion, control, for landslide abatement, or for *other types of water drainage."* Govt. Code § 53750(d) (emphasis added). Since both "sewer" and "drainage systems" (which refer to systems which drain stormwater, including storm sewers) are contained in the same sentence, it must be presumed that the voters intended that "sewer" mean something other than "public improvements . . . intended to provide for . . . other types of water drainage."

The word "sewer," but not the term "drainage systems" appears in article XIII D, section 6. A longstanding principle of statutory construction is that when language is included in one portion of a statute, "its omission from a different portion addressing a similar subject suggests that the omission was purposeful." *E.g., In re Ethan C* (2012) 54 Cal. 4th 610, 638. In *Richmond v. Shasta Community Services Dist.,* the Supreme Court used this tool to analyze article XIII D to determine if a capacity charge and a fire suppression charge imposed by a water district were "property related":

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[126] 40 Cal. 4th at 1037.

> Several provisions of article XIII D tend to confirm the Legislative Analyst's conclusion that charges for utility services such as electricity and water should be understood as charges imposed "as an incident of property ownership." For example, subdivision (b) of section 3 provides that 'fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership' under article XIII D. Under the rule of construction that the expression of some things in a statute implies the exclusion of other things not expressed (*In re Bryce C.* (1995) 12 Cal.4th 226, 231), the expression that electrical and gas service charges are not within the category of property-related fees implies that similar charges for other utility services, such as water and sewer, are property-related fees subject to the restrictions of article XIII D."[127]

A similar analysis of Article XIII D supports the conclusion that the voters' intent was that "sewers" referred to sanitary sewers, not storm drainage systems. As noted above, the municipal infrastructure listed in article XIII D, section 5 includes both "sewers" and "drainage systems." By contrast, article XIII D, section 6(c) refers only to "sewer" in exempting from the majority vote requirement "sewer, water and refuse collection services." Given that another section of the proposition specifically called out "drainage systems" as different from "sewers," the absence of the former term requires that it be presumed that the voters understood "sewer" or "sewer services" in section 6(c) to be limited to sanitary sewers. This was the holding in *Dept. of Finance (San Diego Permit Appeal II).*[128]

The proponents of Proposition 218 also expressed an intent that it "be construed liberally to curb the rise in 'excessive' taxes, assessments, and fees exacted by local governments without taxpayer consent."[129] Any interpretation of the breadth of the meaning of the exception for "sewer services" must therefore take that intent into account and interpret exceptions to limits on the taxing or fee power narrowly.[130]

Thus, the unambiguous, plain meaning of article XIII D, section 6(c) is that the term "sewer" or "sewer services" pertains only to sanitary sewers and not to MS4s. In attempting to expand the facilities and services covered by this term, SB 231 is an invalid modification of Proposition 218 that seeks to override voter intent. SB 231 does not provide authority to bar Claimants from seeking a subvention of funds for costs incurred after January 1, 2018.

While resort to interpretive aids is not required when the meaning of a statutory term is clear, SB 231 justifies its amendment of Govt. Code § 53750 by asserting that "[n]umerous sources predating Proposition 218 reject the notion that the term "sewer" applies only to sanitary sewers and sanitary sewerage." Govt. Code § 53751(i). These include:

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[127] (2004) 32 Cal. 4th 409, 427.

[128] 85 Cal.App.5th at 568.

[129] *City of Salinas,* 98 Cal. App. 4th at 1357-58.

[130] *Ibid.*

(a) Pub. Util. Code § 230.5: This statute is referenced[131] as the source for the "definition of 'sewer' or 'sewer service' that should be used in the Implementation Act. It defines "sewer system" to include both sanitary and storm sewers and appurtenant systems. However, this is an isolated statutory example and is found in a section of the Public Utilities Code dealing with *privately* owned sewer and water systems regulated by the Public Utilities Commission,[132] and not a "system of public improvements that is intended to provide . . . for other types of water drainage." Govt. Code § 53750(d). Such small systems may well serve both as a sanitary and storm system, but they are not typical of the MS4 systems being regulated by the Test Claim Permit or of the public projects that Proposition 218 was written to address. Moreover, the fact that the statute goes to the effort to define "sewer system" to include both sanitary and storm sewers shows that, without such an explicit definition, the tendency would be to consider only sanitary sewers to fall under the definition of "sewer."

(b) Govt. Code § 23010.3. This statute[133] relates to the authorization for counties to spend money for the construction of certain conveyances, and defines those conveyances as "any sanitary sewer, storm sewer, or drainage improvements . . ." This does not further the arguments made in SB 213, since the statutory language calls out "sanitary sewer," "storm sewer" and "drainage improvements" as separate items, and also contradicts the statement in Govt. Code § 53751(g) that the phrase "sanitary sewerage" is uncommon. The similar phrase "sanitary sewer" is commonly found, as noted here and discussed below.

(c) The Street Improvement Act of 1913: Govt. Code § 53751(i)(3) references only to the name of this statute, Streets & Highways Code §§ 10000-10706, but cites no section supporting SB 231's interpretation of Proposition 218. Moreover, within this Act, Streets & Highways Code § 10100.7, which allows a municipality to establish an assessment district to pay for the purchase of already constructed utilities, separately defines "water systems" and "sewer systems," with the latter being defined to be limited to sanitary sewers: "sewer system facilities, including sewers, pipes, conduits, manholes, treatment and disposal plants, connecting sewers and appurtenances for providing sanitary sewer service, or capacity in these facilities . . . ." *Ibid.*

(d) *Los Angeles County Flood Cont. Dist. v. Southern Cal. Edison Co.* (1958) 51 Cal. 2d 331 is cited[134] for the proposition that the California Supreme Court "stated that 'no distinction has been made between sanitary sewers and storm drains or sewers.'" This case involved Edison obligation to pay to relocate its gas lines to allow construction of District storm drains. In stating that there was no distinction (as to the payment obligation) between sanitary sewers and storm drains or sewers, the Court was not commenting on whether a "sewer" *qua* "sewer" necessarily filled both sanitary and storm functions. And, again, the Court distinguished between "sanitary sewers" and "storm drains or sewers" in the language of the opinion.[135]

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[131] Govt. Code § 53751(i)(1)

[132] *See* Pub. Util. Code § 230.6, defining "sewer system corporation" to include "every corporation or person owning, controlling, operating, or managing any sewer system for compensation within this state."

[133] Cited in Govt. Code § 53751(i)(2).

[134] Cited in Govt. Code § 53751(i)(4)

[135] 51 Cal. 2d at 34.

(e) *County of Riverside v. Whitlock* (1972) 22 Cal.App.3d 863, *Ramseier v. Oakley Sanitary Dist.* (1961) 197 Cal.App.2d 722, and *Torson v. Fleming* (1928) 91 Cal. App. 168. These cases are cited in Govt. Code § 53751(i)(5) as examples of "[m]any other cases where the term 'sewer' has been used interchangeably to refer to both sanitary and storm sewers." However, the holdings in these cases are more limited. *County of Riverside* refers to "sewer" only in a footnote, which quotes from an Interim Assembly Committee Report discussing public improvements including "streets, storm and sanitary sewers, sidewalks, curbs, etc."[136] However, in another footnote, quoting Street & Highways Code § 2932 regarding assessments for public improvements, the phrase "sewerage *or* drainage facilities" is employed, again reflecting a distinction between these functions and assigning the function of sanitary services to "sewerage."[137]

Ramseier involved a dispute over a contract to expand the district's "storm and sanitary sewer system." [138] This was the only reference to "sewers" in the case, and that reference distinguishes between "storm" and "sanitary" sewers.

The rationale for citation to *Torson* is unclear, though the case involved a requested extension of a sanitary sewer, and the statutes cited in the case referred, separately, to both "sanitary" and "storm" sewers.[139] While these cases present only limited examples of how the terms "storm sewer" or "sanitary sewer" were employed, it is clear that in all, a distinction was drawn between sanitary sewers and storm sewers.

3. There is Significant Evidence that the Legislature and the Courts Considered "Sewers" to be Different from "Storm Drains" Prior to the Adoption of Proposition 218

There are numerous examples in pre-Proposition 218 California statutes and case law of the term "sewer" being used to denote sanitary sewers and not public storm water systems. For example, Education Code § 81310, in referring to the power of a community college board to convey an easement to a utility, refers to "water, *sewer*, gas, or *storm drain* pipes or ditches, electric or telephone lines, and access roads." (emphasis added). There is no ambiguity in this statute – the "sewer" being referred cannot be a storm sewer, as "storm drain" pipes are specifically referenced.[140]

Another example is Govt. Code § 66452.6, relating to the timing of extensions for subdivision tentative map act approval, and defining "public improvements" to include "traffic controls, streets, roads, highways, freeways, bridges, overcrossings, street interchanges, *flood control or storm drain facilities*, *sewer facilities*, water facilities, and lighting facilities."[141]

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[136] 22 Cal.App.3d at 874 n.9.

[137] 22 Cal.App.3d at 869 n.8 (emphasis supplied).

[138] 197 Cal.App.2d at 723.

[139] 91 Cal. App. at 172.

[140] *K.C., supra,* 24 Cal.App.5th at 1011 n.4 (when Legislature uses different words in the same sentence, it is assumed that it intended the words to have different meanings).

[141] Govt. Code § 66452.6(a)(3) (emphasis added).

Again, there is no ambiguity; the Legislature separately distinguished "flood control or storm drain facilities" from "sewer facilities," with the latter taking on the same meaning ascribed to it in *City of Salinas.*

Similarly, Health & Safety Code § 6520.1 provides that a sanitary district can prohibit a private property owner from connecting "any house, habitation, or structure requiring *sewerage or drainage* disposal service to any privately owned *sewer* or *storm drain* in the district." Again, the Legislature used "sewer" here as a sanitation utility separate and apart from drainage. This practice of defining "sewer" as a sanitary utility distinct from "storm drain" has continued after the adoption of Proposition 218. In Water Code § 8007, effective May 21, 2009, the Legislature made the extension of certain utilities into disadvantaged unincorporated areas subject to the prevailing wage law, and defined those utilities as the city's "water, *sewer, or storm drain* system." (emphasis added).

Courts, too have used the term "sewer" to mean a sanitary sewer handling sewage as opposed to storm drains. For example, in *E.L. White, Inc. v. Huntington Beach* (1978) 21 Cal.3d 497, the Supreme Court used the terms "storm drain" and "sewer" separately in discussing the liability of the city and a contractor for a fatal industrial accident. Also, in *Shea v. Los Angeles* (1935) 6 Cal.App.2d 534, 535-36, the court referred to the "sanitary sewer" and "sewers" in addition to a "storm drain." In *Boynton v. City of Lockport Mun. Sewer Dist.* (1972) 28 Cal.App.3d 91, 93-96, the court discussed whether "sewer rates" were properly assessed by the city, and in that case, the court consistently used the term "sewer" to refer to sanitary sewers handling sewage.

These examples demonstrate that there was no "plain meaning" of "sewer" as a term that encompassed both sanitary and storm sewers. In fact, as the Third District Court of Appeal held in *Dept. of Finance (San Diego Permit Appeal II)*, the term was understood by the voters to mean solely sanitary sewers.

Thus, there is significant evidence, in the language of the ballot measure itself, in the interpretation courts are required to give to the measure, and in the prevailing legislative and judicial usage of the term "sewer," to find that the voters on Proposition 218 intended the result found by the court in *City of Salinas.* As such, SB 231 is an unconstitutional attempt by the Legislature to rewrite article XIII D and should not be relied upon by the Commission to refuse a subvention of funds for the costs of unfunded state mandates in the Test Claim Permit incurred after January 1, 2018.

V. CONCLUSION

Claimants respectfully request that the Commission consider the arguments set forth in these Comments and modify the Proposed Decision accordingly. Claimants appreciate this opportunity to provide these comments on the DPD.

I declare under penalty of perjury that the foregoing, signed on August 25, 2023, is true and correct to the best of my personal knowledge, information, or belief.

BURHENN & GEST LLP
HOWARD GEST
DAVID W. BURHENN

By: _____
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Claim Representative
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DECLARATIONS, EXHIBITS AND EVIDENCE IN SUPPORT OF CLAIMANTS' COMMENTS ON DRAFT PROPOSED DECISION, *CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO. R9-2009-0002*, 10-TC-11

CERTIFIED MINUTE ORDER, ORANGE COUNTY BOARD OF SUPERVISORS, MARCH 22, 2011, INCLUDING ATTACHED AGENDA STAFF REPORT AND ORDINANCE NOS. 11-009 AND 11-010

ORANGE COUNTY BOARD OF SUPERVISORS

Acting as the Board of Supervisors and Orange County Flood Control District

MINUTE ORDER

March 22, 2011

Submitting Agency/Department: OC PUBLIC WORKS

Consider second reading and adoption of "An Ordinance of the County of Orange, California, Amending Articles 1 Through 9 of Title 4, Division 13 Regarding Water Quality" and "An Ordinance of the Orange County Flood Control District, California, Amending Articles 1 Through 9 of Title 9, Division 1 Regarding Water Quality" - All Districts (Continued first reading from 2/1/11, Item 17 and 2/8/11, Item 34; 3/15/11, Item 35)

The following is action taken by the Board of Supervisors:

APPROVED AS RECOMMENDED ☒ OTHER ☐

Unanimous ☒ (1) NGUYEN: **Y** (2) MOORLACH: **Y** (3) CAMPBELL: **Y** (4) NELSON: **Y** (5) BATES: **Y**
Vote Key: Y=Yes; N=No; A=Abstain; X=Excused; B.O.=Board Order

Documents accompanying this matter:

☐ Resolution(s)
☒ Ordinances(s) 11-009 - 11-010
☐ Contract(s)

Item No. 42

Special Notes:

Copies sent to:
CEO
CoCo: Shalaine Aguayo
OCPW: Mary Anne Skorpanich
Eric Swint

3-28-11

I certify that the foregoing is a true and correct copy of the Minute Order adopted by the Board of Supervisors, Acting as the Board of Supervisors and Orange County Flood Control District, Orange County, State of California.
DARLENE J. BLOOM, Clerk of the Board

By: _____
Deputy

Agenda Item

AGENDA STAFF REPORT

ASR Control 10-001604

MEETING DATE:	02/01/11
LEGAL ENTITY TAKING ACTION:	Board of Supervisors and Orange County Flood Control District
BOARD OF SUPERVISORS DISTRICT(S):	All Districts
SUBMITTING AGENCY/DEPARTMENT:	OC Public Works (Approved)
DEPARTMENT CONTACT PERSON(S):	Mary Anne Skorpanich (714) 955-0601
	Chris Crompton (714) 955-0630

SUBJECT: Water Quality Ordinances Update

CEO CONCUR	COUNTY COUNSEL REVIEW	CLERK OF THE BOARD
Concur	Approved Ordinance to Form	Discussion 3 Votes Board Majority

Budgeted: N/A **Current Year Cost:** N/A **Annual Cost:** N/A

Staffing Impact: No **# of Positions:** **Sole Source:** N/A
Current Fiscal Year Revenue: N/A
Funding Source: N/A

Prior Board Action: December 15, 2009; October 26, 2004; March 4, 2003; July 22, 1997

RECOMMENDED ACTION(S):

1. In accordance with Section 21080(c) of the Public Resources Code and CEQA Guidelines Section 15074, the decision-maker has considered Negative Declaration IP02-215, previously adopted on March 4, 2003, and Addendum IP10-346 prior to project approval. Approve IP02-215 and IP10-346 as environmental documentation for the proposed project based on the following findings:

   a. together, these documents are adequate to satisfy the requirements of CEQA;

   b. the additions, clarifications, and/or changes to the original document caused by the Addendum do not raise new significant issues that were not addressed by the Negative Declaration; and

   c. consideration of the Negative Declaration and the approval of the Addendum for the proposed project reflect the independent judgment of the decision-maker.

2. Read the title of the Ordinances.

3. Order further reading of the Ordinances be waived.

4. Direct Ordinances be placed on the agenda of the next regularly scheduled Board meeting for adoption.

5. At the next regularly scheduled Board meeting, consider and adopt the proposed Ordinances.

SUMMARY:

Adoption of the proposed Water Quality Ordinances of the County of Orange and the Orange County Flood Control District will ensure regulatory compliance and protect water quality.

BACKGROUND INFORMATION:

Changes to the Water Quality Ordinances (Ordinances) are needed to conform with new regulatory requirements. The purpose of the Ordinances is to set forth regulations as mandated by the Clean Water Act and National Pollutant Discharge Elimination System (NPDES) permits to (a) effectively prohibit non-stormwater discharges into the County's and the Orange County Flood Control District's (District) drainage systems and (b) reduce the discharge of pollutants out of those drainage systems to the maximum extent practicable.

Human activities, such as agriculture, construction, and the operation and maintenance of urban infrastructure generate a number of pollutants that are carried by stormwater and runoff into storm drains and flood control channels that eventually may be deposited in the waters of the State of California and waters of the United States. The Santa Ana and San Diego Regional Water Quality Control Boards regulate the quality of stormwater and runoff in Orange County through the issuance of NPDES permits. The County of Orange, the District, and the 34 cities of Orange County are jointly regulated under the same permits that are reissued approximately every five years.

The NPDES permits require that each permittee have adequate legal authority to implement and enforce the requirements in the permits. The Ordinances also provide means of regulating discharges, such as a County-issued or District-issued permit. The original Ordinances, Ordinance No. 3987 for the County (Orange County Codified Ordinances, Title 4, Division 13, Sections 4-13-10 et seq.) and Ordinance No. 3988 for the District (Orange County Codified Ordinances, Title 9, Division 1, Sections 9-1-10 et seq.), were enacted on July 22, 1997 to comply with these regulatory and permit requirements so as to give the County the authority to improve water quality by controlling non-allowable discharges into storm drains and flood control channels and reduce pollutants.

On March 4, 2003, your Board approved amendments to County Ordinance No. 3987 based on new requirements in NPDES permits issued in 2002. On October 26, 2004, your Board approved further amendments to County Ordinance No. 3987 to regulate the washing and waxing of aircraft on Airport property; regulate the disposal of wash and wax fluids and other non-stormwater discharges; designate the Director of John Wayne Airport as the Authorized Inspector and enforcer of water quality regulations on Airport property; and grant other necessary powers and functions over Airport property.

New NPDES stormwater permits adopted in 2009 by the Santa Ana and San Diego Regional Water Quality Control Boards require a re-assessment of the current Ordinances. Under federal and state law, storm drains and flood control channels generally can only be used to transport stormwater. In addition to stormwater, there are certain enumerated categories of non-stormwater that can be discharged into the County's storm drains and flood control channels. These permitted non-stormwater categories are commonly referred to as Discharge Exceptions and are specified in the NPDES permits. The San Diego Regional Board made changes to the Discharge Exceptions in the most recent NPDES permit. Six categories of Discharge Exceptions that were permitted in previous permits were determined to be

significant sources of pollution. Because these categories of discharges are no longer allowable under the current NPDES permit, the Ordinances needs to be updated accordingly. Consequently, the following Discharge Exceptions in the Ordinances are no longer allowed under the current San Diego Region NPDES permit:

A. sewage spills managed by a public agency;

B. runoff from landscape irrigation systems or lawn watering;

C. non-stormwater runoff from building roofs;

D. irrigation runoff from agriculture;

E. runoff from street wash water; and

F. discharges of reclaimed water from a treatment or reclamation plant.

The San Diego Region NPDES permit specifically identified runoff from excessive public and private landscape and lawn irrigation as a "conveyance of pollutants" that needed to be prevented and effectively prohibited. Provisions for runoff from irrigation follow the County's Landscape Irrigation Ordinance amendment (affecting Sections 3-13-7, 7-9-77.8, 7-9-78.8, 7-9-79.8, 7-9-132.2, and 7-9-133 of the Codified Ordinances of the County) adopted through a separate action on December 15, 2009.

The Landscape Irrigation Ordinance regulates methods for conserving water and reducing runoff from newly installed landscaping. More specifically, it requires that irrigation of all landscaped areas shall be conducted in a manner conforming to the rules and requirements of the local water purveyor and be subject to their penalties for wasting water. During the last two years, the water purveyors in Orange County have adopted their own rule prohibitions against excessive water flow or runoff from irrigation or hardscape cleaning onto adjoining sidewalks, streets, alleys, and gutters. The revised recommended Ordinances will regulate the runoff from existing landscape irrigation systems, lawn watering, and agriculture.

Seven categories of discharges are still exempt from regulation by the San Diego Region NPDES permit, as shown in the table below:

A. discharges composed entirely of stormwater;

B. discharges authorized by current EPA or Regional Water Quality Control Board issued NPDES permits, State General Permits, or other waivers, permits, or approvals granted by a government agency with jurisdiction over such discharges;

C. stormwater discharges from property for which best management practices set forth in the Orange County Stormwater Program's compliance program documents are being implemented and followed;

D. discharges to the Stormwater Drainage System from:

a. diverted stream flows

b. rising ground waters

c. groundwater uncontaminated by sewage

d. uncontaminated pumped groundwater

e. foundation drains

f. springs

g. water crawl space pumps

h. footing drains

i. air conditioning condensation

j. flows from riparian habitats and wetlands

k. water line flushing, except for fire suppression sprinkler system maintenance and testing discharges

l. potable water sources, except to the extent such discharges are subject to but not in compliance with State General Permits or other general permits issued by the Regional Water Quality Control Board

m. non-commerical car washing

n. dechlorinated swimming pools

o. emergency fire fighting activities

p. runoff from landscape, lawn and agricultural irrigation allowed by the NPDES Permit applicable to that portion of the Stormwater Drainage System in which the discharge occurs

E. discharges authorized pursuant to a permit issued under Article 6 of the Ordinances;

F. stormwater discharges for which the discharger has reduced to the maximum extent practicable the amount of Pollutants in such discharge; and

G. discharges authorized pursuant to Federal or State laws or regulations.

The proposed amendments to the Ordinances also contain a number of non-substantive changes intended to conform terminology to the County's current organizational structure as well as to correct formatting errors.

Compliance with CEQA: Negative Declaration No. IP02-215 previously adopted on March 4, 2003 and Addendum IP 10-346 are complete and adequate to satisfy the requirements of CEQA and are both approved for this project.

FINANCIAL IMPACT:

N/A

STAFFING IMPACT:

N/A

EXHIBIT(S):

Exhibit A- Proposed County Ordinance Markup
Exhibit B- Proposed Flood District Ordinance Markup

ATTACHMENT(S):

Attachment A - Proposed County Ordinance
Attachment B - Proposed Flood Control District Ordinance

ORDINANCE NO. 11-009

AN ORDINANCE OF THE COUNTY OF ORANGE, CALIFORNIA, AMENDING ARTICLES 1 THROUGH 9 OF TITLE 4, DIVISION 13 REGARDING WATER QUALITY

The Board of Supervisors of the County of Orange ordains as follows:

SECTION 1. Sections 4-13-10 through 4-13-110 of Title 4, Division 13 of the Codified Ordinances of the County of Orange are hereby amended to read as follows:

Sec. 4-13-10. Adoption of the Water Quality Ordinance.

Pursuant to Article XI, Section 7 of the State Constitution, which authorizes the County to exercise the police power of the State by adopting regulations promoting the public health, public safety and general prosperity, and in compliance with the conditions of the National Pollution Discharge Elimination System Permit ("NPDES Permit"), there is hereby adopted a Water Quality Ordinance.

Sec. 4-13-20. Purpose.

The purpose of the Water Quality Ordinance is to prescribe regulations as mandated by the Clean Water Act [33 U.S.C. §. 1251 et seq., as amended] to effectively prohibit non-stormwater discharges into the storm sewers and to reduce the discharge of pollutants. Human activities, such as agriculture, construction and the operation and maintenance of an urban infrastructure may result in undesirable discharges of pollutants and certain sediments, which may accumulate in local drainage channels and waterways and eventually may be deposited in the waters of the United States. This Ordinance will improve water quality by controlling the pollutants which enter the network of storm drains throughout Orange County.

Sec. 4-13-30. Definitions

(a) *Authorized Inspector* shall mean the person designated by the Director of OC Public Works, or Building Official, or Director, John Wayne Airport and persons designated by the Authorized Inspector(s) as investigators and under his/her instruction and supervision, who are assigned to investigate compliance and detect violations of this Ordinance.

(b) *County* shall mean the County of Orange, California.

(c) Co-*permittee* shall mean the County of Orange, the Orange County Flood Control District, and all the municipalities within Orange County which are responsible for compliance with the terms of the NPDES Permit.

(d) *DAMP* shall mean the Orange County Drainage Area Management Plan, as the same may be amended from time to time.

(e) *Development Project Guidance* shall mean DAMP Section 7 and the Local Implementation Plan Section A-7 and the exhibits attached thereto (including the Model Water Quality Management Plan), and all subsequent amendments thereto.

(f) *Discharge* shall mean any release, spill, leak, pump, flow, escape, leaching (including subsurface migration or deposition to groundwater), dumping or disposal of any liquid, semi-solid or solid substance.

(g) *Discharge Exception* shall mean the group of activities not restricted or prohibited by this Ordinance, including only:

(1) Discharges composed entirely of stormwater;

(2) Discharges authorized by current EPA or Regional Water Quality Control Board issued NPDES permits, State General Permits, or other waivers, permits or approvals granted by a government agency with jurisdiction over such discharges;

(3) Stormwater discharges from property for which best management practices set forth in the Development Project Guidance and LIPs are being implemented and followed;

(4) Discharges to the Stormwater Drainage System from:

a) Diverted stream flows;

b) Rising ground waters;

c) Infiltration to MS4s of groundwater uncontaminated by sewage;

d) Uncontaminated pumped groundwater;

e) Foundation drains;

f) Springs;

g) Water from crawl space pumps;

h) Footing drains;

i) Air conditioning condensation;

j) Flows from riparian habitats and wetlands;

k) Water line flushing, except for fire suppression sprinkler system maintenance and testing discharges. If any discharges that fall within this exception are subject to State or Regional Water Quality Control Board permits, they are exempt only if the discharger is in compliance with said permits.

l) Potable water sources, except to the extent such discharges are subject to but not in compliance with State General Permits or other general permits issued by the Regional Water Quality Control Board;

m) Non-commercial car washing;

n) Dechlorinated swimming pools;

o) Emergency fire fighting activities;

p) Runoff from landscape, lawn and agricultural irrigation allowed by the NPDES Permit applicable to that portion of the Stormwater Drainage System in which the discharge occurs.

(5) Discharges authorized pursuant to a permit issued under Article 6 of this Division;

(6) Stormwater discharges for which the discharger has reduced to the maximum extent practicable the amount of Pollutants in such discharge; and

(7) Discharges authorized pursuant to federal or state laws or regulations. In any action taken to enforce this Division, the burden shall be on the Person who is the subject of such action to establish that a Discharge was within the scope of this Discharge exception.

(h) *Enforcing Attorney* shall mean the District Attorney acting as counsel to the County or his/her designee, which person is authorized to take enforcement or other actions as described herein. For purposes of criminal prosecution, only the District Attorney or his/her designee shall act as the Enforcing Attorney.

(i) *EPA* shall mean the Environmental Protection Agency of the United States of America.

(j) *Hearing Officer* shall mean the person designated by the Director, OC Public Works, or Building Official, or Director, John Wayne Airport who shall preside at the administrative hearings authorized by this Ordinance and issue final decisions on matters raised therein.

(k) *Illicit Connection* shall mean any man-made conveyance or drainage system, pipeline, conduit, inlet or outlet, through which the discharge of any pollutant to the stormwater drainage system occurs or may occur. The term "illicit connection" shall not include legal nonconforming connections or connections to the stormwater drainage system that are hereinafter authorized by the agency with jurisdiction over the system at the location at which the connection is made.

(l) *Invoice for Costs* shall mean the actual costs and expenses of the County, including but not limited to administrative overhead, salaries and other expenses recoverable under State law, incurred during any inspection conducted pursuant to Article 2 of this division, or where a notice of noncompliance, administrative compliance order or other enforcement option under Article 5 of this division is utilized to obtain compliance with this division.

(m) *Legal Nonconforming Connection* shall mean connections to the stormwater drainage system existing as of the adoption of this division that were in compliance with all federal, state and local rules, regulations, statutes and administrative requirements in effect at the time the connection was established, including but not limited to any discharge permitted pursuant to the terms and conditions of an individual discharge permit issued pursuant to the Industrial Waste Ordinance, County Ordinance No. 703.

(n) *Local Implementation Plan* or *"LIP"* shall mean the County adopted plan for implementation of the NDPES Permit, as may be amended from time to time.

(o) *New Development* shall mean all public and private residential (whether single family, multi-unit or planned unit development), industrial, commercial, retail, and other nonresidential construction projects, or grading for future construction, for which either a discretionary land use approval, grading permit, building permit or nonresidential plumbing permit is required.

(p) *Nonresidential Plumbing Permit* shall mean a plumbing permit authorizing the construction and/or installation of facilities for the conveyance of liquids other than stormwater, potable water, reclaimed water or domestic sewage.

(q) *NPDES Permit* shall mean the currently applicable municipal discharge permit(s) issued by the Regional Water Quality Control Board, Santa Ana and San Diego Regions, which establish waste discharge requirements applicable to storm runoff within the County. John Wayne Airport premises are entirely within the jurisdiction of the Santa Ana Region.

(r) *Person* shall mean any natural person as well as any corporation, partnership, government entity or subdivision, trust, estate, cooperative association, joint venture, business entity, or other similar entity, or the agent, employee or representative of any of the above.

(s) *Pollutant* shall mean any liquid, solid or semi-solid substances, or combination thereof, including and not limited to:

(1) Artificial materials (such as floatable plastics, wood products or metal shavings).

(2) Household waste (such as trash, paper, and plastics; cleaning chemicals, yard wastes, animal fecal materials, used oil and fluids from vehicles, lawn mowers and other common household equipment).

(3) Metals and nonmetals, including compounds of metals and nonmetals (such as cadmium, lead, zinc, copper, silver, nickel, chromium, cyanide, phosphorus and arsenic) with characteristics which cause an adverse effect on living organisms.

(4) Petroleum and related hydrocarbons (such as fuels, lubricants, surfactants, waste oils, solvents, coolants and grease).

(5) Animal wastes (such as discharge from confinement facilities, kennels, pens, and recreational facilities, including, stables, show facilities, and polo fields).

(6) Substances having a pH less than 6.5 or greater than 8.6, or unusual coloration, turbidity or odor.

(7) Waste materials and wastewater generated on construction sites and by construction activities (such as painting and staining; use of sealants and glues; use of lime; use of wood preservatives and solvents; disturbance of asbestos fibers, paint flakes or stucco fragments; application of oils, lubricants, hydraulic, radiator or battery fluids; construction equipment washing, concrete pouring and cleanup; use of concrete detergents; steam cleaning or sand blasting; use of chemical degreasing or diluting agents; and use of super chlorinated water for potable water line flushing).

(8) Materials causing an increase in biochemical oxygen demand, chemical oxygen demand or total organic carbon.

(9) Materials which contain base/neutral or acid extractable organic compounds.

(10) Those pollutants defined in Section 1362(6) of the Federal Clean Water Act; and

(11) Any other constituent or material, including but not limited to pesticides, herbicides, fertilizers, fecal coliform, fecal streptococcus or enterococcus, or eroded soils, sediment and particulate materials, in quantities that will interfere with or adversely affect the beneficial uses of the receiving waters, flora or fauna of the State.

(t) *Prohibited Discharge* shall mean any discharge, which contains any pollutant, from public or private property to (1) the stormwater drainage system; (2) any upstream flow, which is tributary to the stormwater drainage system; (3i) any groundwater, river, stream, creek, wash or dry weather arroyo, wetlands area, marsh, coastal slough, or (4) any coastal harbor, bay, or the Pacific Ocean. The term "prohibited discharge" shall not include discharges allowable under the discharge exception.

(u) *Significant Redevelopment* shall mean the rehabilitation or reconstruction of public or private residential (whether single family, multi-unit or planned unit development), industrial, commercial, retail, or other nonresidential structures, for which either a discretionary land use approval, grading permit, building permit or Nonresidential Plumbing Permit is required.

(v) *State General Permit* shall mean either the Waste Discharge Requirements for Discharges of Stormwater Associated With Industrial Activities Excluding Construction Activities Permit (State Industrial General Permit) or the National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges Associated With Construction and Land Disturbance Activities (State Construction General Permit) or any other State general permit that has been or will be adopted and the terms and requirements of any such permit. In the event the U.S. Environmental Protection Agency revokes the in-lieu permitting authority of the State Water Resources Control Board, then the term State General Permit shall also refer to any EPA administered stormwater control program for industrial and construction activities.

(w) *Stormwater Drainage System* shall mean street gutter, channel, storm drain, constructed drain, lined diversion structure, wash area, inlet, outlet or other facility, which is a part of a tributary to the county-wide stormwater runoff system and owned, operated, maintained or controlled by the County of Orange, the Orange County Flood Control District or any Co-permittee city, and used for the purpose of collecting, storing, transporting, or disposing of stormwater.

Sec. 4-13-40. Prohibition on Illicit Connections and Prohibited Discharges.

(a) No Person shall:

(1) Construct, maintain, operate and/or utilize any Illicit Connection.

(2) Cause, allow or facilitate any Prohibited Discharge.

(3) Act, cause, permit or suffer any agent, employee, or independent contractor, to construct, maintain, operate or utilize any Illicit Connection, or cause, allow or facilitate any Prohibited Discharge.

(4) Irrigate their property in a manner that causes excessive runoff into the Stormwater Drainage System, resulting in unnatural flows, or transports Pollutants to a receiving water as so defined by the NPDES Permit.

(b) The prohibition against Illicit Connections shall apply irrespective of whether the Illicit Connection was established prior to the date of enactment of this Division; however, Legal Nonconforming Connections shall not become Illicit Connections until the earlier of the following:

(1) For all structural improvements to property installed for the purpose of Discharge to the Stormwater Drainage System, the expiration of five (5) years from the adoption of this Division.

(2) For all nonstructural improvements to property existing for the purpose of Discharge to the Stormwater Drainage System, the expiration of six (6) months following delivery of a notice to the owner or occupant of the property, which states a Legal Nonconforming Connection has been identified. The notice of a Legal Nonconforming Connection shall state the date of expiration of use under this Division.

A reasonable extension of use may be authorized by the Director, OC Public Works or the Authorized Inspector upon consideration of the following factors:

(1) The potential adverse effects of the continued use of the connection upon the beneficial uses of receiving waters;

(2) The economic investment of the discharger in the Legal Nonconforming Connection; and

(3) The financial effect upon the discharger of a termination of the Legal Nonconforming Connection.

(c) A civil or administrative violation of section 4-13-40(a) shall occur irrespective of the negligence or intent of the violator to construct, maintain, operate or utilize an Illicit Connection or to cause, allow or facilitate any Prohibited Discharge.

(d) If an Authorized Inspector reasonably determines that a Discharge, which is otherwise within the Discharge Exception, may adversely affect the beneficial uses of receiving waters, then the Authorized Inspector may give written notice to the owner of the property or facility that the Discharge Exception shall not apply to the subject

Discharge following expiration of the thirty-day period commencing upon delivery of the notice. Upon expiration of the thirty-day period any such Discharge shall constitute a violation of section 4-13-40(a).

(e) If a request for an extension of use is denied, the owner or occupant of property on which a Legal Nonconforming Connection exists may request an administrative hearing, pursuant to the procedures set forth in subsections 4-13-70(f) through (j), for an extension of the period allowed for continued use of the connection.

Sec. 4-13-50. New Development and Significant Redevelopment.

(a) All New Development and Significant Redevelopment within the unincorporated area of the County shall be undertaken in accordance with the DAMP, including but not limited to the Development Project Guidance.

(b) Prior to the issuance by the County of a grading permit, building permit or Nonresidential Plumbing Permit for any New Development or Significant Redevelopment, OC Public Works shall review the project plans and impose terms, conditions and requirements on the project in accordance with section 4-13-50(a). If the New Development or Significant Redevelopment will be approved without application for a grading permit, building permit or Nonresidential Plumbing Permit, OC Public Works shall review the project plans and impose terms, conditions and requirement on the project in accordance with section 4-13-50(a) prior to the issuance of a discretionary land use approval or, at the County's discretion, prior to recordation of a subdivision map.

(c) Notwithstanding the foregoing sections 4-13-50(a) and (b), compliance with the Development Project Guidance shall not be required for construction of (1) a (one) single family detached residence or (2) improvements, for which a building permit is required, to a (one) single-family detached residence unless OC Public Works determines that the construction may result in the Discharge of significant levels of a Pollutant into a tributary to the Stormwater Drainage System.

(d) Compliance with the conditions and requirements of the DAMP shall not exempt any Person from the requirement to independently comply with each provision of this Division.

(e) If OC Public Works determine that the project will have a de minimis impact on the quality of stormwater runoff, then it may issue a written waiver of the requirement for compliance with the provisions of the Development Project Guidance.

(f) The owner of a New Development or Significant Redevelopment project, or upon transfer of the property, its successors and assigns, shall implement and adhere to the terms, conditions and requirements imposed pursuant to section 4-13-50(a) on a New Development or Significant Redevelopment project. Each failure by the owner of the property, or its successors or assigns, to implement and adhere to the terms, conditions

and requirements imposed pursuant to section 4-13-50(a) on a New Development or Significant Redevelopment project shall constitute a violation of this Division.

(g) OC Public Works may require that the terms, conditions and requirements imposed pursuant to section 4-13-50(a) be recorded with the County Recorder's office by the property owner. The signature of the owner of the property or any successive owner shall be sufficient for the recording of these terms, conditions and requirements and a signature on behalf of the County of Orange shall not be required for recordation.

Sec. 4-13-51. Cost Recovery.

The County shall be reimbursed by the project applicant for all costs and expenses incurred by OC Public Works and/or OC in the review of New Development or Significant Redevelopment projects for compliance with the DAMP. OC Public Works may elect to require a deposit of estimated costs and expenses, and the actual costs and expenses shall be deducted from the deposit, and the balance, if any, refunded to the project applicant.

Sec. 4-13-52. Litter Control.

No Person shall discard any waste material including but not limited to common household rubbish or garbage of any kind (whether generated or accumulated at a residence, business or other location), upon any public property, whether occupied, open or vacant, including but not limited to any street, sidewalk, alley, right-of-way, open area or point of entry to the Stormwater Drainage System.

Sec. 4-13-60. Scope of Inspections.

(a) *Right to inspect.* Prior to commencing any inspection as hereinbelow authorized, the Authorized Inspector shall obtain either the consent of the owner or occupant of the property or shall obtain an administrative inspection warrant or criminal search warrant.

(b) *Entry to inspect.* The Authorized Inspector may enter property to investigate the source of any Discharge to any public street, inlet, gutter, storm drain or the Stormwater Drainage System located within the jurisdiction of the County of Orange.

(c) *Compliance assessments.* The Authorized Inspector may inspect property for the purpose of verifying compliance with this Division, including but not limited to (1) identifying products produced, processes conducted, chemicals used and materials stored on or contained within the property, (2) identifying point(s) of discharge of all wastewater, process water systems and Pollutants, (3) investigating the natural slope at the location, including drainage patterns and man-made conveyance systems, (4) establishing the location of all points of discharge from the property, whether by surface runoff or through a storm drain system, (5) locating any Illicit Connection or the source of Prohibited Discharge, (6) evaluating compliance with any permit issued pursuant to

Article 6 hereof, and (7) investigating the condition of any Legal Nonconforming Connection.

(d) *Portable equipment.* For purposes of verifying compliance with this Division, the Authorized Inspector may inspect any vehicle, truck, trailer, tank truck or other mobile equipment.

(e) *Records review.* The Authorized Inspector may inspect all records of the owner or occupant of property relating to chemicals or processes presently or previously occurring on-site, including material and/or chemical inventories, facilities maps or schematics and diagrams, material safety data sheets, hazardous waste manifests, business plans, pollution prevention plans, State general permits, stormwater pollution prevention plans, monitoring program plans and any other record(s) relating to Illicit Connections, Prohibited Discharges, a Legal Nonconforming Connection or any other source of contribution or potential contribution of Pollutants to the Stormwater Drainage System.

(f) *Sample and test.* The Authorized Inspector may inspect, sample and test any area runoff, soils area (including groundwater testing), process discharge, materials within any waste storage area (including any container contents), and/or treatment system discharge for the purpose of determining the potential for contribution of Pollutants to the Stormwater Drainage System. The Authorized Inspector may investigate the integrity of all storm drain and sanitary sewer systems, any Legal Nonconforming Connection or other pipelines on the property using appropriate tests, including but not limited to smoke and dye tests or video surveys. The Authorized Inspector may take photographs or video tape, make measurements or drawings, and create any other record reasonably necessary to document conditions on the property.

(g) *Monitoring.* The Authorized Inspector may erect and maintain monitoring devices for the purpose of measuring any Discharge or potential source of Discharge to the Stormwater Drainage System.

(h) *Test results.* The owner or occupant of property subject to inspection shall, on submission of a written request to the Authorized Inspector, receive copies of all monitoring and test results conducted at the property.

Sec. 4-13-70. Administrative Remedies

(a) *Notice of noncompliance.* The Authorized Inspector may deliver to the owner or occupant of any property, or to any Person responsible for an Illicit Connection or Prohibited Discharge a notice of noncompliance. The notice of noncompliance shall be delivered in accordance with section 4-13-70(e) of this Division.

(1) The notice of noncompliance shall identify the provision(s) of this Division or the applicable permit which has been violated. The notice of

noncompliance shall state that continued noncompliance may result in additional enforcement actions against the owner, occupant and/or Person.

(2) The notice of noncompliance shall state a compliance date that must be met by the owner, occupant and/or Person; provided, however, that the compliance date may not exceed ninety (90) days unless the Authorized Inspector extends the compliance deadline an additional period not exceeding ninety (90) days where good cause exists for the extension.

(b) *Administrative Compliance Orders.*

(1) The Authorized Inspector may issue an administrative compliance order. The administrative compliance order shall be delivered in accordance with section 4-13-70(e) of this Division. The administrative compliance order may be issued to:

a) The owner or occupant of any property requiring abatement of conditions on the property that cause or may cause a Prohibited Discharge or an Illicit Connection in violation of this Division;

b) The owner of property subject to terms, conditions or requirements imposed on a project in accordance with section 4-13-50(a) to ensure adherence to those terms, conditions and requirements.

c) A permittee subject to the requirements of any permit issued pursuant to Article 6 hereof to ensure with terms, and requirements of the permit.

d) Any Person responsible for an Illicit Connection or Prohibited Discharge.

(2) The administrative compliance order may include the following terms and requirements:

a) Specific steps and time schedules for compliance as reasonably necessary to eliminate an existing Prohibited Discharge or to prevent the imminent threat of a Prohibited Discharge, including but not limited to a Prohibited Discharge from any pond, pit, well, surface impoundment, holding or storage area;

b) Specific steps and time schedules for compliance as reasonably necessary to discontinue any Illicit Connection;

c) Specific requirements for containment, cleanup, removal, storage, installation of overhead covering, or proper disposal of any Pollutant having the potential to contact stormwater runoff;

d) Any other terms or requirements reasonably calculated to prevent imminent threat of or continuing violations of this Division, including, but not limited to requirements for compliance with best management practices guidance documents promulgated by any federal, State or regional agency;

e) Any other terms or requirements reasonably calculated to achieve full compliance with the terms, conditions and requirements of any permit issued pursuant hereto.

(c) *Cease And Desist Orders.*

(1) The Authorized Inspector may issue a cease and desist order. A cease and desist order shall be delivered in accordance with section 4-13-70(e) of this Division. A cease and desist order may direct the owner or occupant of any property and/or other Person responsible for a violation of this Division to:

a.) Immediately discontinue any Illicit Connection, or Prohibited Discharge to the Stormwater Drainage System;

b) Immediately contain or divert any flow of water off the property, where the flow is occurring in violation of any provision of this Division;

c) Immediately discontinue any other violation of this Division.

d) Clean up the area affected by the violation.

(2) The Authorized Inspector may direct by cease and desist order that: a) the owner of any property, or his successor-in-interest, which property is subject to any conditions or requirements issued pursuant to section 4-13-50(a); or, b) any permittee under any permit issued pursuant to Article 6 hereof:

Immediately cease any activity not in compliance with the conditions or requirements issued pursuant to section 4-13-50(a) or the terms, conditions and requirements of the applicable permit.

(d) *Recovery of Costs.* The Authorized Inspector may deliver to the owner or occupant of any property, any permittee or any other Person who becomes subject to a notice of noncompliance or administrative order, an Invoice for Costs. An Invoice for Costs shall be delivered in accordance with section 4-13-70(e) of this Division. An Invoice for Costs shall be immediately due and payable to the County for the actual costs incurred by the County in issuing and enforcing any notice or order. If any owner or

occupant, permittee or any other Person subject to an Invoice for Costs fails to either pay the Invoice for Costs or appeal successfully the Invoice for Costs in accordance with section 4-13-70(f), then the Enforcing Attorney may institute collection proceedings.

(e) *Delivery of Notice.* Any notice of noncompliance, administrative compliance order, cease and desist order or Invoice for Costs to be delivered pursuant to the requirements of this Division shall be subject to the following:

(1) The notice shall state that the recipient has a right to appeal the matter as set forth in subsections 4-13-70(f) through (j) of this Division.

(2) Delivery shall be deemed complete upon a) personal service to the recipient; b) deposit in the U.S. mail, postage pre-paid for first class delivery; or c) facsimile service with confirmation of receipt.

(3) Where the recipient of notice is the owner of the property, the address for notice shall be the address from the most recently issued equalized assessment roll for the property or as otherwise appears in the current records of the County.

(4) Where the owner or occupant of any property cannot be located after the reasonable efforts of the Authorized Inspector, a Notice of Noncompliance or Cease and Desist Order shall be deemed delivered after posting on the property for a period of ten (10) business days.

(f) *Administrative Hearing for Notices of Noncompliance, Administrative Compliance Orders, Invoices for Costs and Adverse Determinations.* Except as set forth in section 4-13-70(h), any Person receiving a notice of noncompliance, administrative compliance order, a notice of Legal Nonconforming Connection, an Invoice for Costs, or any Person who is subject to any adverse determination made pursuant to this Division, may appeal the matter by requesting an administrative heading. Notwithstanding the foregoing, these administrative appeal procedures shall not apply to criminal proceedings initiated to enforce this Division.

(g) *Request for Administrative Hearing.* Any Person appealing a notice of noncompliance, an administrative compliance order, a notice of Legal Nonconforming Connection, an Invoice for Costs or an adverse determination shall, within thirty (30) days of receipt thereof, file a written request for an administrative hearing, accompanied by an administrative hearing fee as established by separate resolution, with the Office of the Clerk of the Orange County Board of Supervisors, with a copy of the request for administrative hearing mailed on the date of filing to the Director, OC Public Works, or Building Official or Director, John Wayne Airport. Thereafter, a hearing on the matter shall be held before the Hearing Officer within sixty (60) days of the date of filing of the written request unless, in the reasonable discretion of the Hearing Officer and pursuant to written request by the appealing party, a continuance of the hearing is granted.

(h) *Administrative Hearing for Cease and Desist Orders and Emergency Abatement Actions.* An administrative hearing on the issuance of a cease and desist order or following an emergency abatement action shall be held within five (5) business days following the issuance of the order or the action of abatement, unless the hearing (or the time requirement for the hearing) is waived in writing by the party subject to the cease and desist order or the emergency abatement. A request for an administrative hearing shall not be required from the Person subject to the cease and desist order or the emergency abatement action.

(i) *Hearing Proceedings.* The Authorized Inspector shall appear in support of the notice, order, determination, Invoice for Costs or emergency abatement action, and the appealing party shall appear in support of withdrawal of the notice, order, determination, Invoice for Costs, or in opposition to the emergency abatement action. Except as set forth in section 4-13-30(g) (definition of Discharge Exception), the County shall have the burden of supporting any enforcement or other action by a preponderance of the evidence. Each party shall have the right to present testimony and other documentary evidence as necessary for explanation of the case.

(j) *Final Decision and Appeal.* The final decision of the Hearing Officer shall issue within ten (10) business days of the conclusion of the hearing and shall be delivered by first-class mail, postage prepaid, to the appealing party. The final decision shall include notice that any legal challenge to the final decision shall be made pursuant to the provisions of Code of Civil Procedure sections 1094.5 and 1094.6 and shall be commenced within ninety (90) days following issuance of the final decision. The administrative hearing fee paid by a prevailing party in an appeal shall be refunded.

Notwithstanding this section 4-13-70(j), the final decision of the Hearing Officer in any proceeding determining the validity of a cease and desist order or following an emergency abatement action shall be mailed within five (5) business days following the conclusion of the hearing.

(k) *County Abatement.* In the event the owner of property, the operator of a facility, a permittee, or any other Person fails to comply with any provision of a compliance schedule issued to such owner, operator, permittee or Person pursuant to this Division, the Authorized Inspector may request the Enforcing Attorney to obtain an abatement warrant or other appropriate judicial authorization to enter the property, abate the condition and restore the area. Any costs incurred by the County in obtaining and carrying out an abatement warrant or other judicial authorization may be recovered pursuant to section 4-13-71(d).

Sec. 4-13-71. Nuisance.

Any condition in violation of the prohibitions of this Division , including but not limited to the maintenance or use of any Illicit Connection or the occurrence of any Prohibited Discharge, shall constitute a threat to the public health, safety and welfare, and is declared and deemed a nuisance pursuant to Government Code section 38771.

(a) *Court Order to Enjoin or Abate.* At the request of the Director, OC Public Works, or Building Official, or Director, John Wayne Airport, or his/her designee, the Enforcing Attorney may seek a court order to enjoin and/or abate the nuisance.

(b) *Notice to Owner and Occupant.* Prior to seeking any court order to enjoin or abate a nuisance or threatened nuisance, the Director, OC Public Works, or Building Official, or Director, John Wayne Airport, or his/her designee, shall provide notice of the proposed injunction or abatement to the owner and occupant, if any, of the property where the nuisance or threatened nuisance is occurring.

(c) *Emergency Abatement.* In the event the nuisance constitutes an imminent danger to public safety or the environment, the Authorized Inspector may enter the property from which the nuisance emanates, abate the nuisance and restore any property affected by the nuisance. To the extent reasonably practicable, informal notice shall be provided to the owner and occupant prior to abatement. If necessary to protect the public safety or the environment, abatement may proceed without prior notice to or consent from the owner or occupant thereof and without judicial warrant.

(1) An imminent danger shall include, but is not limited to, exigent circumstances created by the dispersal of Pollutants, where the same presents a significant and immediate threat to the public safety or the environment.

(2) Notwithstanding the authority of the County to conduct an emergency abatement action, an administrative hearing pursuant to Section 4-13-70(h) hereinabove shall follow the abatement action.

(d) *Reimbursement of Costs.* All costs incurred by the County is responding to any nuisance, all administrative expenses and all other expenses, recoverable under State law, shall be recoverable from the Person(s) creating, causing, committing, allowing or maintaining the nuisance.

(e) *Nuisance Lien.* All costs shall become a lien against the property from which the nuisance emanated and a personal obligation against the owner thereof in accordance with Government Code sections 38773.1 and 38773.5. The owner of record of the property subject to any lien shall be given notice of the lien prior to recording as required by Government Code section 38773.1.

At the direction of the Director, OC Public Works, or Building Official, or Director, John Wayne Airport, the Enforcing Attorney is authorized to collect nuisance abatement costs or enforce a nuisance lien in an action brought for a money judgment or by delivery to the County Assessor of a special assessment against the property in accord with the conditions and requirements of Government Code section 38773.5.

Sec. 4-13-72. Criminal Sanctions

(a) *Prosecutor.* The Enforcing Attorney may act on the request of the Director, OC Public Works, or Building Official, or Director, John Wayne Airport or his/her designee, to pursue enforcement actions in accordance with the provisions of this Division.

(b) *Infractions.* Any Person who may otherwise be charged with a misdemeanor under this Division may be charged, at the discretion of the Enforcing Attorney, with an infraction punishable by a fine of not more than $100.00 for first violation, $200.00 for a second violation, and a fine not exceeding $500.00 for each additional violation occurring within one (1) year.

(c) *Misdemeanors.* Any Person who negligently or knowingly violates any provision of this Division, undertakes to conceal any violation of this Division, continues any violation of this Division after notice thereof, or violates the terms, conditions and requirements of any permit, shall be guilty of a misdemeanor punishable by a fine of not more than $1,000.00 or by imprisonment for a period of not more than six (6) months, or both.

Sec. 4-13-73. Consecutive Violations.

Each day in which a violation occurs and each separate failure to comply with either a separate provision of this Division, an administrative compliance order, a cease and desist order, or a permit issued pursuant to this Division, shall constitute a separate violation of this Division punishable by fines or sentences issued in accordance herewith.

Sec. 4-13-74. Non-exclusive Remedies.

Each and every remedy available for the enforcement of this Division shall be non-exclusive and it is within the discretion of the Authorized Inspector or Enforcing Attorney to seek cumulative remedies, except that multiple monetary fines or penalties shall not be available for any single violation of this Division.

Sec. 4-13-75. Citations.

Pursuant to Penal Code section 836.5, the Authorized Inspector shall have the authority to cause the arrest of any Person committing a violation of this Division. The Person shall be released and issued a citation to appear before a magistrate in accordance with Penal Code sections 853.5, 853.6, and 853.9, unless the Person demands to be taken before a magistrate. Following issuance of any citation the Authorized Inspector shall refer the matter to the Enforcing Attorney.

Each citation to appear shall state the name and address of the violator, the provisions of this Division violated, and the time and place of appearance before the court, which shall be at least ten (10) business days after the date of violation. The Person

cited shall sign the citation giving his or her written promise to appear as stated therein. If the Person cited fails to appear, the Enforcing Attorney may request issuance of a warrant for the arrest of the Person cited.

Sec. 4-13-76. Violations of Other Laws.

Any Person acting in violation of this Division also may be acting in violation of the Federal Clean Water Act or the State Porter-Cologne Act and other laws and also may be subject to sanctions including civil liability. Accordingly, the Enforcing Attorney is authorized to file a citizen suit pursuant to Federal Clean Water Act section 505(a), seeking penalties, damages, and orders compelling compliance, and other appropriate relief. The Enforcing Attorney may notify EPA Region IX, the Santa Ana or San Diego Regional Water Quality Control Boards, or any other appropriate state or local agency, of any alleged violation of this Division.

Sec. 4-13-77. Injunctions

At the request of the Director, OC Public Works, or Building Official, or Director, John Wayne Airport, or his/her designee, the Enforcing Attorney may cause the filing in a court of competent jurisdiction, of a civil action seeking an injunction against any threatened or continuing noncompliance with the provisions of this Division .

Any temporary, preliminary or permanent injunction issued pursuant hereto may include an order for reimbursement to the County of all costs incurred in enforcing this Division, including costs of inspection, investigation and monitoring, the costs of abatement undertaken at the expense of the County, costs relating to restoration of the environment and all other expenses as authorized by law.

Sec. 4-13-78. Other Civil Remedies

(a) The Director, OC Public Works, or Building Official, or Director, John Wayne Airport, or his/her designee, may cause the Enforcing Attorney to file an action for civil damages in a court of competent jurisdiction seeking recovery of (1) all costs incurred in enforcement of this Division , including but not limited to costs relating to investigation, sampling, monitoring, inspection, administrative expenses, all other expenses as authorized by law, and consequential damages, (2) all costs incurred in mitigating harm to the environment or reducing the threat to human health, and (3) damages for irreparable harm to the environment.

(b) The Enforcing Attorney is authorized to file actions for civil damages resulting from any trespass or nuisance occurring on public land or to the Stormwater Drainage System from any violation of this Division where the same has caused damage, contamination or harm to the environment, public property or the Stormwater Drainage System.

(c) The remedies available to the County pursuant to the provisions of this Division shall not limit the right of the County to seek any other remedy that may be available by law.

Sec. 4-13-80. Procedure.

(a) *Discharge Permit Procedure.*

(1) *Permit.* On application of the owner of property or the operator of any facility, which property or facility is not otherwise subject to the requirements of a State General Permit or a National Pollution Discharge Elimination System Permit regulating stormwater discharges, the Director, OC Public Works or his/her designee, may issue a permit authorizing the release of nonstormwater Discharges to the Stormwater Drainage System if:

a) The Discharge of material or constituents is reasonably necessary for the conduct of otherwise legal activities on the property, and

b) The Discharge will not cause a nuisance, impair the beneficial uses of receiving waters, or cause any reduction in established water quality standards.

(2) Application. The applicant shall provide all information requested by the Director, OC Public Works or his/her designee, for review and consideration of the application, including but not limited to specific detail as to the activities to be conducted on the property, plans and specifications for facilities located on the property, identification of equipment or processes to be used on-site and other information as may be requested in order to determine the constituents, and quantities thereof, which may be discharged if permission is granted.

(3) Permit Issuance. The permit shall be granted or denied by the Director, OC Public Works or his/her designee, no later than sixty (60) days following the completion and acceptance of the application as determined by the Director, OC Public Works or his/her designee.

The applicant shall be notified in person or by first-class mail, postage prepaid, of the action taken.

(4) *Permit Conditions.* The permit may include terms, conditions and requirements to ensure compliance with the objectives of this Division and as necessary to protect the receiving waters, including but not limited to:

a) Identification of the Discharge location on the property and the location at which the Discharge will enter the Stormwater Drainage System;

b) Identification of the constituents and quantities thereof to be discharged into the Stormwater Drainage System;

c) Specification of pollution prevention techniques and structural or nonstructural control requirements as reasonably necessary to prevent the occurrence of potential Discharges in violation of this Division;

d) Requirements for self-monitoring of any Discharge;

e) Requirements for submission of documents or data, such as technical reports, production data, Discharge reports, self-monitoring reports and waste manifests; and

f) Other terms and conditions appropriate to ensure compliance with the provisions of this Division and the protection of receiving waters.

(5) *General Permit.* In the discretion of the Director, OC Public Works or his/her designee, the permit may, in accordance with the conditions identified in section 4-13-80(a)(4) hereinabove, be prepared as a general permit applicable to a specific category of activities. If a general permit is issued, any Person intending to Discharge within the scope of the authorization provided by the general permit may do so by filing an application to Discharge with the Director, OC Public Works or his/her designee. No Discharge within the scope of the general permit shall occur until such application is so filed.

Notwithstanding the foregoing in this section, the Director, OC Public Works or his/her designee, in his discretion, may eliminate the requirement that an application for a general permit be filed for any specific activity for which a general permit has been issued.

(6) *Permit Fees.* The permission to Discharge shall be conditioned upon the applicant's payment of the County's costs, in accordance with a fee schedule adopted by separate resolution, as follows:

a) For individually issued permits, the costs of reviewing the permit application, preparing and issuing the permit, and the costs reasonably related to administrating this permit program.

b) For general permits, the costs of reviewing the permit application, that portion of the costs of preparing the general permit which is reasonably attributable to the permittee's application for the general permit, and the costs reasonably related to administering the

general permit program. Notwithstanding the foregoing, no fee shall be charged for a general permit issued pursuant to section 4-13-80(a)(5).

(b) *Permit Suspension, Revocation or Modification.*

(1) The Director, OC Public Works or his/her designee may suspend or revoke any permit when it is determined that:

a) The permittee has violated any term, condition or requirement of the permit or any applicable provision of this Division; or

b) The permittee's Discharge or the circumstances under which the Discharge occurs have changed so that it is no longer appropriate to except the Discharge from the prohibitions on Prohibited Discharge contained within this Division; or

c) The permittee fails to comply with any schedule for compliance issued pursuant to this Division; or

d) Any regulatory agency, including EPA or a Regional Water Quality Control Board having jurisdiction over the Discharge, notifies the County that the Discharge should be terminated.

(2) The Director, OC Public Works or his/her designee, may modify any permit when it is determined that:

a) Federal or state law requirements have changed in a manner that necessitates a change in the permit; or

b) The permittee's Discharge or the circumstances under which the Discharge occurs have changed so that it is appropriate to modify the permit's terms, conditions or requirements; or

c) A change to the permit is necessary to ensure compliance with the objectives of this Division or to protect the quality of receiving waters.

The permittee, or in the case of a general permit, each Person who has filed an application pursuant to section 4-13-80(a)(5), shall be informed of any change in the permit terms and conditions at least sixty (60) days prior to the effective date of the modified permit. In the case of a general permit issued pursuant to section 4-13-80(a)(5), any change in the permit terms and conditions shall be published in a newspaper of general circulation within the County

at least sixty (60) days prior to the effective date of the modified permit.

(3) The determination that a permit shall be denied, suspended, revoked or modified may be appealed by a permittee pursuant to the same procedures applicable to appeal of an administrative compliance order hereunder. In the absence of a judicial order to the contrary, the permittee may continue to Discharge pending issuance of the final administrative decision by the Hearing Officer.

(c) *Permit Enforcement.*

(1) *Penalties.* Any violation of the terms, conditions and requirements of any permit issued by the Director, OC Public Works or his/her designee, shall constitute a violation of this Division and subject the violator to the administrative, civil and criminal remedies available under this Division.

(d) *Compliance.* Compliance with the terms, conditions and requirements of a permit issued pursuant to this Division shall not relieve the permittee from compliance with all federal, state and local laws, regulations and permit requirements, applicable to the activity for which the permit is issued.

(1) *Limited Permittee Rights.* Permits issued under this Division are for the Person identified therein as the "permittee" only, and authorize the specific operation at the specific location identified in the permit. The issuance of a permit does not vest the permittee with a continuing right to Discharge.

(2) *Transfer of Permits.* No permit issued to any Person may be transferred to allow:

a) A Discharge to the Stormwater Drainage System at a location other than the location stated in the original permit; or

b) A Discharge by a Person other than the Person named in the permit, provided however, that the County may approve a transfer if written approval is obtained, in advance, from the Director, OC Public Works or his/her designee.

Sec. 4-13-90. Federal Clean Water Act.

(a) The County intends to cooperate with other agencies with jurisdiction over stormwater discharges to ensure that the regulatory purposes underlying stormwater regulations promulgated pursuant to the Clean Water Act (33 U.S.C. § 1251 et seq.) are met.

(b) The County may, to the extent authorized by law, elect to contract for the services of any public agency or private enterprise to carry out the planning approvals, inspections, permits and enforcement authorized by this Division.

Sec. 4-13-100. General Provisions.

(a) *Compliance disclaimer.* Full compliance by any Person or entity with the provisions of this Division shall not preclude the need to comply with other local, state or federal statutory or regulatory requirements, which may be required for the control of the discharge of Pollutants into stormwater and/or protection of stormwater quality.

(b) *Severability.* If any provision of this Division or the application of the Division to any circumstance is held invalid, the remainder of the Division or the application of the Division to other Persons or circumstances shall not be affected.

(c) *Repeal of prior ordinance.* The enactment of this Division by County shall repeal the provisions of Article 3, sections 4-3-148 through and including section 4-3-190 of the Codified Ordinances of the County of Orange, enacted for the permitting of Discharges of industrial waste to ground or surface waters and no new Discharge permits shall be issued thereunder; provided however, that connection to Discharge under the terms and conditions of any individual Discharge permit issued prior to the date of enactment of the Water Quality Division shall be allowed hereunder as a Legal Nonconforming Connection.

(d) *Headings.* Headings of the sections of this Division are inserted for convenience only and shall have no effect in the application of this Division.

Sec. 4-13-110. Procedure.

The provisions of sections 1094.5 and 1094.6 of the Code of Civil Procedure set forth the procedure for judicial review of any act taken pursuant to this Division. Parties seeking judicial review of any action taken pursuant to this Division shall file such action within ninety (90) days of the occurrence of the event for which review is sought.

This ordinance shall take effect and be in full force thirty (30) days from and after its passage and before the expiration of fifteen (15) days after the passage thereof, shall be published once in an adjudicated newspaper in the County of Orange.

THE FOREGOING was **PASSED** and **ADOPTED** by the following vote of the Orange County Board of Supervisors on March 22, 2011, to wit:

AYES: Supervisors: SHAWN NELSON, BILL CAMPBELL, JANET NGUYEN
JOHN M. W. MOORLACH, PATRICIA BATES

NOES:
EXCUSED:
ABSTAINED:

Bill Campbell

CHAIRMAN

STATE OF CALIFORNIA)
) ss:
COUNTY OF ORANGE)

I, DARLENE J. BLOOM, Clerk of the Board of Orange County, California, hereby certify that a copy of this document has been delivered to the Chairman of the Board and that the above and foregoing Ordinance was duly and regularly adopted by the Orange County Board of Supervisors.

IN WITNESS WHEREOF, I have hereto set my hand and seal.

DARLENE J. BLOOM
Clerk of the Board.
County of Orange, State of California

Ordinance No.: 11-009
Agenda Date: 03/22/2011
Item No.: 42

I certify that the foregoing is a true and correct copy of the Ordinance adopted by the Board of Supervisors, Orange County, State of California

DARLENE J. BLOOM, Clerk of the Board of Supervisors

By: _____
Deputy

ORDINANCE NO. 11-010

AN ORDINANCE OF THE ORANGE COUNTY FLOOD CONTROL DISTRICT, CALIFORNIA, AMENDING ARTICLES 1 THROUGH 9 OF TITLE 9, DIVISION 1 REGARDING WATER QUALITY

The Board of Supervisors of the Orange County Flood Control District ordains as follows:

SECTION 1. Sections 9-1-10 through 9-1-110 of Title 9, Division 1 are hereby amended to read as follows:

Sec. 9-1-10. Adoption of the Water Quality Ordinance.

Pursuant to the Orange County Flood Control Act, section 36-2, subdivision (b), paragraphs (17) and (18), and section 36-2.5 of West's Annotated California Water Code Appendix, which, among other things, authorize the District to "regulate, prohibit, or control the discharge of pollutants, waste, or any other material into the district's facilities..." and "[to] establish compliance with any federal, state, or local law, order, regulation, or rule..." there is hereby adopted a Water Quality Ordinance.

Sec. 9-1-20. Purpose.

The purpose of the Water Quality Ordinance is to prescribe regulations as mandated by the Clean Water Act [33 USC § 1251 et seq., as amended] to effectively prohibit non-stormwater discharges into the storm sewers and to reduce the discharge of pollutants. Human activities, such as agriculture, construction and the operation and maintenance of an urban infrastructure may result in undesirable discharges of pollutants and certain sediments, which may accumulate in local drainage channels and waterways and eventually may be deposited in the waters of the United States. This Ordinance will improve water quality by controlling the pollutants which enter the network of storm drains throughout Orange County.

Sec. 9-1-30. Definitions

(a) *Authorized Inspector* shall mean the person designated by the Director OC Public Works, or Building Official and persons designated by the Authorized Inspector(s) as investigators and under his/her instruction and supervision, who are assigned to investigate compliance and detect violations of this Ordinance.

(b) *Co-permittee* shall mean the County of Orange, the Orange County Flood Control District, and all the municipalities within Orange County which are responsible for compliance with the terms of the NPDES Permit.

(c) *County* shall mean the County of Orange, California.

(d) *DAMP* shall mean the Orange County Drainage Area Management Plan, as the same may be amended from time to time.

(e) *Development Project Guidance* shall mean DAMP Section 7 and the Local Implementation Plan Section A-7 and the exhibits attached thereto (including the Model Water Quality Management Plan), and all subsequent amendments thereto.

(f) *Discharge* shall mean any release, spill, leak, pump, flow, escape, leaching (including subsurface migration or deposition to groundwater), dumping or disposal of any liquid, semi-solid or solid substance.

(g) *Discharge Exception* shall mean the group of activities not restricted or prohibited by this Ordinance, including only:

(1) Discharges composed entirely of stormwater;

(2) Discharges authorized by current EPA or Regional Water Quality Control Board issued NPDES permits, State General Permits, or other waivers, permits or approvals granted by a government agency with jurisdiction over such discharges;

(3) Stormwater discharges from property for which best management practices set forth in the Development Project Guidance and LIPs are being implemented and followed;

(4) Discharges to the Stormwater Drainage System from:

a) Diverted stream flows;

b) Rising ground waters;

c) Infiltration to MS4s of groundwater uncontaminated by sewage;

d) Uncontaminated pumped groundwater;

e) Foundation drains;

f) Springs;

g) Water from crawl space pumps;

h) Footing drains;

i) Air conditioning condensation;

j) Flows from riparian habitats and wetlands;

k) Water line flushing, except for fire suppression sprinkler system maintenance and testing discharges. If any discharges that fall within this exception are subject to State or Regional Water Quality Control Board permits, they are exempt only if the discharger is in compliance with said permits.

l) Potable water sources, except to the extent such discharges are subject to but not in compliance with State General Permits or other general permits issued by the Regional Water Quality Control Board;

m) Non-commercial car washing;

n) Dechlorinated swimming pools;

o) Emergency fire fighting activities;

p) Runoff from landscape, lawn and agricultural irrigation allowed by the NPDES Permit applicable to that portion of the Stormwater Drainage System in which the discharge occurs.

(5) Discharges authorized pursuant to a permit issued under Article 6 of this Division;

(6) Stormwater discharges for which the discharger has reduced to the maximum extent practicable the amount of Pollutants in such discharge; and

(7) Discharges authorized pursuant to federal or state laws or regulations.

In any action taken to enforce this Division, the burden shall be on the Person who is the subject of such action to establish that a Discharge was within the scope of this Discharge Exception.

(h) *District* shall mean the Orange County Flood Control District.

(i) *Enforcing Attorney* shall mean the District Attorney acting as counsel to the District or his/her designee, which person is authorized to take enforcement or other actions as described herein. For purposes of criminal prosecution, only the District Attorney or his/her designee shall act as the Enforcing Attorney.

(j) *EPA* shall mean the Environmental Protection Agency of the United States of America.

(k) *Hearing Officer* shall mean the person designated by the Director OC Public Works, or Building Official, who shall preside at the administrative hearings authorized by this Ordinance and issue final decisions on matters raise therein.

(l) *Illicit Connection* shall mean any man-made conveyance or drainage system, pipeline, conduit, inlet or outlet, through which the discharge of any pollutant to the stormwater drainage system occurs or may occur. The term "illicit connection" shall not include legal nonconforming connections or connections to the stormwater drainage system that are hereinafter authorized by the agency with jurisdiction over the system at the location at which the connection is made.

(m) *Invoice for Costs* shall mean the actual costs and expenses of the District, including but not limited to administrative overhead, salaries and other expenses recoverable under State law, incurred during any inspection conducted pursuant to Article 2 of this division, or where a notice of noncompliance, administrative compliance order or other enforcement option under Article 5 of this division is utilized to obtain compliance with this division.

(n) *Legal Nonconforming Connection* shall mean connections to the stormwater drainage system existing as of the adoption of this division that were in compliance with all federal, state and local rules, regulations, statutes and administrative requirements in effect at the time the connection was established, including but not limited to any discharge permitted pursuant to the terms and conditions of an individual discharge permit issued pursuant to the Industrial Waste Ordinance, County Ordinance No. 703.

(o) *Local Implementation Plan* or *"LIP"* shall mean the County adopted plan for implementation of the NDPES Permit, as may be amended from time to time.

(p) *New Development* shall mean all public and private residential (whether single family, multi-unit or planned unit development), industrial, commercial, retail, and other nonresidential construction projects, or grading for future construction, for which either a discretionary land use approval, grading permit, building permit or nonresidential plumbing permit is required.

(q) *Nonresidential Plumbing Permit* shall mean a plumbing permit authorizing the construction and/or installation of facilities for the conveyance of liquids other than stormwater, potable water, reclaimed water or domestic sewage.

(r) *NPDES Permit* shall mean the currently applicable municipal discharge permit(s) issued by the Regional Water Quality Control Board, Santa Ana and San Diego Regions, which establish waste discharge requirements applicable to storm runoff within the District.

(s) *Person* shall mean any natural person as well as any corporation, partnership, government entity or subdivision, trust, estate, cooperative association, joint venture, business entity, or other similar entity, or the agent, employee or representative of any of the above.

(t) *Pollutant* shall mean any liquid, solid or semi-solid substances, or combination thereof, including and not limited to:

(1) Artificial materials (such as floatable plastics, wood products or metal shavings).

(2) Household waste (such as trash, paper, and plastics; cleaning chemicals, yard wastes, animal fecal materials, used oil and fluids from vehicles, lawn mowers and other common household equipment).

(3) Metals and nonmetals, including compounds of metals and nonmetals (such as cadmium, lead, zinc, copper, silver, nickel, chromium, cyanide, phosphorus and arsenic) with characteristics which cause an adverse effect on living organisms.

(4) Petroleum and related hydrocarbons (such as fuels, lubricants, surfactants, waste oils, solvents, coolants and grease).

(5) Animal wastes (such as discharge from confinement facilities, kennels, pens, and recreational facilities, including, stables, show facilities, and polo fields).

(6) Substances having a pH less than 6.5 or greater than 8.6, or unusual coloration, turbidity or odor.

(7) Waste materials and wastewater generated on construction sites and by construction activities (such as painting and staining; use of sealants and glues; use of lime; use of wood preservatives and solvents; disturbance of asbestos fibers, paint flakes or stucco fragments; application of oils, lubricants, hydraulic, radiator or battery fluids; construction equipment washing, concrete pouring and cleanup; use of concrete detergents; steam cleaning or sand blasting; use of chemical degreasing or diluting agents; and use of super chlorinated water for potable water line flushing).

(8) Materials causing an increase in biochemical oxygen demand, chemical oxygen demand or total organic carbon.

(9) Materials which contain base/neutral or acid extractable organic compounds.

(10) Those pollutants defined in Section 1362(6) of the Federal Clean Water Act; and

(11) Any other constituent or material, including but not limited to pesticides, herbicides, fertilizers, fecal coliform, fecal streptococcus or enterococcus, or eroded soils, sediment and particulate materials, in quantities that will interfere with or adversely affect the beneficial uses of the receiving waters, flora or fauna of the State.

(u) *Prohibited Discharge* shall mean any discharge, which contains any pollutant, from public or private property to (1) the stormwater drainage system; (2) any upstream flow, which is tributary to the stormwater drainage system; (3) any groundwater, river, stream, creek, wash or dry weather arroyo, wetlands area, marsh, coastal slough, or (4) any coastal harbor, bay, or the Pacific Ocean. The term "prohibited discharge" shall not include discharges allowable under the discharge exception.

(v) *Significant Redevelopment* shall mean the rehabilitation or reconstruction of public or private residential (whether single family, multi-unit or planned unit development), industrial, commercial, retail, or other nonresidential structures, for which either a discretionary land use approval, grading permit, building permit or Nonresidential Plumbing Permit is required.

(w) *State General Permit* shall mean either the Waste Discharge Requirements for Discharges of Stormwater Associated With Industrial Activities Excluding Construction Activities Permit (State Industrial General Permit) or the National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges Associated With Construction and Land Disturbance Activities (State Construction General Permit) or any other State general permit that has been or will be adopted and the terms and requirements of any such permit . In the event the U.S. Environmental Protection Agency revokes the in-lieu permitting authority of the State Water Resources Control Board, then the term State general permit shall also refer to any EPA administered stormwater control program for industrial and construction activities.

(x) *Stormwater Drainage System* shall mean street gutter, channel, storm drain, constructed drain, lined diversion structure, wash area, inlet, outlet or other facility, which is a part of a tributary to the county-wide stormwater runoff system and owned, operated, maintained or controlled by the County of Orange, the Orange County Flood Control District or any Co-permittee city, and used for the purpose of collecting, storing, transporting, or disposing of stormwater.

Sec. 9-1-40. Prohibition on Illicit Connections and Prohibited Discharges.

(a) No Person shall:

(1) Construct, maintain, operate and/or utilize any Illicit Connection.

(2) Cause, allow or facilitate any Prohibited Discharge.

(3) Act, cause, permit or suffer any agent, employee, or independent contractor, to construct, maintain, operate or utilize any Illicit Connection, or cause, allow or facilitate any Prohibited Discharge.

(4) Irrigate their property in a manner that causes excessive runoff into the Stormwater Drainage System, resulting in unnatural flows, or transports Pollutants to a receiving water as so defined by the NPDES Permit.

(b) The prohibition against Illicit Connections shall apply irrespective of whether the illicit connection was established prior to the date of enactment of this Division; however, Legal Nonconforming Connections shall not become Illicit Connections until the earlier of the following:

(1) For all structural improvements to property installed for the purpose of Discharge to the Stormwater Drainage System, the expiration of five (5) years from the adoption of this Division.

(2) For all nonstructural improvements to property existing for the purpose of Discharge to the Stormwater Drainage System, the expiration of six (6) months following delivery of a notice to the owner or occupant of the property, which states a Legal Nonconforming Connection has been identified. The notice of a Legal Nonconforming Connection shall state the date of expiration of use under this Division.

A reasonable extension of use may be authorized by the Director OC Public Works or the Authorized Inspector upon consideration of the following factors:

(1) The potential adverse effects of the continued use of the connection upon the beneficial uses of receiving waters;

(2) The economic investment of the discharger in the Legal Nonconforming Connection; and

(3) The financial effect upon the discharger of a termination of the Legal Nonconforming Connection.

(c) A civil or administrative violation of section 9-1-40(a) shall occur irrespective of the negligence or intent of the violator to construct, maintain, operate or utilize an Illicit Connection or to cause, allow or facilitate any Prohibited Discharge.

(d) If an Authorized Inspector reasonably determines that a Discharge, which is otherwise within the Discharge Exception, may adversely affect the beneficial uses of receiving waters, then the Authorized Inspector may give written notice to the owner of the property or facility that the Discharge Exception shall not apply to the subject Discharge following expiration of the thirty-day period commencing upon delivery of the notice. Upon expiration of the thirty-day period any such Discharge shall constitute a violation of section 9-1-40(a).

(e) If a request for an extension of use is denied, the owner or occupant of property on which a Legal Nonconforming Connection exists may request an administrative hearing, pursuant to the procedures set forth in Article 5, subsections 9-1-70(f) through (j) for an extension of the period allowed for continued use of the connection.

Sec. 9-1-50. New Development and Significant Redevelopment.

(a) All New Development and Significant Redevelopment within the unincorporated area of the County shall be undertaken in accordance with the DAMP, including but not limited to the Development Project Guidance.

(b) Prior to the issuance by the County of a grading permit, building permit or Nonresidential Plumbing Permit for any New Development or Significant Redevelopment, OC Public Works shall review the project plans and impose terms, conditions and requirements on the project in accordance with section 9-1-50(a). If the New Development or Significant Redevelopment will be approved without application for a grading permit, building permit or Nonresidential Plumbing Permit, OC Public Works shall review the project plans and impose terms, conditions and requirement on the project in accordance with section 9-1-50(a) prior to the issuance of a discretionary land use approval or, at the County's discretion, prior to recordation of a subdivision map.

(c) Notwithstanding the foregoing sections 9-1-50(a) and (b), compliance with the Development Project Guidance shall not be required for construction of (1) a (one) single family detached residence or (2) improvements, for which a building permit is required, to a (one) single-family detached residence unless OC Public Works determines that the construction may result in the Discharge of significant levels of a Pollutant into a tributary to the Stormwater Drainage System.

(d) Compliance with the conditions and requirements of the DAMP shall not exempt any Person from the requirement to independently comply with each provision of this Division.

(e) If OC Public Works determines that the project will have a de minimis impact on the quality of stormwater runoff, then it may issue a written waiver of the requirement for compliance with the provisions of the Development Project Guidance.

(f) The owner of a New Development or Significant Redevelopment project, or upon transfer of the property, its successors and assigns, shall implement and adhere to the terms, conditions and requirements imposed pursuant to section 9-1-50(a) on a New Development or Significant Redevelopment project.

Each failure by the owner of the property, or its successors or assigns, to implement and adhere to the terms, conditions and requirements imposed pursuant to section 9-1-50(a) on a New Development or Significant Redevelopment project shall constitute a violation of this Division.

(g) OC Public Works may require that the terms, conditions and requirements imposed pursuant to section 9-1-50(a) be recorded with the County Recorder's office by the property owner. The signature of the owner of the property or any successive owner shall be sufficient for the recording of these terms, conditions and requirements and a signature on behalf of the County of Orange shall not be required for recordation.

Sec. 9-1-51. Cost Recovery.

The District shall be reimbursed by the project applicant for all costs and expenses incurred by OC Public Works in the review of New Development or Significant Redevelopment projects for compliance with the DAMP. OC Public Works may elect to require a deposit of

estimated costs and expenses, and the actual costs and expenses shall be deducted from the deposit, and the balance, if any, refunded to the project applicant.

Sec. 9-1-52. Litter Control.

No Person shall discard any waste material including but not limited to common household rubbish or garbage of any kind (whether generated or accumulated at a residence, business or other location), upon any public property, whether occupied, open or vacant, including but not limited to any street, sidewalk, alley, right-of-way, open area or point of entry to the Stormwater Drainage System.

Sec. 9-1-60. Scope of Inspections.

a) *Right to inspect.* Prior to commencing any inspection as hereinbelow authorized, the Authorized Inspector shall obtain either the consent of the owner or occupant of the property or shall obtain an administrative inspection warrant or criminal search warrant.

(b) *Entry to inspect.* The Authorized Inspector may enter property to investigate the source of any Discharge to any public street, inlet, gutter, storm drain or the Stormwater Drainage System located within the jurisdiction of the District

(c) *Compliance assessments.* The Authorized Inspector may inspect property for the purpose of verifying compliance with this Division, including but not limited to (1) identifying products produced, processes conducted, chemicals used and materials stored on or contained within the property, (2) identifying point(s) of discharge of all wastewater, process water systems and Pollutants, (3) investigating the natural slope at the location, including drainage patterns and man-made conveyance systems, (4) establishing the location of all points of discharge from the property, whether by surface runoff or through a storm drain system, (5) locating any Illicit Connection or the source of Prohibited Discharge, (6) evaluating compliance with any permit issued pursuant to Article 6 hereof, and (7) investigating the condition of any Legal Nonconforming Connection.

(d) *Portable equipment.* For purposes of verifying compliance with this Division, the Authorized Inspector may inspect any vehicle, truck, trailer, tank truck or other mobile equipment.

(e) *Records review.* The Authorized Inspector may inspect all records of the owner or occupant of property relating to chemicals or processes presently or previously occurring on-site, including material and/or chemical inventories, facilities maps or schematics and diagrams, material safety data sheets, hazardous waste manifests, business plans, pollution prevention plans, State general permits, stormwater pollution prevention plans, monitoring program plans and any other record(s) relating to Illicit Connections, Prohibited Discharges, a Legal Nonconforming Connection or any other source of contribution or potential contribution of Pollutants to the Stormwater Drainage System.

(f) *Sample and test.* The Authorized Inspector may inspect, sample and test any area runoff, soils area (including groundwater testing), process discharge, materials within any waste storage area (including any container contents), and/or treatment system discharge for the purpose of determining the potential for contribution of Pollutants to the Stormwater Drainage System. The Authorized Inspector may investigate the integrity of all storm drain and sanitary sewer systems, any Legal Nonconforming Connection or other pipelines on the property using appropriate tests, including but not limited to smoke and dye tests or video surveys. The Authorized Inspector may take photographs or video tape, make measurements or drawings, and create any other record reasonably necessary to document conditions on the property.

(g) *Monitoring.* The Authorized Inspector may erect and maintain monitoring devices for the purpose of measuring any Discharge or potential source of Discharge to the Stormwater Drainage System.

(h) *Test results.* The owner or occupant of property subject to inspection shall, on submission of a written request to the Authorized Inspector, receive copies of all monitoring and test results conducted at the property.

Sec. 9-1-70. Administrative Remedies

(a) *Notice of noncompliance.* The Authorized Inspector may deliver to the owner or occupant of any property, or to any Person responsible for an Illicit Connection or Prohibited Discharge a notice of noncompliance. The notice of noncompliance shall be delivered in accordance with section 9-1-70(e) of this Division.

(1) The notice of noncompliance shall identify the provision(s) of this Division or the applicable permit which has been violated. The notice of noncompliance shall state that continued noncompliance may result in additional enforcement actions against the owner, occupant and/or Person.

(2) The notice of noncompliance shall state a compliance date that must be met by the owner, occupant and/or Person; provided, however, that the compliance date may not exceed ninety (90) days unless the Authorized Inspector extends the compliance deadline an additional period not exceeding ninety (90) days where good cause exists for the extension.

(b) *Administrative compliance orders.*

(1) The Authorized Inspector may issue an administrative compliance order. The administrative compliance order shall be delivered in accordance with section 9-1-70(e) of this Division. The administrative compliance order may be issued to:

a) The owner or occupant of any property requiring abatement of conditions on the property that cause or may cause a Prohibited Discharge or an Illicit Connection in violation of this Division;

b) The owner of property subject to terms, conditions or requirements imposed on a project in accordance with section 9-1-50(a) to ensure adherence to those terms, conditions and requirements.

c) A permittee subject to the requirements of any permit issued pursuant to Article 6 hereof to ensure with terms, and requirements of the permit.

d) Any Person responsible for an Illicit Connection or Prohibited Discharge.

(2) The administrative compliance order may include the following terms and requirements:

a) Specific steps and time schedules for compliance as reasonably necessary to eliminate an existing Prohibited Discharge or to prevent the imminent threat of a Prohibited Discharge, including but not limited to a Prohibited Discharge from any pond, pit, well, surface impoundment, holding or storage area;

b) Specific steps and time schedules for compliance as reasonably necessary to discontinue any Illicit Connection;

c) Specific requirements for containment, cleanup, removal, storage, installation of overhead covering, or proper disposal of any Pollutant having the potential to contact stormwater runoff;

d) Any other terms or requirements reasonably calculated to prevent imminent threat of or continuing violations of this Division, including, but not limited to requirements for compliance with best management practices guidance documents promulgated by any federal, State or regional agency;

e) Any other terms or requirements reasonably calculated to achieve full compliance with the terms, conditions and requirements of any permit issued pursuant hereto.

(c) *Cease and desist orders.*

(1) The Authorized Inspector may issue a cease and desist order. A cease and desist order shall be delivered in accordance with section 9-1-70(e) of this Division. A cease and desist order may direct the owner or occupant of any property and/or other Person responsible for a violation of this Division to:

a) Immediately discontinue any Illicit Connection, or Prohibited Discharge to the Stormwater Drainage System;

b) Immediately contain or divert any flow of water off the property, where the flow is occurring in violation of any provision of this Division;

c) Immediately discontinue any other violation of this Division.

d) Clean up the area affected by the violation.

(2) The Authorized Inspector may direct by cease and desist order that: a) the owner of any property, or his successor-in-interest, which property is subject to any conditions or requirements issued pursuant to section 9-1-50(a); or, b) any permittee under any permit issued pursuant to Article 6 hereof:

Immediately cease any activity not in compliance with the conditions or requirements issued pursuant to section 9-1-50(a) or the terms, conditions and requirements of the applicable permit.

(d) *Recovery of costs.* The Authorized Inspector may deliver to the owner or occupant of any property, any permittee or any other Person who becomes subject to a notice of noncompliance or administrative order, an Invoice for Costs. An Invoice for Costs shall be delivered in accordance with section 9-1-70(e) of this Division. An Invoice for Costs shall be immediately due and payable to the County for the actual costs incurred by the County in issuing and enforcing any notice or order. If any owner or occupant, permittee or any other Person subject to an Invoice for Costs fails to either pay the Invoice for Costs or appeal successfully the Invoice for Costs in accordance with section 9-1-70(f), then the Enforcing Attorney may institute collection proceedings.

(e) *Delivery of notice.* Any notice of noncompliance, administrative compliance order, cease and desist order or Invoice for Costs to be delivered pursuant to the requirements of this Division shall be subject to the following:

(1) The notice shall state that the recipient has a right to appeal the matter as set forth in subsections 9-1-70(f) through (j) of this Division.

(2) Delivery shall be deemed complete upon a) personal service to the recipient; b) deposit in the U.S. mail, postage pre-paid for first class delivery; or c) facsimile service with confirmation of receipt.

(3) Where the recipient of notice is the owner of the property, the address for notice shall be the address from the most recently issued equalized assessment roll for the property or as otherwise appears in the current records of the County.

(4) Where the owner or occupant of any property cannot be located after the reasonable efforts of the Authorized Inspector, a notice of noncompliance or cease and desist order shall be deemed delivered after posting on the property for a period of ten (10) business days.

(f) *Administrative hearing for notices of noncompliance, administrative compliance orders, invoices for costs and adverse determinations.* Except as set forth in section 9-1-70(h), any Person receiving a notice of noncompliance, administrative compliance order, a notice of Legal Nonconforming Connection, an Invoice for Costs, or any Person who is subject to any adverse determination made pursuant to this Division, may appeal the matter by requesting an administrative heading. Notwithstanding the foregoing, these administrative appeal procedures shall not apply to criminal proceedings initiated to enforce this Division.

(g) *Request for Administrative Hearing.* Any Person appealing a notice of noncompliance, an administrative compliance order, a notice of Legal Nonconforming Connection, an Invoice for Costs or an adverse determination shall, within thirty (30) days of receipt thereof, file a written request for an administrative hearing, accompanied by an administrative hearing fee as established by separate resolution, with the Office of the Clerk of the Orange County Board of Supervisors, with a copy of the request for administrative hearing mailed on the date of filing to the Director , OC Public Works, or Building Official. Thereafter, a hearing on the matter shall be held before the Hearing Officer within sixty (60) days of the date of filing of the written request unless, in the reasonable discretion of the Hearing Officer and pursuant to written request by the appealing party, a continuance of the hearing is granted.

(h) *Administrative hearing for cease and desist orders and emergency abatement actions.* An administrative hearing on the issuance of a cease and desist order or following an emergency abatement action shall be held within five (5) business days following the issuance of the order or the action of abatement, unless the hearing (or the time requirement for the hearing) is waived in writing by the party subject to the cease and desist order or the emergency abatement. A request for an administrative hearing shall not be required from the Person subject to the cease and desist order or the emergency abatement action.

(i) *Hearing proceedings.* The Authorized Inspector shall appear in support of the notice, order, determination, Invoice for Costs or emergency abatement action, and the appealing party shall appear in support of withdrawal of the notice, order, determination, Invoice for Costs, or in opposition to the emergency abatement action. Except as set forth in section 9-1-30(g) (definition of Discharge Exception), the District shall have the burden of supporting any enforcement or other action by a preponderance of the evidence. Each party shall have the right to present testimony and other documentary evidence as necessary for explanation of the case.

(j) *Final decision and appeal.* The final decision of the Hearing Officer shall issue within ten (10) business days of the conclusion of the hearing and shall be delivered by first-class mail, postage prepaid, to the appealing party. The final decision shall include notice that any legal challenge to the final decision shall be made pursuant to the provisions of Code of Civil Procedure sections 1094.5 and 1094.6 and shall be commenced within ninety (90) days following issuance of the final decision. The administrative hearing fee paid by a prevailing party in an appeal shall be refunded.

Notwithstanding this section 9-1-70(j), the final decision of the Hearing Officer in any proceeding determining the validity of a cease and desist order or following an emergency

abatement action shall be mailed within five (5) business days following the conclusion of the hearing.

(k) *County abatement.* In the event the owner of property, the operator of a facility, a permittee, or any other Person fails to comply with any provision of a compliance schedule issued to such owner, operator, permittee or Person pursuant to this Division, the Authorized Inspector may request the Enforcing Attorney to obtain an abatement warrant or other appropriate judicial authorization to enter the property, abate the condition and restore the area. Any costs incurred by the District in obtaining and carrying out an abatement warrant or other judicial authorization may be recovered pursuant to section 9-1-71(d).

Sec. 9-1-71. Nuisance.

Any condition in violation of the prohibitions of this Division , including but not limited to the maintenance or use of any Illicit Connection or the occurrence of any Prohibited Discharge, shall constitute a threat to the public health, safety and welfare, and is declared and deemed a nuisance pursuant to Government Code Section 38771.

(a) *Court Order to Enjoin or Abate.* At the request of the Director, OC Public Works, or Building Official, or his/her designee, the Enforcing Attorney may seek a court order to enjoin and/or abate the nuisance.

(b) *Notice to Owner and Occupant.* Prior to seeking any court order to enjoin or abate a nuisance or threatened nuisance, the Director, OC Public Works, or Building Official, or his/her designee, shall provide notice of the proposed injunction or abatement to the owner and occupant, if any, of the property where the nuisance or threatened nuisance is occurring.

(c) *Emergency Abatement.* In the event the nuisance constitutes an imminent danger to public safety or the environment, the Authorized Inspector may enter the property from which the nuisance emanates, abate the nuisance and restore any property affected by the nuisance. To the extent reasonably practicable, informal notice shall be provided to the owner and occupant prior to abatement. If necessary to protect the public safety or the environment, abatement may proceed without prior notice to or consent from the owner or occupant thereof and without judicial warrant.

(1) An imminent danger shall include, but is not limited to, exigent circumstances created by the dispersal of Pollutants, where the same presents a significant and immediate threat to the public safety or the environment.

(2) Notwithstanding the authority of the District to conduct an emergency abatement action, an administrative hearing pursuant to Section 9-1-70(h) hereinabove shall follow the abatement action.

(d) *Reimbursement of Costs.* All costs incurred by the District in responding to any nuisance, all administrative expenses and all other expenses, recoverable under State law, shall

be recoverable from the Person(s) creating, causing, committing, allowing or maintaining the nuisance.

(e) *Nuisance Lien.* All costs shall become a lien against the property from which the nuisance emanated and a personal obligation against the owner thereof in accordance with Government Code Sections 38773.1 and 38773.5. The owner of record of the property subject to any lien shall be given notice of the lien prior to recording as required by Government Code Section 38773.1.

At the direction of the Director, OC Public Works, or Building Official, the Enforcing Attorney is authorized to collect nuisance abatement costs or enforce a nuisance lien in an action brought for a money judgment or by delivery to the County Assessor of a special assessment against the property in accord with the conditions and requirements of Government Code Section 38773.5.

Sec. 9-1-72. Criminal Sanctions

(a) *Prosecutor.* The Enforcing Attorney may act on the request of the Director, OC Public Works, or Building Official, or his/her designee, to pursue enforcement actions in accordance with the provisions of this Division.

(b) *Infractions.* Any Person who may otherwise be charged with a misdemeanor under this Division may be charged, at the discretion of the Enforcing Attorney, with an infraction punishable by a fine of not more than $100.00 for first violation, $200.00 for a second violation, and a fine not exceeding $500.00 for each additional violation occurring within one (1) year.

(c) *Misdemeanors.* Any Person who negligently or knowingly violates any provision of this Division, undertakes to conceal any violation of this Division, continues any violation of this Division after notice thereof, or violates the terms, conditions and requirements of any permit, shall be guilty of a misdemeanor punishable by a fine of not more than $1,000.00 or by imprisonment for a period of not more than six (6) months, or both.

Sec. 9-1-73. Consecutive Violations.

Each day in which a violation occurs and each separate failure to comply with either a separate provision of this Division, an administrative compliance order, a cease and desist order, or a permit issued pursuant to this Division, shall constitute a separate violation of this Division punishable by fines or sentences issued in accordance herewith.

Sec. 9-1-74. Non-exclusive Remedies.

Each and every remedy available for the enforcement of this Division shall be non-exclusive and it is within the discretion of the Authorized Inspector or Enforcing Attorney to seek cumulative remedies, except that multiple monetary fines or penalties shall not be available for any single violation of this Division.

Sec. 9-1-75. Citations.

Pursuant to Penal Code section 836.5, the Authorized Inspector shall have the authority to cause the arrest of any Person committing a violation of this Division. The Person shall be released and issued a citation to appear before a magistrate in accordance with Penal Code sections 853.5, 853.6, and 853.9, unless the Person demands to be taken before a magistrate. Following issuance of any citation the Authorized Inspector shall refer the matter to the Enforcing Attorney.

Each citation to appear shall state the name and address of the violator, the provisions of this Division violated, and the time and place of appearance before the court, which shall be at least ten (10) business days after the date of violation. The Person cited shall sign the citation giving his or her written promise to appear as stated therein. If the Person cited fails to appear, the Enforcing Attorney may request issuance of a warrant for the arrest of the Person cited.

Sec. 9-1-76. Violations of Other Laws.

Any Person acting in violation of this Division also may be acting in violation of the Federal Clean Water Act or the State Porter-Cologne Act and other laws and also may be subject to sanctions including civil liability. Accordingly, the Enforcing Attorney is authorized to file a citizen suit pursuant to Federal Clean Water Act section 505(a), seeking penalties, damages, and orders compelling compliance, and other appropriate relief. The Enforcing Attorney may notify EPA Region IX, the Santa Ana or San Diego Regional Water Quality Control Boards, or any other appropriate state or local agency, of any alleged violation of this Division.

Sec. 9-1-77. Injunctions

At the request of the Director, OC Public Works, or Building Official, or his/her designee, the Enforcing Attorney may cause the filing in a court of competent jurisdiction, of a civil action seeking an injunction against any threatened or continuing noncompliance with the provisions of this Division .

Any temporary, preliminary or permanent injunction issued pursuant hereto may include an order for reimbursement to the District of all costs incurred in enforcing this Division, including costs of inspection, investigation and monitoring, the costs of abatement undertaken at the expense of the District, costs relating to restoration of the environment and all other expenses as authorized by law.

Sec. 9-1-78. Other Civil Remedies

(a) The Director, OC Public Works, or Building Official, or his/her designee, may cause the Enforcing Attorney to file an action for civil damages in a court of competent jurisdiction seeking recovery of (1) all costs incurred in enforcement of this Division , including but not limited to costs relating to investigation, sampling, monitoring, inspection, administrative expenses, all other expenses as authorized by law, and consequential damages, (2) all costs

incurred in mitigating harm to the environment or reducing the threat to human health, and (3) damages for irreparable harm to the environment.

(b) The Enforcing Attorney is authorized to file actions for civil damages resulting from any trespass or nuisance occurring on public land or to the Stormwater Drainage System from any violation of this Division where the same has caused damage, contamination or harm to the environment, public property or the Stormwater Drainage System.

(c) The remedies available to the District pursuant to the provisions of this Division shall not limit the right of the District to seek any other remedy that may be available by law.

Sec. 9-1-80. Procedure.

(a) *Discharge permit procedure.*

(1) *Permit.* On application of the owner of property or the operator of any facility, which property or facility is not otherwise subject to the requirements of a State General Permit or a National Pollution Discharge Elimination System Permit regulating stormwater discharges, the Director, OC Public Works or his/her designee, may issue a permit authorizing the release of non-stormwater Discharges to the Stormwater Drainage System if:

a) The Discharge of material or constituents is reasonably necessary for the conduct of otherwise legal activities on the property, and

b) The Discharge will not cause a nuisance, impair the beneficial uses of receiving waters, or cause any reduction in established water quality standards.

(2) *Application.* The applicant shall provide all information requested by the Director, OC Public Works or his/her designee, for review and consideration of the application, including but not limited to specific detail as to the activities to be conducted on the property, plans and specifications for facilities located on the property, identification of equipment or processes to be used on-site and other information as may be requested in order to determine the constituents, and quantities thereof, which may be discharged if permission is granted.

(3) *Permit issuance.* The permit shall be granted or denied by the Director, OC Public Works or his/her designee, no later than sixty (60) days following the completion and acceptance of the application as determined by the Director, OC Public Works or his/her designee.

The applicant shall be notified in person or by first-class mail, postage prepaid, of the action taken.

(4) *Permit conditions.* The permit may include terms, conditions and requirements to ensure compliance with the objectives of this Division and as necessary to protect the receiving waters, including but not limited to

a) Identification of the Discharge location on the property and the location at which the Discharge will enter the Stormwater Drainage System;

b) Identification of the constituents and quantities thereof to be discharged into the Stormwater Drainage System;

c) Specification of pollution prevention techniques and structural or nonstructural control requirements as reasonably necessary to prevent the occurrence of potential Discharges in violation of this Division;

d) Requirements for self-monitoring of any Discharge;

e) Requirements for submission of documents or data, such as technical reports, production data, Discharge reports, self-monitoring reports and waste manifests; and

f) Other terms and conditions appropriate to ensure compliance with the provisions of this Division and the protection of receiving waters.

(5) *General permit.* In the discretion of the Director, OC Public Works or his/her designee, the permit may, in accordance with the conditions identified in section 9-1-80(a)(4) hereinabove, be prepared as a general permit applicable to a specific category of activities. If a general permit is issued, any Person intending to Discharge within the scope of the authorization provided by the general permit may do so by filing an application to Discharge with the Director, OC Public Works or his/her designee. No Discharge within the scope of the general permit shall occur until such application is so filed. Notwithstanding the foregoing in this section, the Director, OC Public Works or his/her designee, in his discretion, may eliminate the requirement that an application for a general permit be filed for any specific activity for which a general permit has been issued.

(6) *Permit fees.* The permission to Discharge shall be conditioned upon the applicant's payment of the District's costs, in accordance with a fee schedule adopted by separate resolution, as follows:

a) For individually issued permits, the costs of reviewing the permit application, preparing and issuing the permit, and the costs reasonably related to administrating this permit program.

b) For general permits, the costs of reviewing the permit application, that portion of the costs of preparing the general permit which is reasonably attributable to the permittee's application for the general permit, and the

costs reasonably related to administering the general permit program. Notwithstanding the foregoing, no fee shall be charged for a general permit issued pursuant to section 9-1-80(a)(5).

(b) *Permit suspension, revocation or modification.*

(1) The Director, OC Public Works or his/her designee may suspend or revoke any permit when it is determined that:

a) The permittee has violated any term, condition or requirement of the permit or any applicable provision of this Division; or

b) The permittee's Discharge or the circumstances under which the Discharge occurs have changed so that it is no longer appropriate to except the Discharge from the prohibitions on Prohibited Discharge contained within this Division; or

c) The permittee fails to comply with any schedule for compliance issued pursuant to this Division; or

d) Any regulatory agency, including EPA or a Regional Water Quality Control Board having jurisdiction over the Discharge, notifies the District that the Discharge should be terminated.

(2) The Director, OC Public Works or his/her designee, may modify any permit when it is determined that:

a) Federal or state law requirements have changed in a manner that necessitates a change in the permit; or

b) The permittee's Discharge or the circumstances under which the Discharge occurs have changed so that it is appropriate to modify the permit's terms, conditions or requirements; or

c) A change to the permit is necessary to ensure compliance with the objectives of this Division or to protect the quality of receiving waters.

The permittee, or in the case of a general permit, each Person who has filed an application pursuant to section 9-1-80(a)(5), shall be informed of any change in the permit terms and conditions at least sixty (60) days prior to the effective date of the modified permit. In the case of a general permit issued pursuant to section 9-1-80(a)(5), any change in the permit terms and conditions shall be published in a newspaper of general circulation within the County at least sixty (60) days prior to the effective date of the modified permit.

(3) The determination that a permit shall be denied, suspended, revoked or modified may be appealed by a permittee pursuant to the same procedures applicable to appeal of an administrative compliance order hereunder. In the absence of a judicial order to the contrary, the permittee may continue to Discharge pending issuance of the final administrative decision by the Hearing Officer.

(c) *Permit enforcement.*

(1) *Penalties.* Any violation of the terms, conditions and requirements of any permit issued by the Director, OC Public Works or his/her designee, shall constitute a violation of this Division and subject the violator to the administrative, civil and criminal remedies available under this Division.

(d) *Compliance.* Compliance with the terms, conditions and requirements of a permit issued pursuant to this Division shall not relieve the permittee from compliance with all federal, state and local laws, regulations and permit requirements, applicable to the activity for which the permit is issued.

(1) *Limited permittee rights.* Permits issued under this Division are for the Person identified therein as the "permittee" only, and authorize the specific operation at the specific location identified in the permit. The issuance of a permit does not vest the permittee with a continuing right to Discharge.

(2) *Transfer of permits.* No permit issued to any Person may be transferred to allow:

a) A Discharge to the Stormwater Drainage System at a location other than the location stated in the original permit; or

b) A Discharge by a Person other than the Person named in the permit, provided however, that the District may approve a transfer if written approval is obtained, in advance, from the Director, OC Public Works or his/her designee.

Sec. 9-1-90. Federal Clean Water Act.

(a) The District intends to cooperate with other agencies with jurisdiction over stormwater discharges to ensure that the regulatory purposes underlying stormwater regulations promulgated pursuant to the Clean Water Act (33 U.S.C. § 1251 et seq.) are met.

(b) The District may, to the extent authorized by law, elect to contract for the services of any public agency or private enterprise to carry out the planning approvals, inspections, permits and enforcement authorized by this Division.

Sec. 9-1-100. General Provisions.

(a) *Compliance disclaimer.* Full compliance by any Person or entity with the provisions of this Division shall not preclude the need to comply with other local, state or federal statutory or regulatory requirements, which may be required for the control of the discharge of Pollutants into stormwater and/or protection of stormwater quality.

(b) *Severability.* If any provision of this Division or the application of the Division to any circumstance is held invalid, the remainder of the Division or the application of the Division to other Persons or circumstances shall not be affected.

(c) *Headings.* Headings of the sections of this Division are inserted for convenience only and shall have no effect in the application of this Division.

Sec. 9-1-110. Procedure.

The provisions of sections 1094.5 and 1094.6 of the Code of Civil Procedure set forth the procedure for judicial review of any act taken pursuant to this Division. Parties seeking judicial review of any action taken pursuant to this Division shall file such action within ninety (90) days of the occurrence of the event for which review is sought.

This ordinance shall take effect and be in full force thirty (30) days from and after its passage and before the expiration of fifteen (15) days after the passage thereof, shall be published once in an adjudicated newspaper in the County of Orange.

THE FOREGOING was **PASSED** and **ADOPTED** by the following vote of the Orange County Board of Supervisors, Acting as the Orange County Flood Control District on March 22, 2011, to wit:

AYES: Supervisors: SHAWN NELSON, BILL CAMPBELL, JANET NGUYEN
JOHN M. W. MOORLACH, PATRICIA BATES

NOES:
EXCUSED:
ABSTAINED:

Bill Campbell
CHAIRMAN

STATE OF CALIFORNIA)
) ss:
COUNTY OF ORANGE)

I, DARLENE J. BLOOM, Clerk of the Board of Orange County, California, hereby certify that a copy of this document has been delivered to the Chairman of the Board and that the above and foregoing Ordinance was duly and regularly adopted by the Orange County Board of Supervisors, Acting as the Orange County Flood Control District.

IN WITNESS WHEREOF, I have hereto set my hand and seal.

DARLENE J. BLOOM
Clerk of the Board.
County of Orange, State of California

Ordinance No.: 11-010
Agenda Date: 03/22/2011
Item No.: 42

I certify that the foregoing is a true and correct copy of the Ordinance adopted by the Board of Supervisors, Acting as the Orange County Flood Control District, Orange County, State of California

DARLENE J. BLOOM, Clerk of the Board of Supervisors

By: _____
Deputy

DECLARATION OF HOWARD GEST AND EXHIBITS THERETO

DECLARATION OF HOWARD GEST

I, HOWARD GEST, hereby declare and state as follows:

1. I am an attorney with the firm of Burhenn & Gest LLP, counsel for the County of Orange and joint claim representative for Claimants in Test Claim No. 10-TC-11, *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2; C.; D.; F.1.d.; F1.d.7.i; F.1.f; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; K.1.b.4.n.; K.3.a.; and Attachment D.* I have personal knowledge of the matters set forth herein and, if called to testify, could and would testify competently thereto.

2. Exhibit 1 to this Declaration is a true and correct copy of excerpts of an order of the State Water Resources Control Board, *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements For Municipal Separate Storm Sewer System (MS4) Discharges Within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating From the City of Long Beach MS4*, State Board Order WQ 2015-0075 (June 16, 2015).

3. Exhibit 2 to this Declaration is a true and correct copy of a guidance memorandum issued by the United States Environmental Protection Agency ("USEPA") entitled "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements based on Those WLAs" and dated November 22, 2002.

4. Exhibit 3 to this Declaration is a true and correct copy of a guidance memorandum issued by USEPA entitled "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs'" and dated November 12, 2010.

5. Exhibit 4 to this Declaration is a true and correct copy of a guidance memorandum issued by USEPA entitled "Revisions to the November 22, 2002 Memorandum 'Establishing Total

Maximum Daily Load (TMDL) Waste Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAS'" and dated November 26, 2014.

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

Executed this 25 day of August, 2023 at Los Angeles, California.

Howard Gest

EXHIBIT 1

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2015-0075

In the Matter of Review of

Order No. R4-2012-0175, NPDES Permit No. CAS004001

WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE CITY OF LONG BEACH MS4

Issued by the
California Regional Water Quality Control Board,
Los Angeles Region

SWRCB/OCC FILES A-2236 (a)-(kk)

BY THE BOARD:

In this order, the State Water Resources Control Board (State Water Board) reviews Order No. R4-2012-0175 (NPDES Permit No. CAS004001) adopted by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) on November 8, 2012. Order No. R4-2012-0175 regulates discharges of storm water and non-storm water from the municipal separate storm sewer systems (MS4s) located within the coastal watersheds of Los Angeles County, with the exception of the City of Long Beach MS4, and is hereinafter referred to as the "Los Angeles MS4 Order" or the "Order." We received 37 petitions challenging various provisions of the Los Angeles MS4 Order. For the reasons discussed herein, we generally uphold the Los Angeles MS4 Order, but with a number of revisions to the findings and provisions in response to issues raised in the petitions and as a result of our own review of the Order.

I. BACKGROUND

The Los Angeles MS4 Order regulates discharges from the MS4s operated by the Los Angeles County Flood Control District, Los Angeles County, and 84 municipal permittees (Permittees) in a drainage area that encompasses more than 3,000 square miles and multiple watersheds. The Order was issued by the Los Angeles Water Board in

Arcadia, Claremont, Covina, Duarte and Huntington Park, San Marino et al.,[31] and Sierra Madre, incorporated a response to the collateral estoppel argument.

We stated in a July 15, 2013 letter that"[i]nterested persons may not use the [October 15][32] deadline for responses on the remaining petition issues as an opportunity to respond to comments filed on the receiving water limitations approach." We clarified further in a July 29, 2013 letter: "[W]hen submitting subsequent responses to the petitions in accordance with the [October 15] deadline, petitioners and interested persons should not raise new issues related to the specific questions regarding the watershed management program/enhanced watershed management program or respond to any August 15, 2013, submissions; however petitioners and interested persons will not be precluded from responding to specific issues raised in the original petitions on grounds that the issues are related to the receiving water limitations language."

We find that the collateral estoppel responses by the six petitioners are disallowed by the direction we provided in our July 15 and July 29, 2013 letters. However, as will be apparent in our discussion in section II.A, we do not rely on the Environmental Petitioners' collateral estoppel argument in resolving the petitions. Our determination that portions of the October 15, 2013 Responses are disallowed is, therefore, immaterial to the resolution of the issues.[33]

Having resolved the procedural issues, we turn to the merits of the Petitions.

A. Implementation of the Iterative Process as Compliance with Receiving Water Limitations

The Los Angeles MS4 Order includes receiving water limitations provisions that are consistent with our direction in Order WQ 99-05 in Part V.A of the Los Angeles MS4 Order. Part V.A. provides, in part, as follows:

1. Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited.

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[31] The cities of San Marino, Rancho Palos Verdes, South El Monte, Norwalk, Artesia, Torrance, Beverly Hills, Hidden Hills, Westlake Village, La Mirada, Vernon, Monrovia, Agoura Hills, Commerce, Downey, Inglewood, Culver City, and Redondo Beach submitted a joint October 15, 2013 Response.

[32] The July 15, 2013 letter set a deadline of September 20, 2013, which was subsequently extended to October 15, 2013.

[33] In a November 21, 2013 letter, we indicated that we would consider the Motion to Strike concurrently with drafting of this Order, but that we would not accept any additional submissions in this matter, including any responses to the Motion to Strike. City of San Marino objected to the letter and submitted an opposition to the Motion to Strike. Several petitioners submitted joinders in City of San Marino's motion. For the same reasons articulated above, we are not accepting these submissions; they would not affect our resolution of the issues.

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible [footnote omitted], shall not cause or contribute to a condition of nuisance.

3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications. . . .[34]

The petitioners that are permittees (hereinafter referred to as "Permittee Petitioners")[35] argue that the above language either means, or should be read and/or clarified to mean, that good faith engagement in the requirements of Part V.A.3, traditionally referred to as the "iterative process," constitutes compliance with Parts V.A.1. and V.A.2. The position put forth by Permittee Petitioners is one we took up when we initiated a process to re-examine the receiving water limitations and iterative process in MS4 permits statewide with our Receiving Water Limitations Issue Paper and the November 20, 2012 workshop. We summarize the law and policy regarding Permittee Petitioners' position again here and ultimately disagree with Permittee Petitioners that implementation of the iterative process does or should constitute compliance with receiving water limitations.

The Clean Water Act generally requires NPDES permits to include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards.[36] In the context of NPDES permits for MS4s, however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency.[37] Specifically the Clean Water Act states as follows:

> Permits for discharges from municipal storm sewers –
>
> . . .
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

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[34] Los Angeles MS4 Order, Part V.A, pp. 38-39.

[35] For ease of reference, where an argument is made by multiple Permittee Petitioners, even if not by all, we attribute that argument to Permittee Petitioners generally, and do not list which of the 37 Permittee Petitioners in fact make the argument. Where only one or two Permittee Petitioners make a particular argument, we have identified the specific Permittee Petitioner(s).

[36] 33 U.S.C. §§ 1311, 1342(a).

[37] 33 U.S.C. § 1342(p)(3)(B); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants.[38]

Thus, a permitting agency imposes requirements related to attainment of water quality standards where it determines that those provisions are "appropriate for the control of [relevant] pollutants" pursuant to the Clean Water Act municipal storm water provisions.

Under the Porter-Cologne Act, waste discharge requirements must implement applicable water quality control plans, which include the beneficial uses to be protected for a given water body and the water quality objectives reasonably required for that protection.[39] In this respect, the Porter-Cologne Act treats MS4 dischargers and other dischargers even-handedly and anticipates that all waste discharge requirements will implement the water quality control plans. However, when implementing requirements under the Porter-Cologne Act that are not compelled by federal law, the State Water Board and regional water boards (collectively, "water boards") have some flexibility to consider other factors, such as economics, when establishing the appropriate requirements.[40] Accordingly, since the State Water Board has discretion under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, the State Water Board may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.

We have previously exercised the discretion we have under federal law in favor of requiring compliance with water quality standards, but have required less than strict compliance. We have directed, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters,[41] but have prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. That iterative process involves reporting of the violation, submission of a report describing proposed improvements to BMPs

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[38] 33 U.S.C. § 1342(p)(3)(B).

[39] Wat. Code, § 13263. The term "water quality standards" encompasses the beneficial uses of the water body and the water quality objectives (or "water quality criteria" under federal terminology) that must be met in the waters of the United States to protect beneficial uses. Water quality standards also include the federal and state antidegradation policy.

[40] Wat. Code, §§ 13241, 13263; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

[41] State Water Board Orders WQ 98-01 (*Environmental Health Coalition*), WQ 99-05 (*Environmental Health Coalition*), WQ 2001-15 (*Building Industry Association of San Diego*).

expected to better meet water quality standards, and implementation of these new BMPs.[42] The current language of the existing receiving waters limitations provisions was actually developed by USEPA when it vetoed two regional water board MS4 permits that utilized a prior version of the State Water Board's receiving water limitations provisions.[43] In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.

There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process.[44]

The position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld on several occasions. The receiving water limitations provisions of the 2001 Los Angeles MS4 Order specifically have been litigated twice, and in both cases, the courts upheld the provisions and the Los Angeles Water Board's interpretation of the provisions. In a decision resolving a challenge to the 2001 Los Angeles MS4 Order, the Los Angeles County Superior Court stated: "[T]he Regional [Water] Board acted within its authority when it included [water quality standards compliance] in

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[42] State Water Board Order WQ 99-05, pp. 2-3; see also State Water Board Order WQ 2001-15, pp. 7-9. Additionally, consistent with federal law, we found it appropriate to require implementation of BMPs in lieu of numeric water quality-based effluent limitations to meet water quality standards. See State Water Board Orders WQ 91-03 (*Citizens for a Better Environment*), WQ 91-04 (*Natural Resources Defense Council*), WQ 98-01, WQ 2001-15. This issue is discussed in greater detail in Section II.C. of this order.

[43] See State Water Board Orders WQ 99-05, WQ 2001-15.

[44] Several Permittee Petitioners have argued that the State Water Board's opinion in State Water Board Order WQ 2001-15 must be read to endorse a safe harbor in the iterative process. We disagree. Regardless, the State Water Board's position that the iterative process of the subject permit did not create a "safe harbor" from compliance with receiving water limitations was clearly established in subsequent litigation on that order. (See *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (Super. Ct. 2003, No. GIC780263), affd. *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866.)

the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard."[45] The lack of a safe harbor in the iterative process of the 2001 Los Angeles MS4 Order was again acknowledged in 2011 and 2013, this time by the Ninth Circuit Court of Appeal. In these instances, the Ninth Circuit was considering a citizen suit brought by the Natural Resources Defense Council against the County of Los Angeles and the Los Angeles County Flood Control District for alleged violations of the receiving water limitations of that order. The Ninth Circuit held that, as the receiving water limitations of the 2001 Los Angeles MS4 Order (and accordingly as the precedential language in State Water Board Order WQ 99-05) was drafted, engagement in the iterative process does not excuse liability for violations of water quality standards.[46] The California Court of Appeal has come to the same conclusion in interpreting similar receiving water limitations provisions in MS4 Orders issued by the San Diego Regional Water Quality Control Board in 2001 and the Santa Ana Regional Water Quality Control Board in 2002.[47]

While we reiterate that the judicial rulings have been consistent with the water boards' intention and position regarding the relationship between the receiving water limitations and the iterative process, we acknowledge that some in the regulated community perceived the 2011 Ninth Circuit opinion in particular as a re-interpretation of that relationship. Our Receiving Water Limitations Issue Paper and subsequent workshop reflected our desire to re-examine the issue in response to concerns expressed by the regulated community in the aftermath of that ruling.

As stated above, both the Clean Water Act and the Porter-Cologne Act afford some discretion to not require strict compliance with water quality standards for MS4 discharges. In each of the discussed court cases above, the court's decision is based on the specific permit language; thus the cases do not address our authority with regard to requiring compliance with water quality standards in an MS4 permit as a threshold matter, and they do not require us to continue to exercise our discretion as we decided in State Water Board Order

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[45] *In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7. The decision was affirmed on appeal (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985); however, this particular issue was not discussed in the court of appeal's decision.

[46] *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d. 880, rev'd on other grounds sub nom. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710, mod. by *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135.

[47] *Building Industry Assn. of San Diego County, supra*,124 Cal.App.4th 866; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377.

WQ 99-05. Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process,[48] we may even have the flexibility to reverse[49] our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance.[50]

However, with this Order, we now decline to do either. As the storm water management programs of municipalities have matured, an increasing body of monitoring data indicates that many water quality standards are in fact not being met by many MS4s. The iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. Compliance with water quality standards is and should remain the ultimate goal of any MS4 permit. We reiterate and confirm our determination that provisions requiring compliance with receiving water limitations are "appropriate for the control of . . . pollutants" addressed in MS4 permits and that therefore, consistent with our authority under the Clean Water Act, we will continue to require compliance with receiving water limitations.[51]

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[48] See, e.g. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia, *supra*, fn. 17.

[49] Of course any change of direction would be subject to ordinary principles of administrative law. (See Code Civ. Proc., § 1094.5, subd. (b).)

[50] As such, it is not necessary to address the collateral estoppel arguments raised by the Environmental Petitioners and opposed by Permittee Petitioners. We agree that it is settled law that we have the discretion to require compliance with water quality standards in an MS4 permit under federal and state law. We also agree that it is settled law that the receiving water limitations provisions currently spelled out in our MS4 permits do not carve out a safe harbor in the iterative process. But the question for us is whether we should continue to exercise our discretion to utilize the same approach to receiving water limitations established under our prior precedent, or proceed in a new direction.

[51] Several Permittee Petitioners argued in comments submitted on the first draft of this order that, because we find that we have some discretion under Clean Water Act section 402(p)(3) to not require compliance with receiving water limitations, the Los Angeles Water Board's action in requiring such compliance -- and our action in affirming it -- is pursuant to state authority. (See, e.g., Cities of Arcadia, Claremont, and Covina, Comment Letter, Jan. 21, 2015.) The Permittee Petitioners argue that the action is therefore subject to evaluation in light of the factors set out in Water Code section 13263 and 13241 pursuant to *City of Burbank, supra,* 35 Cal.4th 613. Under *City of Burbank,* a regional water board must consider the factors specified in section 13241 when issuing waste discharge requirements under section 13263, subdivision (a), but only to the extent those waste discharge requirements exceed the requirements of the federal Clean Water Act. (35 Cal.4th at 627.) Nowhere in our discussion in this section do we mean to disavow either that the Los Angeles Water Board acted under federal authority to impose "such other provisions as . . .determine[d] appropriate for the control of . . . pollutants" in adopting the receiving water limitations provisions of the Los Angeles MS4 Order in the first instance or that we are acting under federal authority in upholding those provisions. (33 U.S.C. § 1342(p)(3)(B)(iii).) The receiving water limitations provisions do not exceed the requirements of federal law. We nevertheless also point out that the Los Angeles Water Board engaged in an analysis of the factors under section 13241 when adopting the Order. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-139 to F-155.)

EXHIBIT 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 22 2002

OFFICE OF WATER

MEMORANDUM

SUBJECT: Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs

FROM: Robert H. Wayland, III, Director
Office of Wetlands, Oceans and Watersheds

James A. Hanlon, Director
Office of Wastewater Management

TO: Water Division Directors
Regions 1 - 10

This memorandum clarifies existing EPA regulatory requirements for, and provides guidance on, establishing wasteload allocations (WLAs) for storm water discharges in total maximum daily loads (TMDLs) approved or established by EPA. It also addresses the establishment of water quality-based effluent limits (WQBELs) and conditions in National Pollutant Discharge Elimination System (NPDES) permits based on the WLAs for storm water discharges in TMDLs. The key points presented in this memorandum are as follows:

NPDES-regulated storm water discharges must be addressed by the wasteload allocation component of a TMDL. See 40 C.F.R. § 130.2(h).

NPDES-regulated storm water discharges may not be addressed by the load allocation (LA) component of a TMDL. See 40 C.F.R. § 130.2 (g) & (h).

Storm water discharges from sources that are not currently subject to NPDES regulation may be addressed by the load allocation component of a TMDL. See 40 C.F.R. § 130.2(g).

It may be reasonable to express allocations for NPDES-regulated storm water discharges from multiple point sources as a single categorical wasteload allocation when data and information are insufficient to assign each source or outfall individual WLAs. See 40 C.F.R. § 130.2(i). In cases where wasteload allocations

are developed for categories of discharges, these categories should be defined as narrowly as available information allows.

The WLAs and LAs are to be expressed in numeric form in the TMDL. See 40 C.F.R. § 130.2(h) & (i). EPA expects TMDL authorities to make separate allocations to NPDES- regulated storm water discharges (in the form of WLAs) and unregulated storm water (in the form of LAs). EPA recognizes that these allocations might be fairly rudimentary because of data limitations and variability in the system.

NPDES permit conditions must be consistent with the assumptions and requirements of available WLAs. See 40 C.F.R. § 122.44(d)(1)(vii)(B).

WQBELs for NPDES-regulated storm water discharges that implement WLAs in TMDLs may be expressed in the form of best management practices (BMPs) under specified circumstances. See 33 U.S.C. §1342(p)(3)(B)(iii); 40 C.F.R. §122.44(k)(2)&(3). If BMPs alone adequately implement the WLAs, then additional controls are not necessary.

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.

When a non-numeric water quality-based effluent limit is imposed, the permit's administrative record, including the fact sheet when one is required, needs to support that the BMPs are expected to be sufficient to implement the WLA in the TMDL. See 40 C.F.R. §§ 124.8, 124.9 & 124.18.

The NPDES permit must also specify the monitoring necessary to determine compliance with effluent limitations. See 40 C.F.R. § 122.44(i). Where effluent limits are specified as BMPs, the permit should also specify the monitoring necessary to assess if the expected load reductions attributed to BMP implementation are achieved (e.g., BMP performance data).

The permit should also provide a mechanism to make adjustments to the required BMPs as necessary to ensure their adequate performance.

This memorandum is organized as follows:

(I). Regulatory basis for including NPDES-regulated storm water discharges in WLAs in TMDLs;

(II). Options for addressing storm water in TMDLs; and

(III). Determining effluent limits in NPDES permits for storm water discharges consistent with the WLA

(I). Regulatory Basis for Including NPDES-regulated Storm Water Discharges in WLAs in TMDLs

As part of the 1987 amendments to the CWA, Congress added Section 402(p) to the Act to cover discharges composed entirely of storm water. Section 402(p)(2) of the Act requires permit coverage for discharges associated with industrial activity and discharges from large and medium municipal separate storm sewer systems (MS4), i.e., systems serving a population over 250,000 or systems serving a population between 100,000 and 250,000, respectively. These discharges are referred to as Phase I MS4 discharges.

In addition, the Administrator was directed to study and issue regulations that designate additional storm water discharges, other than those regulated under Phase I, to be regulated in order to protect water quality. EPA issued regulations on December 8, 1999 (64 FR 68722), expanding the NPDES storm water program to include discharges from smaller MS4s (including all systems within "urbanized areas" and other systems serving populations less than 100,000) and storm water discharges from construction sites that disturb one to five acres, with opportunities for area-specific exclusions. This program expansion is referred to as Phase II.

Section 402(p) also specifies the levels of control to be incorporated into NPDES storm water permits depending on the source (industrial versus municipal storm water). Permits for storm water discharges associated with industrial activity are to require compliance with all applicable provisions of Sections 301 and 402 of the CWA, i.e., all technology-based and water quality-based requirements. See 33 U.S.C. §1342(p)(3)(A). Permits for discharges from MS4s, however, "shall require controls to reduce the discharge of pollutants to the maximum extent practicable ... and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." See 33 U.S.C. §1342(p)(3)(B)(iii).

Storm water discharges that are regulated under Phase I or Phase II of the NPDES storm water program are point sources that must be included in the WLA portion of a TMDL. See 40 C.F.R. § 130.2(h). Storm water discharges that are not currently subject to Phase I or Phase II of the NPDES storm water program are not required to obtain NPDES permits. 33 U.S.C. §1342(p)(1) & (p)(6). Therefore, for regulatory purposes, they are analogous to nonpoint sources and may be included in the LA portion of a TMDL. See 40 C.F.R. § 130.2(g).

(II). Options for Addressing Storm Water in TMDLs

Decisions about allocations of pollutant loads within a TMDL are driven by the quantity and quality of existing and readily available water quality data. The amount of storm water data available for a TMDL varies from location to location. Nevertheless, EPA expects TMDL authorities will make separate aggregate allocations to NPDES-regulated storm water discharges

(in the form of WLAs) and unregulated storm water (in the form of LAs). It may be reasonable to quantify the allocations through estimates or extrapolations, based either on knowledge of land use patterns and associated literature values for pollutant loadings or on actual, albeit limited, loading information. EPA recognizes that these allocations might be fairly rudimentary because of data limitations.

EPA also recognizes that the available data and information usually are not detailed enough to determine waste load allocations for NPDES-regulated storm water discharges on an outfall-specific basis. In this situation, EPA recommends expressing the wasteload allocation in the TMDL as either a single number for all NPDES-regulated storm water discharges, or when information allows, as different WLAs for different identifiable categories, e.g., municipal storm water as distinguished from storm water discharges from construction sites or municipal storm water discharges from City A as distinguished from City B. These categories should be defined as narrowly as available information allows (e.g., for municipalities, separate WLAs for each municipality and for industrial sources, separate WLAs for different types of industrial storm water sources or dischargers).

(III). Determining Effluent Limits in NPDES Permits for Storm Water Discharges Consistent with the WLA

Where a TMDL has been approved, NPDES permits must contain effluent limits and conditions consistent with the requirements and assumptions of the wasteload allocations in the TMDL. See 40 CFR § 122.44(d)(1)(vii)(B). Effluent limitations to control the discharge of pollutants generally are expressed in numerical form. However, in light of 33 U.S.C. §1342(p)(3)(B)(iii), EPA recommends that for NPDES-regulated municipal and small construction storm water discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits. See *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 FR 43761 (Aug. 26, 1996). The Interim Permitting Approach Policy recognizes the need for an iterative approach to control pollutants in storm water discharges. Specifically, the policy anticipates that a suite of BMPs will be used in the initial rounds of permits and that these BMPs will be tailored in subsequent rounds.

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

Under certain circumstances, BMPs are an appropriate form of effluent limits to control pollutants in storm water. See 40 CFR § 122.44(k)(2) & (3). If it is determined that a BMP approach (including an iterative BMP approach) is appropriate to meet the storm water component of the TMDL, EPA recommends that the TMDL reflect this.

EPA expects that the NPDES permitting authority will review the information provided by the TMDL, see 40 C.F.R. § 122.44(d)(1)(vii)(B), and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit. Where BMPs are used, EPA recommends that the permit provide a mechanism to require use of expanded or better-tailored BMPs when monitoring demonstrates they are necessary to implement the WLA and protect water quality.

Where the NPDES permitting authority allows for a choice of BMPs, a discussion of the BMP selection and assumptions needs to be included in the permit's administrative record, including the fact sheet when one is required. 40 C.F.R.§§ 124.8, 124.9 & 124.18. For general permits, this may be included in the storm water pollution prevention plan required by the permit. See 40 C.F.R. § 122.28. Permitting authorities may require the permittee to provide supporting information, such as how the permittee designed its management plan to address the WLA(s). See 40 C.F.R. § 122.28. The NPDES permit must require the monitoring necessary to assure compliance with permit limitations, although the permitting authority has the discretion under EPA's regulations to decide the frequency of such monitoring. See 40 CFR § 122.44(i). EPA recommends that such permits require collecting data on the actual performance of the BMPs. These additional data may provide a basis for revised management measures. The monitoring data are likely to have other uses as well. For example, the monitoring data might indicate if it is necessary to adjust the BMPs. Any monitoring for storm water required as part of the permit should be consistent with the state's overall assessment and monitoring strategy.

The policy outlined in this memorandum affirms the appropriateness of an iterative, adaptive management BMP approach, whereby permits include effluent limits (e.g., a combination of structural and non-structural BMPs) that address storm water discharges, implement mechanisms to evaluate the performance of such controls, and make adjustments (i.e., more stringent controls or specific BMPs) as necessary to protect water quality. This approach is further supported by the recent report from the National Research Council (NRC), *Assessing the TMDL Approach to Water Quality Management* (National Academy Press, 2001). The NRC report recommends an approach that includes "adaptive implementation," i.e., "a cyclical process in which TMDL plans are periodically assessed for their achievement of water quality standards" . . . and adjustments made as necessary. *NRC Report* at ES-5.

This memorandum discusses existing requirements of the Clean Water Act (CWA) and codified in the TMDL and NPDES implementing regulations. Those CWA provisions and regulations contain legally binding requirements. This document describes these requirements; it does not substitute for those provisions or regulations. The recommendations in this memorandum are not binding; indeed, there may be other approaches that would be appropriate

in particular situations. When EPA makes a TMDL or permitting decision, it will make each decision on a case-by-case basis and will be guided by the applicable requirements of the CWA and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the particular situation. EPA may change this guidance in the future.

If you have any questions please feel free to contact us or Linda Boornazian, Director of the Water Permits Division or Charles Sutfin, Director of the Assessment and Watershed Protection Division.

cc:
Water Quality Branch Chiefs
Regions 1 - 10

Permit Branch Chiefs
Regions 1 - 10

EXHIBIT 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 12 2010

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs"

FROM: James A. Hanlon, Director
Office of Wastewater Management

Denise Keehner, Director
Office of Wetlands, Oceans and Watersheds

TO: Water Management Division Directors
Regions 1 - 10

This memorandum updates aspects of EPA's November 22, 2002 memorandum from Robert H. Wayland, III, Director of the Office of Wetlands, Oceans and Watersheds, and James A. Hanlon, Director of the Office of Wastewater Management, on the subject of "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (hereafter "2002 memorandum").

Background

Section III of the 2002 memorandum "affirm[ed] the appropriateness of an iterative, adaptive management best management practices (BMP) approach" for improving stormwater management over time as permitting agencies, the regulated community, and other involved stakeholders gain more experience and knowledge. Since 2002, States and EPA have obtained considerable experience in developing TMDLs and WLAs that address stormwater sources. The technical capacity to monitor stormwater and its impacts on water quality has increased. In many areas, monitoring of the impacts of stormwater on water quality has become more sophisticated and widespread. Better information on the effectiveness of stormwater controls to reduce pollutant loadings and address water quality impairments is now available. In many parts of the country, permitting agencies have issued several rounds of permits for Phase I municipal separate storm sewer systems (MS4s), Phase II MS4s, and stormwater discharges associated with industrial activity, including stormwater from construction activities. Notwithstanding these developments, stormwater discharges remain a significant cause of water quality

impairment in many places, highlighting a continuing need for more useful WLAs and better NPDES permit provisions to restore impaired waters to their beneficial uses.

With this additional experience in mind, EPA is updating and revising the following four elements of the 2002 memorandum to better reflect current practices and trends in permits and WLAs for stormwater discharges:

- Providing numeric water quality-based effluent limitations in NPDES permits for stormwater discharges;
- Disaggregating stormwater sources in a WLA;
- Using surrogates for pollutant parameters when establishing targets for TMDL loading capacity; and
- Designating additional stormwater sources to regulate and treating load allocations as wasteload allocations for newly regulated stormwater sources.

EPA is currently reviewing other elements of the 2002 memorandum and will consider making appropriate revisions in the future.

Providing Numeric Water Quality-Based Effluent Limitations in NPDES Permits for Stormwater Discharges

In today's memorandum, EPA is revising the 2002 memorandum with respect to water quality-based effluent limitations (WQBELs) in stormwater permits. Since 2002, many NPDES authorities have documented the contributions of stormwater discharges to water quality impairment and have identified the need to include clearer permit requirements in order to address these impairments. Numeric WQBELs in stormwater permits can clarify permit requirements and improve accountability and enforceability. For the purpose of this memorandum, numeric WQBELs use numeric parameters such as pollutant concentrations, pollutant loads, or numeric parameters acting as surrogates for pollutants, such as such as stormwater flow volume or percentage or amount of impervious cover.

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

Where the NPDES authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality standard excursion, EPA recommends that, where feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards. The 2002

memorandum stated "EPA expects that most WQBELs for NPDES-regulated municipal and small construction stormwater discharges will be in the form of BMPs, and that numeric limitations will be used only in rare instances." Those expectations have changed as the stormwater permit program has matured. EPA now recognizes that where the NPDES authority determines that MS4 discharges and/or small construction stormwater discharges have the reasonable potential to cause or contribute to water quality standards excursions, permits for MS4s and/or small construction stormwater discharges should contain numeric effluent limitations where feasible to do so. EPA recommends that NPDES permitting authorities use numeric effluent limitations where feasible as these types of effluent limitations create objective and accountable means for controlling stormwater discharges.

The Clean Water Act (CWA) requires that permits for stormwater discharges associated with industrial activity comply with section 301 of the Act, including the requirement under section 301(b)(1)(C) to contain WQBELs for any discharge that the permitting authority determines has the reasonable potential to cause or contribute to a water quality standard excursion. CWA section 402(p)(3)(A), 40 CFR 122.44(d)(1)(iii). When the permitting authority determines, using the procedures specified at 40 CFR 122.44(d)(1)(ii) that the discharge causes or has the reasonable potential to cause or contribute to an in-stream excursion of the water quality standards, the permit must contain effluent limits for that pollutant. EPA recommends that NPDES permitting authorities use numeric effluent limitations where feasible as these types of effluent limitations create objective and accountable means for controlling stormwater discharges.

Where WQBELs in permits for stormwater discharges from MS4s, small construction sites or industrial sites are expressed in the form of BMPs, the permit should contain objective and measurable elements (e.g., schedule for BMP installation or level of BMP performance). The objective and measureable elements should be included in permits as enforceable provisions. Permitting authorities should consider including numeric benchmarks for BMPs and associated monitoring protocols or specific protocols for estimating BMP effectiveness in stormwater permits. These benchmarks could be used as thresholds that would require the permittee to take additional action specified in the permit, such as evaluating the effectiveness of the BMPs, implementing and/or modifying BMPs, or providing additional measures to protect water quality.

If the State or EPA has established a TMDL for an impaired water that includes WLAs for stormwater discharges, permits for either industrial stormwater discharges or MS4 discharges must contain effluent limits and conditions consistent with the requirements and assumptions of the WLAs in the TMDL. See 40 CFR § 122.44(d)(1)(vii)(B). Where the WLA of a TMDL is expressed in terms of a surrogate pollutant parameter, then the corresponding permit can generally use the surrogate pollutant parameter in the WQBEL as well. Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant load or numeric surrogate pollutant parameter objectives, the WLA should, where feasible, be translated into numeric WQBELs in the applicable stormwater permits.

The permitting authority's decision as to how to express the WQBEL(s), either as numeric effluent limitations or BMPs, including BMPs accompanied by numeric benchmarks, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying WLA, including the nature of the stormwater discharge, available data, modeling results or other relevant information. As discussed in the 2002 memorandum, the permit's administrative record needs to provide an adequate demonstration that, where a BMP-based approach to permit limitations is selected, the BMPs required by the permit will be sufficient to implement applicable WLAs. Improved knowledge of BMP effectiveness gained since 2002 should be reflected in the demonstration and supporting rationale that implementation of the BMPs will attain water quality standards and WLAs.

EPA's regulations at 40 CFR § 122.47 govern the use of compliance schedules in NPDES permits. Central among the requirements is that the effluent limitation(s) must be met "as soon as possible." 40 CFR 122.47(a)(1). EPA expects the permitting authority to include in the permit record a sound rationale for determining that any compliance schedule meets this requirement. Where a TMDL has been established and there is an accompanying implementation plan that provides a schedule for an MS4 to implement the TMDL, the permitting authority should consider the schedule as it decides whether and how to establish enforceable interim requirements and interim dates in the permit.

Lastly, NPDES permits must specify monitoring requirements necessary to determine compliance with effluent limitations. See CWA section 402(a)(2); 40 C.F.R. 122.44(i). Where WQBELs are expressed as BMPs, the permit must require adequate monitoring to determine if the BMPs are performing as necessary. When developing monitoring requirements, the NPDES authority should consider the variable nature of stormwater as well the availability of reliable and applicable field data describing the treatment efficiencies of the BMPs required and supporting modeling analysis.

Disaggregating Stormwater Sources in a WLA

As stated in the 2002 memorandum, EPA expects TMDL authorities will make separate aggregate allocations to NPDES-regulated storm water discharges (in the form of WLAs) and unregulated storm water (in the form of LAs). EPA also recognized that the available data and information usually are not detailed enough to determine waste load allocations for NPDES-regulated storm water discharges on an outfall-specific basis.

EPA still recognizes that decisions about allocations of pollutant loads within a TMDL are driven by quantity and quality of existing and readily available water quality data. However, today, TMDL writers may have better data or better access to data and, over time, may have gained more experience since 2002 in developing TMDLs and WLAs in a less aggregated manner. Moreover, since 2002, EPA has noted the difficulty of establishing clear, effective, and enforceable NPDES permit limitations for sources covered by WLAs that are expressed as single categorical or aggregated wasteload allocations.

Accordingly, for all these reasons, EPA recommends that WLAs for NPDES-regulated stormwater discharges should be disaggregated into specific categories (e.g., separate WLAs for MS4 and industrial stormwater discharges) to the extent feasible based on available data and/or modeling projections. In addition, these disaggregated WLAs should be defined as narrowly as available information allows (e.g., for MS4s, separate WLAs for each one; and, for industrial sources, separate WLAs for different sources or types of industrial sources or discharges.)

Where appropriate, EPA encourages permit writers to assign specific shares of the wasteload allocation to specific permittees during the permitting process.

Using Surrogate for Pollutant Parameters When Establishing Targets for TMDL Loading Capacity

Many waterbodies affected by stormwater discharges are listed as impaired under Section 303(d) due to biological degradation or habitat alteration, rather than for specific pollutants (e.g., metals, pathogens, sediment). Impairment can be due to pollutants where hydrologic changes such as quantity of flow and variation in flow regimes are important factors in their transport. Since the stormwater-source impairment is usually the result of the cumulative impact of multiple pollutants and physical effects, it may be difficult to identify a specific pollutant (or pollutants) causing the impairment. Using a surrogate parameter in developing wasteload allocations for waters impaired by stormwater sources may, at times, be the appropriate approach for restoring the waterbodies.

In the 2009 report *Urban Stormwater Management in the United States,* the National Research Council suggests: "A more straightforward way to regulate stormwater contributions to waterbody impairment would be to use flow or a surrogate, like impervious cover, as a measure of stormwater loading . . . Efforts to reduce stormwater flow will automatically achieve reductions in pollutant loading. Moreover, flow is itself responsible for additional erosion and sedimentation that adversely impacts surface water quality."

Therefore, when developing TMDLs for receiving waters where stormwater sources are the primary source of impairment, it may be suitable to establish a numeric target for a surrogate pollutant parameter, such as stormwater flow volume or impervious cover, that would be expected to provide attainment of water quality standards. This is consistent with the TMDL regulations that specify that TMDLs can be expressed in terms of mass per time, toxicity or other appropriate measure (40 C.F.R. §130.2(i)).

Where a surrogate parameter is used, the TMDL document must demonstrate the linkage between the surrogate parameter and the documented impairment (e.g., biological degradation). In addition, the TMDL should provide supporting documentation to indicate that the surrogate pollutant parameter appropriately represents stormwater pollutant loadings. Monitoring is an essential undertaking to ensure that compliance with the effluent limitations occurs.

Recent examples of TMDLs using flow or impervious cover as surrogates for pollutants in setting TMDL loading targets include: the Eagleville Brook (CT) TMDL and the Barberry Creek (ME) TMDL which used impervious cover as a surrogate; and, the Potash Brook (VT) TMDL which used stormwater flow volume as a surrogate.

Designating Additional Stormwater Sources to Regulate and Treating Load Allocations as Wasteload Allocations for Newly Regulated Stormwater Sources

The 2002 memorandum states that "stormwater discharges from sources that are not currently subject to NPDES regulation may be addressed by the load allocation component of a TMDL." Section 402(p)(2) of the Clean Water Act (CWA) requires industrial stormwater sources, certain municipal separate storm sewer systems, and other designated sources to be subject to NPDES permits. Section 402(p)(6) provides EPA with authority to identify additional stormwater discharges as needing a permit.

In addition to the stormwater discharges specifically identified as needing an NPDES permit, the CWA and the NPDES regulations allow for EPA and NPDES authorized States to designate, additional stormwater discharges for regulation. See 40 CFR 122.26 (a)(9)(i)(C), (a)(9)(i)(D), (b)(4)(iii), (b)(7)(iii), (b)(15)(ii) and 122.32(a)(2). Since 2002, EPA has become concerned that NPDES authorities have generally not adequately considered exercising these authorities to designate for NPDES permitting stormwater discharges that are currently not required to obtain permit coverage but that are significant enough to be identified in the load allocation component of a TMDL. Accordingly, EPA encourages permitting authorities to consider designation of stormwater sources in situations where coverage under NPDES permits would afford a more effective mechanism to reduce pollutants in stormwater discharges than available nonpoint source control methods.

In situations where a stormwater source addressed in a TMDL's load allocation is not currently regulated by an NPDES permit but may be required to obtain an NPDES permit in the future, the TMDL writer should consider including language in the TMDL explaining that the allocation for the stormwater source is expressed in the TMDL as a "load allocation" contingent on the source remaining unpermitted, but that the "load allocation" would later be deemed a "wasteload allocation" if the stormwater discharge from the source were required to obtain NPDES permit coverage. Such language, while not legally required, would help ensure that the allocation is properly characterized by the permit writer should the source's regulatory status change. This will help ensure that effluent limitations in a NPDES permit applicable to the newly permitted source are consistent with the requirements and assumptions of the TMDL's allocation to that source.

Such recharacterization of a load allocation as a wasteload allocation would not automatically require resubmission of the TMDL to EPA for approval. However, if the TMDL's allocation for the newly permitted source had been part of a single aggregated or gross load allocation for all unregulated stormwater sources, it may be appropriate for the NPDES permit authority to determine a wasteload allocation and corresponding

effluent limitation specific to the newly permitted stormwater source. Any additional analysis used to refine the allocation should be included in the administrative record for the permit. In such cases, the record should describe the basis for (1) recharacterizing the load allocation as a wasteload allocation for this source and (2) determining that the permit's effluent limitations are consistent with the assumptions and requirements of this recharacterized wasteload allocation. For purposes of this discussion, it is assumed that the permit writer's additional analysis or recharacterization of the load allocation as a wasteload allocation does not change the TMDL's overall loading cap. Any change in a TMDL loading cap would have to be resubmitted for EPA approval.

If you have any questions please feel free to contact us or Linda Boornazian, Director of the Water Permits Division or Benita Best-Wong, Director of the Assessment and Watershed Protection Division.

cc: Association of State and Interstate Water Pollution Control Administrators
Water Quality Branch Chiefs, Regions 1 – 10
Permits Branch Chiefs, Regions 1 – 10

EXHIBIT 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 26 2014

OFFICE OF WATER

MEMORANDUM

SUBJECT: Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs"

FROM: Andrew D. Sawyers, Director
Office of Wastewater Management

Benita Best-Wong, Director
Office of Wetlands, Oceans and Watersheds

TO: Water Division Directors
Regions 1 - 10

This memorandum updates aspects of EPA's November 22, 2002 memorandum from Robert H. Wayland, III, Director of the Office of Wetlands, Oceans and Watersheds, and James A. Hanlon, Director of the Office of Wastewater Management, on the subject of "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (hereafter "2002 memorandum"). Today's memorandum replaces the November 12, 2010, memorandum on the same subject; the Water Division Directors should no longer refer to that memorandum for guidance.

This memorandum is guidance. It is not a regulation and does not impose legally binding requirements on EPA or States. EPA and state regulatory authorities should continue to make permitting and TMDL decisions on a case-by-case basis considering the particular facts and circumstances and consistent with applicable statutes, regulations, and case law. The recommendations in this guidance may not be applicable to a particular situation. EPA may change or revoke this guidance at any time.

Background

Stormwater discharges are a significant contributor to water quality impairment in this country, and the challenges from these discharges are growing as more land is developed and more impervious surface is created. Stormwater discharges cause beach closures and contaminate shellfish and surface drinking water supplies. The increased volume and velocity of stormwater discharges causes streambank erosion, flooding, sewer overflows, and basement backups. The decreased natural infiltration of rainwater reduces groundwater recharge, depleting

our underground sources of drinking water.[1] There are stormwater management solutions, such as green infrastructure, that can protect our waterbodies from stormwater discharges and, at the same time, offer many other benefits to communities.

Section III of the 2002 memorandum recommended that for NPDES-regulated municipal and small construction stormwater discharges, effluent limits be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits. The 2002 memorandum went on to provide guidance on using "an iterative, adaptive management BMP approach" for improving stormwater management over time as permitting agencies, the regulated community, and other involved stakeholders gain more experience and knowledge. EPA continues to support use of an iterative approach, but with greater emphasis on clear, specific, and measurable permit requirements and, where feasible, numeric NPDES permit provisions, as discussed below.

Since 2002, States and EPA have obtained considerable experience in developing TMDLs and WLAs that address stormwater sources (see Box 1 in the attachment for specific examples). Monitoring of the impacts of stormwater discharges on water quality has become more sophisticated and widespread.[2] The experience gained during this time has provided better information on the effectiveness of stormwater controls to reduce pollutant loadings and address water quality impairments. In many parts of the country, permitting agencies have issued several rounds of stormwater permits. Notwithstanding these developments, stormwater discharges remain a significant cause of water quality impairment in many places, highlighting a continuing need for more meaningful WLAs and more clear, specific, and measurable NPDES permit provisions to help restore impaired waters to their beneficial uses.

With this additional experience in mind, on November 12, 2010, EPA issued a memorandum updating and revising elements of the 2002 memorandum to better reflect current practices and trends in permits and WLAs for stormwater discharges. On March 17, 2011, EPA sought public comment on the November 2010 memorandum and, earlier this year, completed a nationwide review of current practices used in MS4 permits[3] and industrial and construction stormwater discharge permits. As a result of comments received and informed by the reviews of EPA and state-issued stormwater permits, EPA is in this memorandum replacing the

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[1] See generally Urban Stormwater Management in the United States (National Research Council, 2009), particularly the discussion in Chapter 3, *Hydrologic, Geomorphic, and Biological Effects of Urbanization on Watersheds.*

[2] Stormwater discharge monitoring programs have expanded the types pollutants and other indices (e.g., biologic integrity) being evaluated. This information is being used to help target priority areas for cleanup and to assess the effectiveness of stormwater BMPs. There are a number of noteworthy monitoring programs that are ongoing, including for example those being carried out by Duluth, MN, Capitol Region Watershed District, MN, Honolulu, HI, Baltimore or Montgomery County, MD, Puget Sound, WA, Los Angeles County, CA, and the Alabama Dept. of Transportation, among many others. See also Section 4.2 (Monitoring/Modeling Requirements) of EPA's *Municipal Separate Storm Sewer System Permits: Post-Construction Performance Standards & Water Quality-Based Requirements – A Compendium of Permitting Approaches* (EPA, June 2014), or "MS4 Compendium" available at http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_ms4_compendium.pdf, for other examples of note.

[3] See EPA's MS4 Permit Compendium, referenced in the above footnote.

November 2010 memorandum, updating aspects of the 2002 memorandum and providing additional information in the following areas:

- Including clear, specific, and measurable permit requirements and, where feasible, numeric effluent limitations in NPDES permits for stormwater discharges;
- Disaggregating stormwater sources in a WLA; and
- Designating additional stormwater sources to regulate and developing permit limits for such sources.

Including Clear, Specific, and Measurable Permit Requirements and, Where Feasible, Numeric Effluent Limitations in NPDES Permits for Stormwater Discharges

At the outset of both the Phase I and Phase II stormwater permit programs, EPA provided guidance on the type of water quality-based effluent limits (WQBELs) that were considered most appropriate for stormwater permits. See Interim Permitting Policy for Water Quality-Based Limitations in Storm Water Permits [61 FR 43761 (August 26, 1996) and 61 FR 57425 (November 6, 1996)] and the Phase II rulemaking preamble 64 FR 68753 (December 8, 1999). Under the approach discussed in these documents, EPA envisioned that in the first two to three rounds of permit issuance, stormwater permits typically would require implementation of increasingly more effective best management practices (BMPs). In subsequent stormwater permit terms, if the BMPs used during prior years were shown to be inadequate to meet the requirements of the Clean Water Act (CWA), including attainment of applicable water quality standards, the permit would need to contain more specific conditions or limitations.

There are many ways to include more effective WQBELs in permits. In the spring of 2014, EPA published the results of a nationwide review of current practices used in MS4 permits in *Municipal Separate Storm Sewer Systems Permits: Post-Construction Performance Standards & Water Quality-Based Requirements – A Compendium of Permitting Approaches* (June 2014). This MS4 Compendium demonstrates how NPDES authorities have been able to effectively establish permit requirements that are more specifically tied to a measurable water quality target, and includes examples of permit requirements expressed in both numeric and non-numeric form. These approaches, while appropriately permit-specific, each share the attribute of being expressed in a clear, specific, and measurable way. For example, EPA found a number of permits that employ numeric, retention-based performance standards for post-construction discharges, as well as instances where permits have effectively incorporated numeric effluent limits or other quantifiable measures to address water quality impairment (see the attachment to this memorandum).

EPA has also found examples where the applicable WLAs have been translated into BMPs, which are required to be implemented during the permit term to reflect reasonable further progress towards meeting the applicable water quality standard (WQS). Incorporating greater specificity and clarity echoes the approach first advanced by EPA in the 1996 Interim Permitting Policy, which anticipated that where necessary to address water quality concerns, permits would be modified in subsequent terms to include "more specific conditions or limitations [which] may include an integrated suite of BMPs, performance objectives, narrative standards, monitoring triggers, numeric WQBELs, action levels, etc."

EPA also recently completed a review of state-issued NPDES industrial and construction permits, which also revealed a number of examples where WQBELs are expressed using clear, specific, and measurable terms. Permits are exhibiting a number of different approaches, not unlike the types of provisions shown in the MS4 Compendium. For example, some permits are requiring as an effluent limitation compliance with a numeric or narrative WQS, while others require the implementation of specific BMPs that reduce the discharge of the pollutant of concern as necessary to meet applicable WQS or to implement a WLA and/or are requiring their permittees to conduct stormwater monitoring to ensure the effectiveness of those BMPs. EPA intends to publish a compendium of permitting approaches in state-issued industrial and construction stormwater permits in early 2015.

Permits for MS4 Discharges

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

The 2002 memorandum stated "EPA expects that most WQBELs for NPDES-regulated municipal and small construction stormwater discharges will be in the form of BMPs, and that numeric limitations will be used only in rare instances." As demonstrated in the MS4 Compendium, NPDES permitting authorities are using various forms of clear, specific, and measurable requirements, and, where feasible, numeric effluent limitations in order to establish a more objective and accountable means for reducing pollutant discharges that contribute to water quality problems.[4] Where the NPDES authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality standard excursion, EPA recommends that the NPDES permitting authority exercise its discretion to include clear, specific, and measurable permit requirements and, where feasible, numeric effluent limitations[5] as necessary to meet water quality standards.

NPDES authorities have significant flexibility in how they express WQBELs in MS4 permits (see examples in Box 1 of the attachment). WQBELs in MS4 permits can be expressed as system-wide requirements rather than as individual discharge location requirements such as

[4] The MS4 Compendium presents examples of different permitting approaches that EPA has found during a nationwide review of state MS4 permits. Examples of different WQBEL approaches in the MS4 Compendium include permits that have (1) a list of applicable TMDLs, WLAs, and the affected MS4s; (2) numeric limits and other quantifiable approaches for specific pollutants of concern; (3) requirements to implement specific stormwater controls or management measures to meet the applicable WLA; (4) permitting authority review and approval of TMDL plans; (5) specific impaired waters monitoring and modeling requirements; and (6) requirements for discharges to impaired waters prior to TMDL approval.

[5] For the purpose of this memorandum, and in the context of NPDES permits for stormwater discharges, "numeric" effluent limitations refer to limitations with a quantifiable or measurable parameter related to a pollutant (or pollutants). Numeric WQBELs may include other types of numeric limits in addition to end-of-pipe limits. Numeric WQBELs may include, among others, limits on pollutant discharges by specifying parameters such as on-site stormwater retention volume or percentage or amount of effective impervious cover, as well as the more traditional pollutant concentration limits and pollutant loads in the discharge.

effluent limitations on discharges from individual outfalls. Moreover, the inclusion of numeric limitations in an MS4 permit does not, by itself, mandate the type of controls that a permittee will use to meet the limitation.

EPA recommends that NPDES permitting authorities establish clear, specific, and measurable permit requirements to implement the minimum control measures in MS4 permits. With respect to requirements for post-construction stormwater management, consistent with guidance in the 1999 Phase II Rule, EPA recommends, where feasible and appropriate, numeric requirements that attempt to maintain pre-development runoff conditions (40 CFR § 122.34(b)(5)) be incorporated into MS4 permits. EPA's MS4 Compendium features examples from 17 states and the District of Columbia that have already implemented retention performance standards for newly developed and redeveloped sites. See Box 2 of the attachment for examples.

Permits for Industrial Stormwater Discharges

The CWA requires that permits for stormwater discharges associated with industrial activity comply with section 301 of the Act, including the requirement under section 301(b)(1)(C) to contain WQBELs to achieve water quality standards for any discharge that the permitting authority determines has the reasonable potential to cause or contribute to a water quality standard excursion. CWA section 402(p)(3)(A), 40 CFR § 122.44(d)(1)(iii). When the permitting authority determines, using the procedures specified at 40 CFR § 122.44(d)(1)(ii), that the discharge causes or has the reasonable potential to cause or contribute to an in-stream excursion of the water quality standards, the permit must contain WQBELs as stringent as necessary to meet any applicable water quality standard for that pollutant. EPA recommends that NPDES permitting authorities use the experience gained in developing WQBELs to design effective permit conditions to create objective and accountable means for controlling stormwater discharges. See box 3 in the attachment for examples.

Permits should contain clear, specific, and measurable elements associated with BMP implementation (*e.g.*, schedule for BMP installation, frequency of a practice, or level of BMP performance), as appropriate, and should be supported by documentation that implementation of selected BMPs will result in achievement of water quality standards. Permitting authorities should also consider including numeric benchmarks for BMPs and associated monitoring protocols for estimating BMP effectiveness in stormwater permits. Benchmarks can support an adaptive approach to meeting applicable water quality standards. While exceeding the benchmark is not generally a permit violation, exceeding the benchmark would typically require the permittee to take additional action, such as evaluating the effectiveness of the BMPs, implementing and/or modifying BMPs, or providing additional measures to protect water quality.[6] Permitting authorities should consider structuring the permit to clarify that failure to implement required corrective action, including a corrective action for exceeding a benchmark, is a permit violation. EPA notes that, as many stormwater discharges are authorized under a general

[6] For example, Part 6.2.1 of EPA's 2008 MSGP provides: "This permit stipulates pollutant benchmark concentrations that may be applicable to your discharge. The benchmark concentrations are not effluent limitations; a benchmark exceedance, therefore, is not a permit violation. Benchmark monitoring data are primarily for your use to determine the overall effectiveness of your control measures and to assist you in knowing when additional corrective action(s) may be necessary to comply with the effluent limitations ..."

permit, NPDES authorities may find it more appropriate where resources allow to issue individual permits that are better tailored to meeting water quality standards for large industrial stormwater discharges with more complex stormwater management features, such as multiple outfalls and multiple entities responsible for permit compliance.

All Permitted Stormwater Discharges

As stated in the 2002 memorandum, where a State or EPA has established a TMDL, NPDES permits must contain effluent limits and conditions consistent with the assumptions and requirements of the WLAs in the TMDL. See 40 CFR § 122.44(d)(1)(vii)(B). Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this objective. This could take the form of a numeric limit, or of a measurable, objective BMP-based limit that is projected to achieve the WLA. For MS4 discharges, CWA section 402(p)(3)(B)(iii) provides flexibility for NPDES authorities to set appropriate deadlines for meeting WQBELs consistent with the requirements for compliance schedules in NPDES permits set forth in 40 CFR § 122.47.

The permitting authority's decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information. As discussed in the 2002 memorandum, the permit's administrative record needs to provide an adequate demonstration that, where a BMP-based approach to permit limitations is selected, the BMPs required by the permit will be sufficient to implement applicable WLAs. Permits should also include milestones or other mechanisms where needed to ensure that the progress of implementing BMPs can be tracked. Improved knowledge of BMP effectiveness gained since 2002[7] should be reflected in the demonstration and supporting rationale that implementation of the BMPs will attain water quality standards and be consistent with WLAs.

EPA's regulations at 40 CFR § 122.47 govern the use of compliance schedules in NPDES permits. Central among the requirements is that the effluent limitation(s) must be met "as soon as possible." 40 CFR § 122.47(a)(1). As previously discussed, by providing discretion to include "such other provisions" as deemed appropriate, CWA section 402(p)(3)(B)(iii) provides flexibility for NPDES authorities to set appropriate deadlines towards meeting WQBELs in MS4 permits consistent with the requirements for compliance schedules in NPDES permits set forth in 40 CFR § 122.47. See *Defenders of Wildlife v Browner*, 191 F.3d at 1166. EPA expects the permitting authority to document in the permit record the basis for determining that the compliance schedule is "appropriate" and consistent with the CWA and 40 CFR § 122.47. Where a TMDL has been established and there is an accompanying implementation plan that provides a schedule for an MS4 to implement the TMDL, or where a comprehensive, integrated plan addressing a municipal government's wastewater and stormwater obligations under the NPDES program has been developed, the permitting authority should consider such

[7] See compilation of current BMP databases and summary reports available at http://water.epa.gov/infrastructure/greeninfrastructure/gi_performance.cfm, which has compiled current BMP databases and summary reports.

schedules as it decides whether and how to establish enforceable interim requirements and interim dates in the permit.

EPA notes that many permitted stormwater discharges are covered by general permits. Permitting authorities should consider and build into general permits requirements to ensure that permittees take actions necessary to meet the WLAs in approved TMDLs and address impaired waters. A general permit can, for example, identify permittees subject to applicable TMDLs in an appendix, and prescribe the activities that are required to meet an applicable WLA.

Lastly, NPDES permits must specify monitoring requirements necessary to determine compliance with effluent limitations. See CWA section 402(a)(2); 40 CFR 122.44(i). The permit could specify actions that the permittee must take if the BMPs are not performing properly or meeting expected load reductions. When developing monitoring requirements, the NPDES authority should consider the variable nature of stormwater as well as the availability of reliable and applicable field data describing the treatment efficiencies of the BMPs required and supporting modeling analysis.

Disaggregating Stormwater Sources in a WLA

In the 2002 memorandum, EPA said it "may be reasonable to express allocations for NPDES-regulated stormwater discharges from multiple point sources as a single categorical wasteload allocation when data and information are insufficient to assign each source or outfall individual WLAs." EPA also said that, "[i]n cases where wasteload allocations are developed for categories of discharges, these categories should be defined as narrowly as available information allows." Furthermore, EPA said it "recognizes that the available data and information usually are not detailed enough to determine waste load allocations for NPDES-regulated stormwater discharges on an outfall-specific basis."

EPA still recognizes that "[d]ecisions about allocations of pollutant loads within a TMDL are driven by the quantity and quality of existing and readily available water quality data," but has noted the difficulty of establishing clear, specific, and measurable NPDES permit limitations for sources covered by WLAs that are expressed as single categorical or aggregated wasteload allocations. Today, TMDL writers may have more information—such as more ambient monitoring data, better spatial and temporal representation of stormwater sources, and/or more permit-generated data—than they did in 2002 to develop more disaggregated TMDL WLAs.

Accordingly, for all these reasons, EPA is again recommending that, "when information allows," WLAs for NPDES-regulated stormwater discharges be expressed "as different WLAs for different identifiable categories" (*e.g.*, separate WLAs for MS4 and industrial stormwater discharges). In addition, as EPA said in 2002, "[t]hese categories should be defined as narrowly as available information allows (*e.g.*, for municipalities, separate WLAs for each municipality and for industrial sources, separate WLAs for different types of industrial stormwater sources or dischargers)." EPA does not expect states to assign WLAs to individual MS4 outfalls; however, some states may choose to do so to support their implementation efforts. These recommendations are consistent with the decision in *Anacostia Riverkeeper, Inc. v. Jackson*, 2011 U.S. Dist. Lexis 80316 (July 25, 2011).

In general, states are encouraged to disaggregate the WLA when circumstances allow to facilitate implementation. TMDL writers may want to consult with permit writers and local authorities to collect additional information such as sewer locations, MS4 jurisdictional boundaries, land use and growth projections, and locations of stormwater controls and infrastructure, to facilitate disaggregation. TMDLs have used different approaches to disaggregate stormwater to facilitate MS4 permit development that is consistent with the assumptions and requirements of the WLA. For example, some TMDLs have used a geographic approach and developed individual WLAs by subwatershed[8] or MS4 boundary (*i.e.*, the WLA is subdivided by the relative estimated load contribution to the subwatershed or the area served by the MS4). TMDLs have also assigned percent reductions[9] of the loading based on the estimated wasteload contribution from each MS4 permit holder. Where appropriate, EPA encourages permit writers to identify specific shares of an applicable wasteload allocation for specific permittees during the permitting process, as permit writers may have more detailed information than TMDL writers to effectively identify reductions for specific sources.

Designating Additional Stormwater Sources to Regulate and Developing Permit Limits for Such Sources

The 2002 memorandum states that "stormwater discharges from sources that are not currently subject to NPDES regulation may be addressed by the load allocation component of a TMDL." Section 402(p)(2) of the Clean Water Act (CWA) requires industrial stormwater sources, certain municipal separate storm sewer systems, and other designated sources to be subject to NPDES permits. Section 402(p)(6) provides EPA with authority to identify additional stormwater discharges as needing a permit.

In addition to the stormwater discharges specifically identified as needing an NPDES permit, the CWA and the NPDES regulations allow for EPA and NPDES authorized States to designate additional stormwater discharges for regulation. See:
40 CFR §§122.26 (a)(9)(i)(C), (a)(9)(i)(D), (b)(4)(iii), (b)(7)(iii), (b)(15)(ii) and 122.32(a)(2). Accordingly, EPA encourages permitting authorities to consider designation of stormwater sources in situations where coverage under NPDES permits would, in the reasonable judgment of the permitting authority and, considering the facts and circumstances in the waterbody, provide the most appropriate mechanism for implementing the pollution controls needed within a watershed to attain and maintain applicable water quality standards.

If a TMDL had previously included a newly permitted source as part of a single aggregated or gross load allocation for all unregulated stormwater sources, or all unregulated sources in a specific category, the NPDES permit authority could identify an appropriate allocation share and include a corresponding limitation specific to the newly permitted stormwater source. EPA recommends that any additional analysis used to identify that share and develop the corresponding limit be included in the administrative record for the permit. The

[8] Wissahickon Creek Siltation TMDL (Pennsylvania) www.epa.gov/reg3wapd/tmdl/pa_tmdl/wissahickon/index.htm.
[9] Liberty Bay Watershed Fecal Coliform Bacteria TMDL (Washington).
https://fortress.wa.gov/ecy/publications/SummaryPages/1310014.html and Upper Minnehaha Creek Watershed Nutrients and Bacteria TMDL (Minnesota) http://www.pca.state.mn.us/index.php/view-document.html?gid=20792

permit writer's additional analysis would not change the TMDL, including its overall loading cap.

In situations where a stormwater source addressed in a TMDL's load allocation is not currently regulated by an NPDES permit but may be required to obtain an NPDES permit in the future, the TMDL writer should consider including language in the TMDL explaining that the allocation for the stormwater source is expressed in the TMDL as a "load allocation" contingent on the source remaining unpermitted, but that the "load allocation" would later be deemed a "wasteload allocation" if the stormwater discharge from the source were required to obtain NPDES permit coverage. Such language would help ensure that the allocation is properly characterized by the permit writer should the source's regulatory status change. This will help the permit writer develop limitations for the NPDES permit applicable to the newly permitted source that are consistent with the assumptions and requirements of the TMDL's allocation to that source.

If you have any questions please feel free to contact us or Deborah Nagle, Director of the Water Permits Division, or Tom Wall, Director of the Assessment and Watershed Protection Division.

cc: Association of Clean Water Administrators
TMDL Program Branch Chiefs, Regions 1 – 10
NPDES Permits Branch Chiefs, Regions 1 – 10

Attachment: MS4 and Industrial Stormwater Permit Examples

ATTACHMENT: MS4 and Industrial Stormwater Permit Examples

BOX 1. Examples of WQBELs in MS4 Permits:

1. Numeric expression of the WQBEL: The MS4 Permit includes a specific, quantifiable performance requirement that must be achieved within a set timeframe. For example:
   - Reduce fine sediment particles, total phosphorus, and total nitrogen loads by 10 percent, 7 percent, and 8 percent, respectively, by September 30, 2016 (2011 Lake Tahoe, CA MS4 permit)
   - Restore within the 5-year permit term 20 percent of the previously developed impervious land (2014 Prince George's County, MD MS4 permit)
   - Achieve a minimum net annual planting rate of 4,150 planting annually within the MS4 area, with the objective of an MS4-wide urban tree canopy of 40 percent by 2035 (2011 Washington, DC MS4 permit)
   - Discharges from the MS4 must not cause or contribute to exceedances of receiving water limits for Diazinon of 0.08µg/L for acute exposure (1 hr averaging period) or 0.05µg/L for chronic exposure (4-day averaging period), OR must not exceed Diazinon discharge limits of 0.072 µg/L for acute exposure or 0.045µg/L for chronic exposure (2013 San Diego, CA Regional MS4 permit)

2. Non-numeric expressions of the WQBEL: The MS4 Permit establishes individualized, watershed-based requirements that require each affected MS4 to implement specific BMPs within the permit term, which will ensure reasonable further progress towards meeting applicable water quality standards.
   - To implement the corrective action recommendations of the Issaquah Creek Basin Water Cleanup Plan for Fecal Coliform Bacteria (part of the approved Fecal Coliform Bacteria TMDL for the Issaquah Creek Basin), King County is required during the permit term to install and maintain animal waste education and/or collection stations at municipal parks and other permittee owned and operated lands reasonably expected to have substantial domestic animal use and the potential for stormwater pollution. The County is also required to complete IDDE screening for bacteria sources in 50 percent of the MS4 subbasins, including rural MS4 subbasins, by February 2, 2017 and implement the activities identified in the Phase I permit for responding to any illicit discharges found (2013 Western Washington Small MS4 General Permit)
   - For discharges to Segment 14 of the Upper South Platte River Basin associated with WLAs from the approved *E. coli* TMDL, the MS4 must identify outfalls with dry weather flows; monitor priority outfalls for flow rates and *E. coli* densities; implement a system maintenance program for listed priority basins (which includes storm sewer cleaning and sanitary sewer investigations); install markers on at least 90% of storm drain inlets in areas with public access; and conduct a public outreach program focused on sources that contribute *E. coli* loads to the MS4. By November 30, 2018, dry weather discharges from MS4 outfalls of concern must not contribute to an exceedance of the *E. coli* standard (126 cfu per 100 ml for a geometric mean of all samples collected at a specific outfall in a 30-day period) (2009 Denver, CO MS4 Permit)

3. Hybrid approach with both numeric and non-numeric expressions of the WQBEL:
   - Discharges of trash from the MS4 to the LA River must be reduced to zero by Sept. 2016. Permittees also have the option of complying via the installation of defined "full capture systems" to prevent trash from entering the MS4 (2012 Los Angeles County, CA MS4 Permit).
   - To attain the shared, load allocation of 27,000 metric tons/year of sediment in the Napa River sediment TMDL, municipalities shall determine opportunities to retrofit and/or reconstruction of road crossings to minimize road-related sediment delivery (≤ 500 cubic yards/mile per 20-year period) to stream channels (2013 CA Small MS4 General Permit).

Box 2. Examples of Retention Post Construction Standards for New and Redevelopment in MS4 Permits

- 2009 WV small MS4 permit: Keep and manage on site the first one inch of rainfall from a 24-hour storm preceded by 48 hours of no measurable precipitation.
- 2011 DC Phase I MS4 permit: Achieve on-site retention of 1.2" of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting.
- 2012 Albuquerque, NM Phase I MS4 permit: Capture the 90th percentile storm event runoff to mimic the predevelopment hydrology of the previously undeveloped site.
- 2010 Anchorage, AK Phase I MS4 permit: Keep and manage the runoff generated from the first 0.52 inches of rainfall from a 24 hour event preceded by 48 hours of no measureable precipitation.
- 2013 Western WA small MS4 permit: Implement low impact development performance standards to match developed discharge durations to pre-developed durations for the range of pre-developed discharge rates from 8% of the 2-year flow to 50% of the 2-year flow.

BOX 3. Examples of WQBELs in Industrial (including Construction) Stormwater Permits:

1. Numeric expression of the WQBEL: The permit includes a specific, quantifiable performance requirement that must be achieved:
   - Pollutant concentrations shall not exceed the stormwater discharge limits specified in the permit (based on state WQS), including (for example): Cadmium-0.003 mg/l; Mercury-0.0024 mg/l; Selenium-0.02 mg/l (2013 Hawaii MSGP)
   - Beginning July 1, 2010, permittees discharging to impaired waters without an EPA-approved TMDL shall comply with the following effluent limits (based on state WQS), including (for example): Turbidity-25 NTU; TSS-30 mg/l; Mercury-0.0021 mg/l; Phosphorus, Ammonia, Lead, Copper, Zinc-site-specific limits to be determined at time of permit coverage (2010 Washington MSGP)
   - If discharging to waters on the 303(d) list (Category 5) impaired for turbidity, fine sediment, or phosphorus, the discharge must comply with the following effluent limit for turbidity: 25 NTU (at the point of discharge from the site), or no more than 5 NTU above background turbidity when the background turbidity is 50 NTU or less, or no more than a 10% increase in turbidity when background turbidity is more than 50 NTU. Discharges to waterbodies on the 303(d) list (Category 5) for high pH must comply with the numeric effluent limit of pH 6.5 to 8.5 su (2010 Washington CGP) (2010 Washington CGP)

2. Narrative expression of the WQBEL: The permit includes narrative effluent limits based on applicable WQS:
   - New discharges or new dischargers to an impaired water are not eligible for permit coverage, unless documentation or data exists to show that (1) all exposure of the pollutant(s) of concern to stormwater is prevented; or (2) the pollutant(s) of concern are not present at the facility; or (3) the discharge of the pollutant(s) of concern will meet instream water quality criteria at the point of discharge (for waters without an EPA-approved TMDL), or there is sufficient remaining WLAs in an EPA-approved TMDL to allow the discharge and that existing dischargers are subject to compliance schedules to bring the waterbody into attainment with WQS (2011 Vermont MSGP; similar requirements in RI, NY, MD, VA, WV, SC, AR, TX, KS, NE, AZ, CA, AK, OR, and WA permits)
   - In addition to other applicable WQBELs, there shall be no discharge that causes visible oil sheen, and no discharge of floating solids or persistent foam in other than trace amounts. Persistent foam is foam that does not dissipate within one half hour of point of discharge (2014 Maryland MSGP)

3. Requirement to implement additional practices or procedures for discharges to impaired waters:
   - For sediment-impaired waters (without an approved TMDL), the permittee is required to maintain a minimum 50-foot buffer zone between any disturbance and all edges of the receiving water (2009 Kentucky CGP)
   - For discharges to impaired waters, implement the following: (1) stabilization of all exposed soil areas immediately, but in no case later than 7 days after the construction activity in that portion of the site has temporarily or permanently ceased (as compared to 14 days for no-impaired waters); (2) temporary sediment basins must meet specified design standards if they will serve an area of 5 or more acres (as compared to 10 or more acres for other sites); (3) retain a water quality volume of 1 inch of runoff from the new impervious surfaces created by the project (though this volume reduction requirement is for discharges to all waters, not just impaired waters) (2013 Minnesota CGP).
   - If the site discharges to a water impaired for sediment or turbidity, or to a water subject to an EPA-approved TMDL, the permittee must implement one or more of the following practices: (1) compost berms, compost blankets, or compost socks; (2) erosion control mats; (3) tackifiers used with a perimeter control BMP; (4) a natural buffer of 50 feet (horizontally) plus 25 feet (horizontally) for 5 degrees of slope; (5) water treatment by electro-coagulation, flocculation, or filtration; and/or (6) other substantially equivalent sediment or turbidity BMP approved by the state (2010 Oregon CGP)

DECLARATION OF RITA ABELLAR

DECLARATION OF RITA ABELLAR

I, RITA ABELLAR, hereby declare and state as follows:

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

2. I am an Environmental Resources Specialist employed by the County of Orange ("OC") and work in the OC Environmental Resources service area of OC Public Works. In that capacity, I manage the South OC Bacteria TMDLs (Baby Beach TMDL and Beaches and Creeks TMDL), Regional Harbor Monitoring Program for Dana Point Harbor, and the Pathogen Health Risk track of the South OC Water Quality Improvement Plan (South OC WQIP).

3. The Municipal Stormwater Permit issued by the San Diego Regional Water Quality Control Board to the County of Orange, Orange County Flood Control District and Orange County incorporated cities within the San Diego Region ("South County Permittees), Order No. R9-2009-0002 (the "2009 Permit"), incorporated into the 2009 Permit as water quality-based effluent limitations the Waste Load Allocations ("WLAs") of the TMDL known as the Baby Beach Bacterial Indicator TMDL.

4. The 2009 Permit further required the co-permittees in the Baby Beach watershed to implement Best Management Practices ("BMPs") capable of achieving the interim and final WLAs, to conduct necessary monitoring, and to submit annual progress reports.

5. Prior to the effective date of the 2009 Permit, these WLAs were not incorporated into the municipal stormwater permit issued to the South County permittees. Prior to the 2009 Permit, the BMP, monitoring and annual reporting requirements relating to this TMDL were also not incorporated into the municipal stormwater permit issued to the South County permittees.

6. In response to the incorporation of the Baby Beach Bacterial Indicator TMDL being incorporated into the 2009 Permit, the County of Orange took the lead in implementing the following new programs:

Tasks Done to Comply with TMDL	Period Covered
Permit required TMDL related supplemental monitoring (i.e., non-AB411 monitoring for dry weather, targeted wet weather sampling) and reporting	2009-2015
Microbial Source Tracking Study	2012 - 2015
Dye Study	2015
Sewer Investigation/Sanitary Survey/BMP Investigation Study	2015

7. The costs incurred each year in complying with these TMDL requirements were as follows:

(a) Fiscal Year ("FY") 2009-2010 $53,020.37

(b) FY 2010-2011 $31,646.10

(c) FY 2011-2012 $13,595.34

(d) FY 2012-2013 $17,271.49

(e) FY 2013-2014 $12,037.11

(f) FY 2014-2015 $127,383.91

8. These programs were new. They were not required until the Baby Beach Bacterial Indicator TMDL was incorporated into the 2009 Permit and the costs would not have otherwise been incurred.

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

Executed this 22 day of August, 2023, at Orange, California.

Rita Abellar

DECLARATION OF CINDY RIVERS

I, CINDY RIVERS, hereby state and declare as follows:

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

2. I am a Senior Environmental Resources Specialist with the Orange County Environmental Resources Service Area of the Orange County Public Works Department ("OC Public Works"). One of my duties is being the South Orange County Stormwater Program Manager. In that capacity, I work with the permittees under the Municipal Separate Storm Sewer System Permit ("MS4 Permit") for South Orange County issued by the San Diego Regional Water Quality Control Board ("San Diego Water Board").

3. I am familiar with the content of filings that were required to be made by the permittees under San Diego Water Board Order No. R9-2009-0002 ("2009 Permit") as well as how copies of such filings are kept in the ordinary course of business at OC Public Works.

4. The 2009 Permit required each permittee to submit an annual report during the Permit's term with respect to its Jurisdictional Runoff Management Program (the "Annual Report"). The 2009 Permit required the Annual Report to include a fiscal analysis which, among other things, had to include a description of the source of funds that were proposed to meet the capital and operation and maintenance expenditures necessary to accomplish the programs required of permittees under the 2009 Permit. Permittees were required to submit Annual Reports for each fiscal year during the term of the 2009 Permit.

5. With respect to cities which operated MS4s that were split between the permitting authority of the San Diego Water Board and the Santa Ana Regional Water Quality Control Board ("Santa Ana Water Board"), such as the City of Laguna Hills, a single Annual Report document covering requirements of both the Santa Ana Water Board MS4 permit and the 2009 Permit was used. This Annual Report document included information required by the 2009 Permit regarding the source of funds for the 2009 Permit requirements.

6. Each permittee either delivered its Annual Report to OC Public Works, which then consolidated and delivered the reports to the San Diego Water Board, or delivered the Annual report directly to the San Diego Water Board, with a copy to OC Public Works. OC Public Works has maintained copies of the permittees' Annual Reports in its files and records, which are kept in the ordinary course of business at OC Public Works.

7. Each permittee's Annual Report was accompanied by a Signed Certified Statement in which the signer stated that he/she was certifying "under penalty of law" that the document being submitted was, to the best of the certifier's knowledge and belief, true, accurate, and complete. Attached as Exhibit 1 to this declaration are true and correct copies of Signed Certified Statements executed by representatives of the Cities of Dana Point, Laguna Hills and Laguna Niguel as examples of such certifications. These Statements, which accompanied Annual Reports submitted by those cities, were retrieved by OC Public Works staff from the files and records of the agency, where they are kept in the regular course of business.

8. Attached as Exhibits 2 through 4 are true and correct copies of excerpts of the fiscal analysis contained in the Annual Reports submitted by the Cities of Dana Point, Laguna Laguna Niguel for fiscal years 2009-2010 through 2014-2015. Those excerpts set forth, among other things, the percentage of 2009 Permit costs paid through the use of general funds, gas

taxes, grants, or other sources. These documents were retrieved by OC Public Works staff from the files and records of the agency, where they are kept in the regular course of business.

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

Executed August 24, 2023, at Orange, California.

Cindy Rivers

EXHIBIT 1

Signed Certified Statement

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Brad Fowler

11-6-14

Brad Fowler, P.E.
Director of Public Works& Engineering Services
City of Dana Point

Date

City of Laguna Hills' Signed Certified Statement

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

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

CITY OF LAGUNA NIGUEL
Public Works/Engineering
30111 Crown Valley Parkway • Laguna Niguel, California 92677
Phone/949•362•4337 Fax/949•362•4385

Signed Certified Statement

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

11/4/13

David Rogers
Director of Public Works/City Engineer

Date

EXHIBIT 2

	CAPITAL COSTS	
Fiscal Analysis Summary		
LIP Program Elements	**FY2009-10 Costs**	**Projected Costs FY2010-11**
Public Projects - BMPs	$50,000.00	$25,000.00
Construction BMPs for Public Construction Projects		
Other Capital Projects / Major Equipment Purchases		
TOTALS	**$50,000.00**	**$25,000.00**

OPERATIONS & MAINTENANCE

Fiscal Analysis Summary

LIP Program Elements	FY2009-10 Costs	Projected Costs FY2010-11
Supportive of Program Administration (LIP Section 2.0)	$475,208.00	$482,080.00
Municipal Activities (LIP Section 5.0) Trash & Debris Control (formerly "Litter Control")	$99,109.00	$112,100.00
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance	$735,948.00	$738,250.00
Municipal Activities (LIP Section 5.0) Street Sweeping	$248,029.00	$242,040.00
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	$0.00	$0.00
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	$4,841.00	$4,000.00
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	$7,527.00	$9,500.00
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	$0.00	$0.00
Requiring New Development BMPs (Supportive of Planning, etc) (LIP Section 7.0)	$0.00	$0.00
Requiring Construction BMPs (Supportive of Plan Check & Inspection) (LIP Section 8.0)	$0.00	$0.00
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	$7,620.00	$10,000.00
Illicit Connections/Discharge Ident. & Elimination (LIP Section10.0) Investigations	$2,248.00	$48,500.00
Agency Contribution to Regional Program	$70,634.00	$83,600.00
Other - Household Hazardous Waste		
Other	30567	54000
TOTALS	$1,681,721.00	$1,784,070.00

LIP Funding Sources	FY 2009-10 Funding Sources	FY 2010-11 Projected Funding Sources
General Fund	100.00%	100.00%
Utility Tax/Charges		
Separate Utility Billing Item		
Gas Tax		
Special District Fund		
- Sanitation Fee		
- Benefit Assessment		
- Fleet Maintenance Fund		
- Community Services Fund		
- Water Fund		
- Sewer & Storm Drain Maintenance Fee		
- Others		

General Fund	100.00%	100.00%
Utility Tax/Charges	0.00%	0.00%
Separate Utility Billing Item	0.00%	0.00%
Gas Tax	0.00%	0.00%
Special District Fund	0.00%	0.00%
Other	0.00%	0.00%
TOTAL	100.00%	100.00%

Fiscal Analysis - Dana Point, *(H.3., page 77)*

Capital Costs

LIP Program Elements	Preceding Period FY2009-10 Costs	Current Reporting Period FY 2010-11 Costs	Projected FY 2011-12 Costs - Draft	If there was a 25% change in annual costs, explain here.
Doheny Epidemiology Study	20,000	0	25,000	SCCWRP saved these allocated funds to do some follow-up work in regards to Epi Study. No Dana Point funds used in FY10-11.
Other Capital Projects/Major Equipment Purchases	0			
Totals	**20,000**		**25,000**	

Operation & Maintenance Costs

LIP Program Elements	Preceding Period FY2009-10 Costs	Current Reporting Period FY 2010-11 Costs	Projected FY 2011-12 Costs - Draft	
Supportive of Program Administration (LIP Section 2.0) – Please see details of Staff Costs in table below. Other administrative costs, include: memberships, conferences, training, cell phone, office supplies, mileage, SWRCB Permit Fee, Federal Lobbyist	$475,208	$468,039	$478,550	
Municipal Activities (LIP Section 5.0) Trash & Debris Control, include County, Park and Bus Stop litter control & mutt mitts, recycling	$99,109	$135,132	$164,250	City evaluated and determined feasible a low cost method of accomplishing litter removal in our City by using a landscape maintenance contractor for this service at an inexpensive labor rate, in lieu of City staff and County maintenance crews, allowing st
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (includes Catch Basin Stenciling)	$735,948	$607,325	$774,850	
Municipal Activities (LIP Section 5.0) Street Sweeping	$248,029	$243,358	$274,480	
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	$4,841	$5,272	$5,130	
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	$7,527	$6,676	$9,000	
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Requiring Construction BMPs(Supportive of Plan Check & Inspection) (LIP Section 8.0)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	$7,620	$8,640	$11,000	
Illicit Connections/Discharge Ident. & Elimination Facility Inspection, included Grease Interceptor Rebate Funds	$2,248	$15,207	$63,500	No grease interceptors installed under rebate program in FY09-10.
Agency Contribution to Regional Program* FY08-09 budget includes estimates for TMDL/Watershed Implementation	$70,634	$65,592	$62,000	
Other	$30,557	$30,918	$38,100	
Totals	**$1,681,721**	**$1,586,159**	**$1,880,860**	

Funding Sources

FUNDING SOURCES	Preceding Period FY2009-10 Costs	Current Reporting Period FY 2010-11 Costs	Projected FY 2011-12 Costs - Draft
General Fund	80	100	100
Grants: Clean Beaches Initiative	20		
TOTALS	100%	100%	100%

Fiscal Analysis - Dana Point, *(H.3., page 77)*

Capital Costs

LIP Program Elements	Preceding Period FY2010-11 Costs	Current Reporting Period FY 2011-12 Costs	Projected FY 2012-13 Costs - Draft	If there was a 25% change in annual costs, explain here.
Doheny Epidemiology Study	$0	$25,000	$0	SCCWRP saved these allocated funds to do some follow-up work in regards to Epi Study. No Dana Point funds used in FY10-11, but funds were used in FY11-12.
Other Capital Projects/Major Equipment Purchases	$0	$0	$110,000	Priscilla/Jeremiah Parkway Mitigation Project (OCTA M2 Grant)
Totals	$0			

Operation & Maintenance Costs

LIP Program Elements	Preceding Period FY2009-10 Costs	Current Reporting Period FY 2010-11 Costs	Projected FY 2011-12 Costs - Draft	
Supportive of Program Administration (LIP Section 2.0) – Please see details of Staff Costs in table below. Other administrative costs, include: memberships, conferences, training, cell phone, office supplies, mileage, SWRCB Permit Fee, Federal Lobbyist	$468,039	$503,767	$505,600	
Municipal Activities (LIP Section 5.0) Trash & Debris Control, include County, Park and Bus Stop litter control & mutt mitts, recycling	$135,132	$159,026	$209,750	
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (Includes Catch Basin Stenciling)	$607,325	$691,817	$780,900	
Municipal Activities (LIP Section 5.0) Street Sweeping	$243,358	$267,480	$274,480	
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	$5,272	$2,046	$5,650	Reduced fertilizer/pesticide management services used.
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	$6,676	$9,502	$9,000	existing stock of giveaways diminished; new giveaways purchased
Requiring New Development BMPs(Supportive of Planning, etc.) (LIP Section 7.0)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Requiring Construction BMPs(Supportive of Plan Check & Inspection) (LIP Section 8.0)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	$8,640	$10,260	$11,000	
Illicit Connections/Discharge Identification. & Elimination Facility Inspection, Included Grease Interceptor Rebate Funds	$15,207	$14,093	$70,500	
Agency Contribution to Regional Program* , Includes TMDL/Watershed Implementation	$65,592	$50,713	$65,000	
Other	$30,916	$36,380	$38,500	
Totals	$1,586,159	$1,745,084	$1,970,380	

Funding Sources

FUNDING SOURCES	Preceding Period FY2009-10 Costs	Current Reporting Period FY 2010-11 Costs	Projected FY 2011-12 Costs - Draft	
General Fund	100	100	98	
Grants: Clean Beaches Initiative				
Grants: OCTA			2	$72,000 awarded for OCTA M2 Tier 1 Grant for Jeremiah/Priscilla Parkway Improvement Project
Grants: Prop 84				
Other:				
TOTALS	100%	100%	100%	

Fiscal Analysis - Dana Point, *(H.3., page 77)*

Capital Costs

LIP Program Elements	Preceding Period FY2011-12 Costs	Current Reporting Period FY 2012-13 Costs	Projected FY 2013-14 Costs - Draft	If there was a 25% change in annual costs, explain here.
Doheny Epidemiology Study	$25,000	$0	$0	Project completed in FY11-12
Other Capital Projects/Major Equipment Purchases	$0	$94,000	$0	OCTA M2 Tier 1 Grant: Priscilla/Jeremiah Parkway Mitigation Project
Totals	$25,000	$94,000	?	OCTA Measure M2 Tier 2 Grant Award for LO1SO2 Dry weather diversion project received. Schedule of implementation to be determined in FY13-14 or FY14-15.

Operation & Maintenance Costs

LIP Program Elements	Preceding Period FY2011-12 Costs	Current Reporting Period FY 2012-13 Costs	Projected FY 2013-14 Costs - Draft	
Supportive of Program Administration (LIP Section 2.0) – Please see details of Staff Costs in table below. Other administrative costs, include: memberships, conferences, training, cell phone, office supplies, mileage, SWRCB Permit Fee, Legal Fees	$503,767	$472,489	$469,808	
Municipal Activities (LIP Section 5.0) Trash & Debris Control, include County, Park and Bus Stop litter control & mutt mitts, recycling	$169,028	$112,849	$176,051	
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (includes Catch Basin Stenciling)	$691,817	$602,616	$770,040	
Municipal Activities (LIP Section 5.0) Street Sweeping	$267,480	$245,435	$271,905	
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	Included in Program Administration	$0	$0	
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	$2,046	$4,804	$6,324	Specialized contractor for fertilizer/pesticide management services used.
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	$9,502	$4,896	$9,000	budget cuts- reduced amount of give-aways purchased
Requiring New Development BMPs(Supportive of Planning, etc.) (LIP Section 7.0)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Requiring Construction BMPs(Supportive of Plan Check & Inspection) (LIP Section 8.0)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	$10,260	$8,280	$12,000	
Illicit Connections/Discharge Identification. & Elimination Facility Inspection, included Grease Interceptor Rebate Funds	$14,093	$66,150	$86,076	2 grease interceptor rebates issued, special investigations
Agency Contribution to Regional Program*, includes TMDL/Watershed Implementation	$60,713	$55,982	$65,000	
Other	$36,380	$28,840	$33,500	Includes San Juan Creek Bacteria TMDL Implementation, Baby Beach TMDL, Federal Lobbyist
Totals	$1,745,084	$1,802,341	$1,899,704	

Funding Sources

FUNDING SOURCES	Preceding Period FY2011-12 Costs	Current Reporting Period FY 2012-13 Costs	Projected FY 2013-14 Costs - Draft	
Grants: Clean Beaches Initiative				
Grants: OCTA Tier 1	NA	$72,426	$0	$72,000 awarded for OCTA M2 Tier 1 Grant for Jeremiah/Priscilla Parkway Improvement Project
Grants: OCTA Tier 2	NA	NA	$470,236	$470,236 awarded for OCTA M2 Tier 2 Grant for LO1SO2 Dry Weather Diversion & Trash BMP
Grants: Prop 84				
Other:				
General Fund Percentage	100	95.5	75+/-	Draft estimate for FY13-14, grant project schedule is yet to be determined and the funds could be spent in FY14-15
Grant Funding Percentage	0	4.5	25+/-	Draft estimate for FY13-14, grant project schedule is yet to be determined and the funds could be spent in FY14-15
TOTALS	100%	100%	100%	

Fiscal Analysis - Dana Point, *(H.3., page 77)*

Capital Costs

LIP Program Elements	Preceding Period FY2012-13 Costs	Current Reporting Period FY 2013-14 Costs	Projected FY 2014-15 Costs - Draft	If there was a 25% change in annual costs, explain here.
Other Capital Projects/Major Equipment Purchases	$94,000	0	$0	OCTA M2 Tier 1 Grant: Priscilla/Jeremiah Parkway Mitigation Project
Totals	$94,000	0	$470,236	OCTA Measure M2 Tier 2 Grant Award for LO1SO2 Dry weather diversion project received. Schedule of implementation to be determined in FY14-15 or FY15-16.

Operation & Maintenance Costs

LIP Program Elements	Preceding Period FY2012-13 Costs	Current Reporting Period FY 2013-14 Costs	Projected FY 2014-15 Costs - Draft	
Supportive of Program Administration (LIP Section 2.0) – Please see details of Staff Costs in table below. Other administrative costs, include: memberships, conferences, training, cell phone, office supplies, mileage, SWRCB Permit Fee, Legal Fees	$472,489	$497,008	$530,000	
Municipal Activities (LIP Section 5.0) Trash & Debris Control, include County, Park and Bus Stop litter control & mutt mitts, recycling	$112,849	$176,252	$170,000	
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (includes Catch Basin Stenciling)	$602,616	$650,443	$770,000	
Municipal Activities (LIP Section 5.0) Street Sweeping	$245,435	$261,929	$272,000	
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	$0	$0	$0	
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	$4,804	$4,326	$4,000	
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	$4,896	$5,412	$9,000	
Requiring New Development BMPs(Supportive of Planning, etc.) (LIP Section 7.0)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Requiring Construction BMPs(Supportive of Plan Check & Inspection) (LIP Section 8.0)	Included in Program Administration	Included in Program Administration	Included in Program Administration	
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	$8,280	$8,940	$12,000	
Illicit Connections/Discharge Identification. & Elimination Facility Inspection, included Grease Interceptor Rebate Funds	$66,150	$86,036	$93,000	Amount varies based on spill response, number of grease interceptor rebates installed. & special studies conducted. We are currently doing an ongoing investigation on LO1SO2 for which we have sampling and monitoring costs
Agency Contribution to Regional Program* , includes TMDL/Watershed Implementation	$55,982	$44,524	$70,000	Regional program saved money in certain areas thus lower FY contribution.
Other: Includes San Juan Creek Bacteria TMDL Implementation, Baby Beach TMDL, Federal Lobbyist	$28,840	$29,143	$35,000	
Totals	$1,602,341	$1,764,013	$1,965,000	

Funding Sources

FUNDING SOURCES	Preceding Period FY2012-13 Costs	Current Reporting Period FY 2013-14 Costs	Projected FY 2014-15 Costs - Draft	
Grants: Clean Beaches Initiative				
Grants: OCTA Tier 1	$72,426	NA	$0	$72,000 awarded for OCTA M2 Tier 1 Grant for Jeremiah/Priscilla Parkway Improvement Project
Grants: OCTA Tier 2	NA	NA	$470,236	$470,236 awarded for OCTA M2 Tier 2 Grant for LO1SO2 Dry Weather Diversion & Trash BMP
Grants: Prop 84				
Other:				
General Fund Percentage	95.5	10.0	75+/-	Draft estimate for FY14-15, grant project schedule is yet to be determined and the funds could be spent in FY15-16
Grant Funding Percentage	4.5	0.0	25+/-	Draft estimate for FY14-15, grant project schedule is yet to be determined and the funds could be spent in FY15-16
TOTALS	100%	100%	100%	

	CAPITAL COSTS		

Fiscal Analysis Summary

LIP Program Elements	FY2013-14 Costs	FY2014-15 Costs	Projected Costs FY2015-16
Public Projects - BMPs	$0.00	$22,000.00	$470,236.00
Construction BMPs for Public Construction Projects	$0.00	NA	NA
Other Capital Projects / Major Equipment Purchases	$0.00	NA	NA
TOTALS	**$0.00**	**$22,000.00**	**$470,236.00**
		Infiltration/bioretention for Doheny Park Road parking lot	OCTA Measure M2 Tier 2 Grant Award for LO1SO2 Dry weather diversion project received. Schedule of implementation to be determined in FY15-16 or FY16-17.

OPERATIONS & MAINTENANCE

Fiscal Analysis Summary

LIP Program Elements	FY2013-14 Costs	FY2014-15 Costs	Projected Costs FY2015-16
Supportive of Program Administration (LIP Section 2.0) – Includes Staff Resources (see separate sheet for itemized list. Other administrative costs include: memberships, conferences, training, cell phone, office supplies, mileage, SWRCB Permit Fee, Legal Fees, Federal Lobbyist	$497,008	$685,147	$711,085
Municipal Activities (LIP Section 5.0) Trash & Debris Control (formerly "Litter Control"): include County, Park and Bus Stop litter control & mutt mitts, recycling	$176,252	$158,222	$164,416
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (includes Catch Basin Stenciling)	$650,443	$689,835	$831,887
Municipal Activities (LIP Section 5.0) Street Sweeping	$261,929	$259,939	$278,885
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	$0	$0	$0
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	$4,362	$4,379	$6,114
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	$5,412	$4,397	$9,000
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	$0	$0	$0
Requiring New Development BMPs (Supportive of Planning, etc) (LIP Section 7.0)	$0	$0	$0
Requiring Construction BMPs (Supportive of Plan Check & Inspection) (LIP Section 8.0)	$0	$0	$0
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	$8,940	$11,820	$12,000
Illicit Connections/Discharge Ident. & Elimination (LIP Section10.0) Investigations (includes Grease Interceptor Rebate Funds)	$86,036	$59,939	$92,800
Agency Contribution to Regional Program	$44,524	$50,769	$75,000
Other - includes San Juan Creek Bacteria TMDL Implementation, Baby Beach TMDL,	$0	$4,514	$14,000
Other	$29,143		
TOTALS	$1,764,049	$1,928,961	$2,195,187

LIP Funding Sources	FY 2014-15 Funding Sources	FY 2015-16 Projected Funding Sources
General Fund	100%	83%
Utility Tax/Charges		
Separate Utility Billing Item		
Gas Tax		
Special District Fund		
- Sanitation Fee		
- Benefit Assessment		
- Fleet Maintenance Fund		
- Community Services Fund		
- Water Fund		
- Sewer & Storm Drain Maintenance Fee		
Other: OCTA Tier 2 Grant ($470,236)		17.00%
Other:		
Other:		
Other:		
Other:		
Other:		

$470,236 for CIP through OCTA Measure M2 for LO1SO2 Project

Please define LIP funding source(s) under "OTHER" if you use this category

General Fund	100.00%	83.00%
Utility Tax/Charges	0.00%	0.00%
Separate Utility Billing Item	0.00%	0.00%
Gas Tax	0.00%	0.00%
Special District Fund	0.00%	0.00%
Other	0.00%	17.00%
TOTAL	100.00%	100.00%

OCTA Tier 2 Grant for $470,236 for CIP LO1SO2 Project

EXHIBIT 3

April 22, 2010	☒
May 27, 2010	☒
June 24, 2010	☒

In addition, City representatives participated in the following sub-committees and task forces:

Committee/Task Force	Attended
LIP/PEA	☒
Inspection	☒
Trash & Debris	☐
Legal/Regulatory Authority	☐
Public Education	☐
Water Quality	☒
Ad Hoc Annual Report	☐
Permittee Advisory Group (PAG) for the Development of the Model WQMP	☐

Also, City representatives participated in the following watershed-committees:

Watershed Committee	Attended
Laguna Coastal Streams	☐
Aliso Creek	☒
Dana Point Coastal Streams	☐
San Juan Creek	☒
San Clemente Coastal Streams	☐

City Internal Coordination (LIP Table A-2.2)

The responsibilities of City departments for the internal coordination of LIP activities are detailed in LIP Table A- 2.2

Fiscal Analysis (LIP Section A-2.2.5)

The Fiscal Analysis includes the following:

- The City's expenditures for the previous fiscal year;
- The City's budget for the current fiscal year; and
- A description of the source of funds.

The Fiscal Analysis is intended to depict all NPDES compliance related costs for the City of Laguna Hills. The tables below report costs that include the costs of Permittee operations and contracted services.

Capital Costs

Capital costs include any capital expended for each one of the DAMP elements. This would consist of any land, large equipment, and structures.

Operations and Maintenance Costs

Operations and Maintenance costs refer to normal costs of operation including the cost of keeping equipment and facilities in working order.

CAPITAL COSTS
(Land, Large Equipment and Structures)

LIP Program Elements	FY 2009-10 Costs	Projected FY 2010-11 Costs
Public Projects - BMPs		
Construction BMPs for Public Construction Projects	7,091.50*	10,000
Other Capital Projects / Major Equipment Purchases		
Totals	7,091.50*	10,000

*Catch Basin Debris gates along Moulton Parkway, CIP 166/167

OPERATION AND MAINTENANCE COSTS

LIP Program Elements	*Preceding Period FY2008-09 Costs $*	*Current Period FY 2009-10 Costs $*	*Projected FY 2010-11 Costs $*
Supportive of Program Administration (LIP Section 2.0)*	253,234.42	258,470.59	270,783.12
Municipal Activities (LIP Section 5.0) Trash & Debris Control (formerly "Litter Control")***	49,405.30	46,218.32	50,840.15
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance	37,140.00	25,601.00	26,880.00
Municipal Activities (LIP Section 5.0) Street Sweeping	126,817.27	124,701.63	127195.66
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)****	10,489.92	313.09	500.00
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	39,948.00	38,460.00	40,383.00
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness******	750.00	750.00	750.00
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	0.00	0.00	0.00
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)**	0.00	0.00	0.00
Requiring Construction BMPs (Supportive of Plan Check & Inspection) (LIP Section 8.0)**	0.00	0.00	0.00
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections**	0.00	0.00	0.00
Illicit Connections/Discharge Ident. & Elimination (LIP Section10.0) Investigations**	0.00	0.00	0.00
Agency Contribution to Regional Program*****	111,132.63	102,118.53	112,330.38
Totals	**628,917.54**	**596,633.16**	**629,662.31**

*Program Administration Costs include Program Admin Costs plus County pollution response costs

**All costs related to:
Public Information, Requiring New Development BMPs, Requiring Construction BMPs, Existing Development, and ID/IC Investigations, have been added into Program Administration Costs. See table on page C-2-6.
***Trash and Debris Control (Litter Control) Costs include County Costs + doggie walk bags cost.
****Environmental Performance Costs include pollution response costs
*****Agency Contribution to Regional Program includes total NPDES Shared Costs Budget, Aliso Creek Directive, Newport Bay (NSMP), and SWRCB annual fee.
****** Trails 4 All sponsorship.

	YES	NO
Are there any legal resitrictions on the use of any of the above funds? If yes, please explain		X
Was there a 25% or greater annual change for any of the budget line items? If yes, please explain		X

FUNDING SOURCES

LIP Funding Sources	FY 2009-10 Costs $	Projected FY 2010-11 Costs
General Fund	100%	
Utility Tax/Charges		
Separate Utility Billing Item		
Gas Tax		
Special Restricted Fund		
- Sanitation Fee		
- Benefit Assessment		
- Fleet Maintenance Fund		
- Community Services Fund		
- Water Fund		
- Sewer & Storm Drain Maintenance Fee		
- Others		
TOTALS	100%	

June 23, 2011 ☒

In addition, City representatives participated in the following sub-committees and task forces:

Committee/Task Force	Attended
LIP/PEA	☒
Inspection	☒
Trash & Debris	☐
Legal/Regulatory Authority	☐
Public Education	☐
Water Quality	☒
Ad Hoc Annual Report	☐
Permittee Advisory Group (PAG) for the Development of the Model WQMP	☐

Also, City representatives participated in the following watershed-committees:

Watershed Committee	Attended
Laguna Coastal Streams	☐
Aliso Creek	☒
Dana Point Coastal Streams	☐
San Juan Creek	☒
San Clemente Coastal Streams	☐

C-2.3 City Internal Coordination (LIP Table A-2.2)

The responsibilities of City departments for the internal coordination of LIP activities are detailed in LIP Table A- 2.2

C-2.4 Fiscal Analysis (LIP Section A-2.2.5)

The Fiscal Analysis includes the following:

- The City's expenditures for the previous fiscal year;
- The City's budget for the current fiscal year; and
- A description of the source of funds.

The Fiscal Analysis is intended to depict all NPDES compliance related costs for the City of Laguna Hills. The tables below report costs that include the costs of Permittee operations and contracted services.

Capital Costs

Capital costs include any capital expended for each one of the DAMP elements. This would consist of any land, large equipment, and structures.

Operations and Maintenance Costs

Operations and Maintenance costs refer to normal costs of operation including the cost of keeping equipment and facilities in working order.

CAPITAL COSTS
(Land, Large Equipment and Structures)

LIP Program Elements	2009-10 Expenditures	2010-11 Expenditures	2011-12 Projected Costs
Public Projects - BMPs			$64,860.80*
Construction BMPs for Public Construction Projects	$7,091.50		
Other Capital Projects / Major Equipment Purchases		$1,853.20	
Totals	$7,091.50	$1,853.20	$64,860.80*

*$61,950 has been granted to the City to install debris gates from the M2 Environmental Cleanup Program. $2,910 is an annual match that the City is to spend for the next 10 years in order to maintain the debris gates.

OPERATION AND MAINTENANCE COSTS

LIP Program Elements	***Preceding Period FY2009-10 Costs $***	***Current Period FY 2010-11 Costs $***	***Projected FY 2011-12 Costs $***
Supportive of Program Administration (LIP Section 2.0)*	258,470.59	270,302.12	278,979.96
Municipal Activities (LIP Section 5.0) Trash & Debris Control (formerly "Litter Control")***	46,218.32	19,488.69	20,000.00
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance	25,601.00	50,047.00	52,549.00
Municipal Activities (LIP Section 5.0) Street Sweeping	124,701.63	127,235.77	130,000.00
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)****	313.09	2,338.20	600.00
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	38,460.00	31,839.00	33,431.00
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness******	750.00	0	0

Public Information (LIP Section 6.0) Household Hazardous Waste Collection	0.00	0	0
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)**	0.00	0	0
Requiring Construction BMPs (Supportive of Plan Check & Inspection) (LIP Section 8.0)**	0.00	0	0
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections**	0.00	0	0
Illicit Connections/Discharge Ident. & Elimination (LIP Section10.0) Investigations**	0.00	0	0
Agency Contribution to Regional Program*****	102,118.53	89,534.67	103,000.00
Totals	**596,633.16**	**590,785.45**	**618,559.96**

*Program Administration Costs include Program Admin Costs plus County pollution response costs
**All costs related to:
Public Information, Requiring New Development BMPs, Requiring Construction BMPs, Existing Development, and ID/IC Investigations, have been added into Program Administration Costs. See table on page C-2-6.
***Trash and Debris Control (Litter Control) Costs include County Costs + doggie walk bags cost.
****Environmental Performance Costs include pollution response costs
*****Agency Contribution to Regional Program includes total NPDES Shared Costs Budget, Aliso Creek Directive, Newport Bay (NSMP), and SWRCB annual fee.
****** Trails 4 All sponsorship.

	YES	NO
Are there any legal resitrictions on the use of any of the above funds? If yes, please explain		X
Was there a 25% or greater annual change for any of the budget line items? If yes, please explain		X

FUNDING SOURCES

LIP Funding Sources	FY 2009-10 Funding Sources	FY 2010-11 Funding Sources	FY 2011-12 Projected Funding Sources
General Fund	100%	100%	5%
Utility Tax/Charges			
Separate Utility Billing Item			

Gas Tax			
Special District Fund			
- Sanitation Fee			
- Benefit Assessment			
- Fleet Maintenance Fund			
- Community Services Fund			
- Water Fund			
- Sewer & Storm Drain Maintenance Fee			
- Other (Measure M2)			95%*

*The City has been granted $61,950.00 through OCTA Measure M2 Environmental Cleanup Program. See Capital Costs Table above for an explanation.

PROGRAM ADMINSTRATION COSTS
(Included with Operation and Maintenance Costs above)

Position Title	FY 10-11 Total Costed Compensation	Projected FY 11-12 Total Costed Compensation
Public Services Director – 10% Time	28,537.00	26,181.20
Assistant Civil Engineer/NPDES Program Coordinator – 50% Time	59,030.00	63,781.50
Water Quality/Building Inspector – 50% Time	63,553.00	70,681.00
Public Works Supervisor – 25% Time	37,557.75	34,705.50
Parks Supervisor – 10% Time	14,643.80	13,882.20
City Attorney – 10% Time	27,279.82	28,643.81
Planning/Code Enforcement Aide – 10% Time	5,753.30	7,035.30
Planning/Code Enforcement Aide– 10% Time	5,966.50	6,432.20
Senior Planner – 5% Time	3,467.55	3,642.45
Deputy City Manager – 10% Time – Recycling Program	20,314.80	19,736.00
Administrative Assistant, Public Services – 5% Time	4,198.60	4,258.80
Total Costed Compensation of all Water Quality Related Positions in Laguna Hills	**270,302.12**	**278,979.96**

June 28, 2012 ☒

In addition, City representatives participated in the following sub-committees and task forces:

Committee/Task Force	Attended
LIP/PEA	☒
Inspection	☐
Trash & Debris	☐
Legal/Regulatory Authority	☐
Public Education	☐
Water Quality	☒

Also, City representatives participated in the following watershed-committees:

Watershed Committee	Attended
Aliso Creek	☒
San Juan Creek/San Clemente Coastal Streams	☒

C-2.3 City Internal Coordination (LIP Section A-2.2)

The responsibilities of City departments for the internal coordination of LIP activities are detailed in LIP Table A- 2.2

C-2.4 Fiscal Analysis (LIP Section A-2.2.5)

The Fiscal Analysis includes the following:

- The City's expenditures for the previous fiscal year;
- The City's budget for the current fiscal year; and
- A description of the source of funds.

The Fiscal Analysis is intended to depict all NPDES compliance related costs for the City of Laguna Hills. The tables below report costs that include the costs of Permittee operations and contracted services.

Capital Costs

Capital costs include any capital expended for each one of the DAMP elements. This would consist of any land, large equipment, and structures.

Operations and Maintenance Costs

Operations and Maintenance costs refer to normal costs of operation including the cost of keeping equipment and facilities in working order.

CAPITAL COSTS
(Land, Large Equipment and Structures)

LIP Program Elements	2010-11 Expenditures	2011-12 Expenditures	2012-13 Projected Costs
Public Projects - BMPs		61,950.00	$70,350*
Construction BMPs for Public Construction Projects			
Other Capital Projects / Major Equipment Purchases	$1,853.20	$17,007.50	
Totals	$1,853.20	$78,957.50	$70,350*

*The City has applied for an additional $70,350 through the M2 Environmental Cleanup Program phase 2.

OPERATION AND MAINTENANCE COSTS

LIP Program Elements	***Preceding Period FY2010-11 Costs $***	***Current Period FY 2011-12 Costs $***	***Projected FY 2012-13 Costs $***
Supportive of Program Administration (LIP Section 2.0)*	270,302.12	287145.46	294669.8
Municipal Activities (LIP Section 5.0) Trash & Debris Control (formerly "Litter Control")***	19,488.69	55934.84	43627
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance	50,047.00	37609	28161
Municipal Activities (LIP Section 5.0) Street Sweeping	127,235.77	119914.12	120000
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)****	2,338.20	1691.82	1500
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	31,839.00	36205	38016
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness******	0	0	0
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	0	0	0
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)**	0	0	0

Requiring Construction BMPs (Supportive of Plan Check & Inspection) (LIP Section 8.0)**	0	0	0
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections**	0	0	0
Illicit Connections/Discharge Ident. & Elimination (LIP Section10.0) Investigations**	0	0	0
Agency Contribution to Regional Program*****	89,534.67	109959.89	100000
Totals	**590,785.45**	**648,460.13**	**625,973.80**

*Program Administration Costs include Program Admin Costs plus County pollution response costs
**All costs related to:
Public Information, Requiring New Development BMPs, Requiring Construction BMPs, Existing Development, and ID/IC Investigations, have been added into Program Administration Costs. See table on page C-2-6.
***Trash and Debris Control (Litter Control) Costs include County Costs + doggie walk bags cost.
****Environmental Performance Costs include pollution response costs
*****Agency Contribution to Regional Program includes total NPDES Shared Costs Budget, Aliso Creek Directive, Newport Bay (NSMP), and SWRCB annual fee.
****** Trails 4 All sponsorship.

	YES	NO
Are there any legal resitrictions on the use of any of the above funds? If yes, please explain		X
Was there a 25% or greater annual change for any of the budget line items? If yes, please explain		X

FUNDING SOURCES

LIP Funding Sources	FY 2010-11 Funding Sources	FY 2011-12 Funding Sources	FY 2012-13 Projected Funding Sources
General Fund	100%	22%	
Utility Tax/Charges			
Separate Utility Billing Item			
Gas Tax			
Special District Fund			
- Sanitation Fee			
- Benefit Assessment			

- Fleet Maintenance Fund			
- Community Services Fund			
- Water Fund			
- Sewer & Storm Drain Maintenance Fee			
- Other (Measure M2)		78%	100%*

*For FY 11-12, $61,950 was spent on the installation of catch basin debris gates, and $17,007.50 was spent to develop the City's GIS system to meet NPDES requirements. Through OCTA's Measure M2 Environmental Cleanup Program, the City has applied for additional funding for debris gates in FY 12-13. See Capital Costs table.

PROGRAM ADMINSTRATION COSTS
(Included with Operation and Maintenance Costs above)

Position Title	FY 11-12 Total Costed Compensation	Projected FY 12-13 Total Costed Compensation
Public Services Director – 10% Time	25,721.60	26,184.20
Assistant Civil Engineer/NPDES Program Coordinator – 50% Time	64,860.00	70,877.50
Water Quality/Building Inspector – 50% Time	72,874.00	71,116.00
Public Works Supervisor – 25% Time	34,654.50	35,329.25
Parks Supervisor – 10% Time	13,894.60	14,131.70
City Attorney – 10% Time	28,643.81	30,076.00
Planning/Code Enforcement Aide – 10% Time	7,027.10	7,466.40
Planning/Code Enforcement Aide– 10% Time	6,436.10	6,836.30
Senior Planner – 5% Time	3,646.90	3,702.50
Deputy City Manager – 10% Time – Recycling Program	19,377.10	24,668.10
Administrative Assistant, Public Services – 5% Time	4,209.75	4,281.85
Total Costed Compensation of all Water Quality Related Positions in Laguna Hills	**281,345.46**	**294,669.80**

C-2.5 Program Management Modifications

The Plan Management section of the City's LIP was modified to include new permit requirements.

In addition, City representatives participated in the following sub-committees and task forces:

Committee/Task Force	Attended
LIP/PEA	☒
Inspection	☒
Trash & Debris	☐
Legal/Regulatory Authority	☐
Public Education	☐
Water Quality	☒

Also, City representatives participated in the following watershed-committees:

Watershed Committee	Attended
Aliso Creek	☒
San Juan Creek/San Clemente Coastal Streams	☒

C-2.3 City Internal Coordination (LIP Section A-2.2)

The responsibilities of City departments for the internal coordination of LIP activities are detailed in LIP Table A- 2.2

C-2.4 Fiscal Analysis (LIP Section A-2.2.5)

The Fiscal Analysis includes the following:

- The City's expenditures for the previous fiscal year;
- The City's budget for the current fiscal year; and
- A description of the source of funds.

The Fiscal Analysis is intended to depict all NPDES compliance related costs for the City of Laguna Hills. The tables below report costs that include the costs of Permittee operations and contracted services.

Capital Costs

Capital costs include any capital expended for each one of the DAMP elements. This would consist of any land, large equipment, and structures.

Operations and Maintenance Costs

Operations and Maintenance costs refer to normal costs of operation including the cost of keeping equipment and facilities in working order.

CAPITAL COSTS
(Land, Large Equipment and Structures)

LIP Program Elements	2011-12 Expenditures	2012-13 Expenditures	2013-14 Projected Costs
Public Projects - BMPs	61,950.00	0	$70,350*
Construction BMPs for Public Construction Projects		$543	0
Other Capital Projects / Major Equipment Purchases	$17,007.50	$9,193.75	0
Totals	$78,957.50	9,736.75	$70,350*

* M2 Environmental Cleanup Program phase 2 for catch basin automatic retractable screens.

OPERATION AND MAINTENANCE COSTS

LIP Program Elements	***Preceding Period FY2011-12 Costs $***	***Current Period FY 2012-13 Costs $***	***Projected FY 2013-14 Costs $***
Supportive of Program Administration (LIP Section 2.0)*	287145.46	298493.80	304564.55
Municipal Activities (LIP Section 5.0) Trash & Debris Control (formerly "Litter Control")***	55934.84	35745.61	38400
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance	37609	16253	26900
Municipal Activities (LIP Section 5.0) Street Sweeping	119914.12	134594.83	130000
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)****			
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	36205	26990	31600
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness******	0	0	0
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	0	0	0
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)**	0	0	0

Requiring Construction BMPs (Supportive of Plan Check & Inspection) (LIP Section 8.0)**	0	0	0
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections******	0	4507.50	0
Illicit Connections/Discharge Ident. & Elimination (LIP Section10.0) Investigations**	0	0	0
Agency Contribution to Regional Program*****	109959.89	118301.89	120000
Totals	**646,768.31**	**634,886.63**	**651,464.55**

*Program Administration Costs include Program Admin Costs plus County pollution response costs
**All costs related to:
Public Information, Requiring New Development BMPs, Requiring Construction BMPs, Existing Development, and ID/IC Investigations, have been added into Program Administration Costs. See table on page C-2-6.
***Trash and Debris Control (Litter Control) Costs include County Costs + doggie walk bags cost.
****Environmental Performance Costs include pollution response costs
*****Agency Contribution to Regional Program includes total NPDES Shared Costs Budget, Aliso Creek Directive, Newport Bay (NSMP), and SWRCB annual fee.
****** BV consultant inspection costs.

	YES	NO
Are there any legal resitrictions on the use of any of the above funds? If yes, please explain		X
Was there a 25% or greater annual change for any of the budget line items? If yes, please explain		X

FUNDING SOURCES

LIP Funding Sources	FY 2011-12 Funding Sources	FY 2012-13 Funding Sources	FY 2013-14 Projected Funding Sources
General Fund	22%	100%	
Utility Tax/Charges			
Separate Utility Billing Item			
Gas Tax			
Special District Fund			
- Sanitation Fee			
- Benefit Assessment			

- Fleet Maintenance Fund			
- Community Services Fund			
- Water Fund			
- Sewer & Storm Drain Maintenance Fee			
- Other (Measure M2)	78%		100%

*For FY 12-13, capital costs are SWPPP costs and GIS related costs. For FY 13-14 the City has obtained $70,350 through OCTA's Measure M2 Environmental Cleanup Program and will be expending it.

PROGRAM ADMINSTRATION COSTS
(Included with Operation and Maintenance Costs above)

Position Title	FY 12-13 Total Costed Compensation	Projected FY 13-14 Total Costed Compensation
Public Services Director – 10% Time	26,184.20	26,461.40
Associate Civil Engineer/NPDES Program Coordinator – 50% Time	70,877.50	73,708.50
Water Quality/Building Inspector – 50% Time	71,116.00	71,732.00
Public Works Supervisor – 25% Time	35,329.25	35,602.00
Parks Supervisor – 10% Time	14,131.70	14,085.90
City Attorney – 10% Time	30,076.00	31,579.80
Planning/Code Enforcement Aide – 10% Time	7,466.40	9,195.40
Planning/Code Enforcement Aide– 10% Time	6,836.30	8,426.00
Senior Planner – 5% Time	3,702.50	3,711.55
Deputy City Manager – 10% Time – Recycling Program	24,668.10	21,100.80
Administrative Assistant, Public Services – 5% Time	4,281.85	4,361.20
Total Costed Compensation of all Water Quality Related Positions in Laguna Hills	**294,669.80**	**299,964.55**

C-2.5 Program Management Modifications

The Plan Management section of the City's LIP was modified to include new permit requirements.

Committee/Task Force	Attended
LIP/PEA	☒
Inspection	☒
Trash & Debris	☐
Legal/Regulatory Authority	☐
Public Education	☐
Water Quality	☒

Also, City representatives participated in the following watershed-committees:

Watershed Committee	Attended
Aliso Creek	☒
San Juan Creek/San Clemente Coastal Streams	☒

C-2.3 City Internal Coordination (LIP Section A-2.2)

The responsibilities of City departments for the internal coordination of LIP activities are detailed in LIP Table A- 2.2

C-2.4 Fiscal Analysis (LIP Section A-2.2.5)

The Fiscal Analysis includes the following:

- The City's expenditures for the previous fiscal year;
- The City's budget for the current fiscal year; and
- A description of the source of funds.

The Fiscal Analysis is intended to depict all NPDES compliance related costs for the City of Laguna Hills. The tables below report costs that include the costs of Permittee operations and contracted services.

Capital Costs

Capital costs include any capital expended for each one of the DAMP elements. This would consist of any land, large equipment, and structures.

Operations and Maintenance Costs

Operations and Maintenance costs refer to normal costs of operation including the cost of keeping equipment and facilities in working order.

CAPITAL COSTS
(Land, Large Equipment and Structures)

LIP Program Elements	2012-13 Expenditures	2013-14 Expenditures	2014-15 Projected Costs
Public Projects - BMPs		$135,265.00	$71,075.00*
Construction BMPs for Public Construction Projects	$543.00		
Other Capital Projects / Major Equipment Purchases	$9,193.75	$4,812.50	
Totals	**$9,736.75**	**$140,077.50**	**$71,075.00**

* M2 Environmental Cleanup Program phase 3 for catch basin automatic retractable screens.

OPERATION AND MAINTENANCE COSTS

LIP Program Elements	***Preceding Period FY2012-13 Costs $***	***Current Period FY 2013-14 Costs $***	***Projected FY 2014-15 Costs $***
Supportive of Program Administration (LIP Section 2.0)*	$298,012.80	$303,935.55	$324,990.44
Municipal Activities (LIP Section 5.0) Trash & Debris Control (formerly "Litter Control")***	$35,745.51	$26,665.00	$23,141.00
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance	$16,253.00	$36,789.00	$26,521.00
Municipal Activities (LIP Section 5.0) Street Sweeping	$134,594.43	$128,983.26	$130,000.00
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)****			
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	$26,990.00	$26,709.00	$26,849.00
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness******	0	0	0
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	0	0	0
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)**	0	0	0
Requiring Construction BMPs (Supportive of Plan Check & Inspection) (LIP Section 8.0)**	0	0	0

Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections******	$4,507.50	$38,075.22	
Illicit Connections/Discharge Ident. & Elimination (LIP Section10.0) Investigations**	0	0	0
Agency Contribution to Regional Program*****	$118,301.89	$103,383.65	$105,000.00
Totals	$634,405.13	$664,540.68	$636,501.44

*Program Administration Costs include Program Admin Costs plus County pollution response costs
**All costs related to:
Public Information, Requiring New Development BMPs, Requiring Construction BMPs, Existing Development, and ID/IC Investigations, have been added into Program Administration Costs. See table on page C-2-6.
***Trash and Debris Control (Litter Control) Costs include County Costs + doggie walk bags cost.
****Environmental Performance Costs include pollution response costs
*****Agency Contribution to Regional Program includes total NPDES Shared Costs Budget, Aliso Creek Directive, Newport Bay (NSMP), and SWRCB annual fee.
****** BV consultant inspection costs.

	YES	NO
Are there any legal resitrictions on the use of any of the above funds? If yes, please explain		X
Was there a 25% or greater annual change for any of the budget line items? If yes, please explain		X

FUNDING SOURCES

LIP Funding Sources	FY 2012-13 Funding Sources	FY 2013-14 Funding Sources	FY 2014-15 Projected Funding Sources
General Fund	100%	100%	100%
Utility Tax/Charges			
Separate Utility Billing Item			
Gas Tax			
Special District Fund			
- Sanitation Fee			
- Benefit Assessment			
- Fleet Maintenance Fund			
- Community Services Fund			

- Water Fund			
- Sewer & Storm Drain Maintenance Fee			
- Other (Measure M2)			

PROGRAM ADMINSTRATION COSTS
(Included with Operation and Maintenance Costs above)

Position Title	FY 13-14 Total Costed Compensation	Projected FY 14-15 Total Costed Compensation
Public Services Director – 10% Time	26,461.40	27,424.50
Associate Civil Engineer/NPDES Program Coordinator – 50% Time	73,708.50	83,228.00
Water Quality/Building Inspector – 50% Time	71,732.00	74,231.00
Public Works Supervisor – 25% Time	35,602.00	38,830.25
Parks Supervisor – 10% Time	14,085.90	15,361.30
City Attorney – 10% Time	31,579.80	33,158.79
Planning/Code Enforcement Aide – 10% Time	9,195.40	9,930.30
Planning/Code Enforcement Aide– 10% Time	8,426.00	9,138.50
Senior Planner – 5% Time	3,711.55	3,855.75
Deputy City Manager – 10% Time – Recycling Program	21,100.80	21,884.20
Administrative Assistant, Public Services – 5% Time	4,361.20	4,526.85
Total Costed Compensation of all Water Quality Related Positions in Laguna Hills	299,964.55	321,569.44

C-2.5 Program Management Modifications

The Plan Management section of the City's LIP was modified to include new permit requirements.

CAPITAL COSTS

Local Implementation Program Elements	2013-14 Expenditures	2014-15 Expenditures	2015-16 Projected Costs
Public Projects - BMPs	$135,265	$89,667.51*	$95,000.00
Construction BMPs for Public Construction Projects	$543.00		
Other Capital Projects / Major Equipment Purchases	$4,812.50		$45,000
Totals	**$140,077.50**	**$89,667.51**	**$140,000**

* CIP 412 Debris Gates, Dairy Fork, Cabot Road Bio Swale

OPERATION AND MAINTENANCE COSTS

LIP Program Elements	*Preceding Period FY2013-14 Costs $*	*Current Period FY 2014-15 Costs $*	*Projected FY 2015-16 Costs $*
Supportive of Program Administration (LIP Section 2.0)*	$303,935.55	$314,870.34	$330,327.73
Municipal Activities (LIP Section 5.0) Trash & Debris Control (formerly "Litter Control")***	$26,665.00	$17,831.93	$18,723.53
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance	$36,789.00	$36,834.40	$37,000.00
Municipal Activities (LIP Section 5.0) Street Sweeping	$128,983.26	$131,652.82	$138,235.46
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)****	0	0	0
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	$26,709.00	0	0
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness******	0	0	0
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	0	0	0
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)**	0	0	0

Requiring Construction BMPs (Supportive of Plan Check & Inspection) (LIP Section 8.0)**	0	0	0
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections******	$38,075.22	$10,245.39	$10,757.66
Illicit Connections/Discharge Ident. & Elimination (LIP Section10.0) Investigations**	0	0	0
Agency Contribution to Regional Program*****	$103,383.65	$91,246.02	$95,808.32
Totals	$664,540.68	602,680.90	630,852.70

*Program Administration Costs include Program Admin Costs plus County pollution response costs
**All costs related to:
Public Information, Requiring New Development BMPs, Requiring Construction BMPs, Existing Development, and ID/IC Investigations, have been added into Program Administration Costs. See table on page C-2-6.
***Trash and Debris Control (Litter Control) Costs include County Costs + doggie walk bags cost.
****Environmental Performance Costs include pollution response costs
*****Agency Contribution to Regional Program includes total NPDES Shared Costs Budget, Aliso Creek Directive, Newport Bay (NSMP), and SWRCB annual fee.
******Consultant inspection costs.

FUNDING SOURCES

Funding Sources	FY 2014-15 Funding Sources	FY 2015-16 Projected Funding Sources
General Fund	100%	100%
Utility Tax/Charges		
Separate Utility Billing Item		
Gas Tax		
Special District Fund		
- Sanitation Fee		
- Benefit Assessment		
- Fleet Maintenance Fund		
- Community Services Fund		
- Water Fund		
- Sewer & Storm Drain Maintenance Fee		

- Other (Measure M2)		

The funding for the NPDES program Operation and Maintenance is reserved in the City's General Fund Water Quality Program, and the City has no restrictions on the use of these funds. A portion of the Capital costs for BMPs are reimbursed through the OCTA Measure M2 Tier 1 and Tier 2 Environmental Cleanup Programs.

PROGRAM ADMINSTRATION COSTS
(Included with Operation and Maintenance Costs above)

Position Title	FY 14-15 Total Costed Compensation	Projected FY 15-16 Total Costed Compensation
Public Services Director – 10% Time	27,683.60	28,742.10
Associate Civil Engineer/NPDES Program Coordinator – 50% Time	79,088.50	84,843.50
Building/Water Quality Inspector – 50% Time	72,969.00	75,677.00
Public Works Supervisor – 25% Time	37,364.75	37,650.00
Parks Supervisor – 10% Time	14,456.50	14,541.60
City Attorney – 10% Time	33,158.79	34,816.73
Planner – 10% Time	10,159.80	11,013.00
Planner – 10% Time	8,875.30	9,691.50
Senior Planner – 5% Time	4,466.55	4,643.70
Deputy City Manager – 10% Time – Recycling Program	23,615.20	24,912.30
Administrative Assistant, Public Services – 5% Time	3,032.35	3,796.30
Total Costed Compensation of all Water Quality Related Positions in Laguna Hills	314,870.34	330,327.73

CONCLUSION

The City of Laguna Hills has judged that it has an effective Storm Water Quality Program based upon the results of the Program Effectiveness Assessment to date. Future improvement is possible in any program; and the City does allocate its resources to meet the needs as they arise. For example, the City regularly, through its inspection program and Code Enforcement inspectors is working on its goal to educate the residents and businesses of the City of Laguna Hills to eliminate irrigation runoff. Since the fourth term

EXHIBIT 4

The information in the tables has been developed in accordance with the Fiscal Analysis Guidance Manual developed in 2006-2007 to assist the Cities to further improve consistency and comparability Countywide.

Table 2.4.1
CAPITAL COSTS
(Land, Large Equipment and Structures)

LIP Program Elements	FY 2009-10 Costs	Projected FY 2010-11 Costs
Public Projects - BMPs	**$184,952**	**$733,600**
Construction BMPs for Public Construction Projects	**$219,022**	**$327,310**
Other Capital Projects / Major Equipment Purchases	0.00	0.00
Totals	**$403,974**	**$1,060,910**

Table 2.4.2
OPERATION AND MAINTENANCE COSTS

LIP Program Elements	FY 2009-10 Costs	Projected FY, 2010-11 Costs
Supportive of Program Administration (LIP Section 2.0)	143,982	$147,582
Municipal Activities (LIP Section 5.0) Trash & Debris Control (formerly "Litter Control")	26,447	26,132
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance	392,719	425,788
Municipal Activities (LIP Section 5.0) Street Sweeping	187,179	189,000
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	7,143	7,322
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	6,371	6,530
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	74,375	92,917
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	7,709	8,750

Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)	35,448	36,334
Requiring Construction BMPs (Supportive of Plan Check & Inspection) (LIP Section 8.0)	122,325	125,383
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	93,315	95,648
Illicit Connections/Discharge Ident. & Elimination (LIP Section10.0) Investigations	21,611	33,315
Agency Contribution to Regional Program	222,722	457,830
Totals	**1,341,346**	**1,652,531**

Table 2.4.2
FUNDING SOURCES

LIP FUNDING SOURCES	FY 09-10 Costs	Projected FY 2010-11 Costs
General Fund	100%	100%
Utility Tax/Charges	%	%
Separate Utility Billing Item	%	%
Gas Tax	%	%
Special Restricted Fund	%	%
- Sanitation Fee	%	%
- Benefit Assessment	%	%
- Fleet Maintenance Fund	%	%
- Community Services Fund	%	%
- Water Fund	%	%
- Sewer & Storm Drain Maintenance Fee	%	%
- Others (Grants)	%	0%
TOTALS	**100%**	**100%**

Capital Costs – Discussion

Capital costs include any capital expended for water-quality-related construction projects, including design and planning for such projects, as well as any land, large equipment, minor structures and municipal construction BMPs, as well as other improvements with a value exceeding $5,000 and a lifespan exceeding 5 years. Capital Improvement Project (CIP) budgets typically fluctuate substantially from year to year as projects are planned and completed; funds are appropriated to account for reimbursement-based grants; or funds are carried over into the following year for projects that experience design or construction delays.

Fiscal Analysis - City of Laguna Niguel *(H.3., page 77)*

Capital Costs

LIP Program Elements	Preceding Period FY2009-10 Costs	Current Reporting Period FY 2010-11 Costs	Projected FY 2011-12 Costs - Draft	Was there was a 25% annual change in this budget item? If yes, please explain.
Public Project BMPs relating to water quality	184,952	176,011	$692,000	CIP expenses vary annually; incomplete projects are carried over
Construction BMPs for Other Public Construction Projects	$219,022	$268,100	$323,483	CIP expenses vary annually
Other Capital Projects/Major Equipment Purchases	0	3,799	5,092	Vehicle depreciation
Totals	**403,974**		**1,020,575**	

Operation & Maintenance Costs

LIP Program Elements	Prior Reporting Period FY 2009-10 Costs	Current Reporting Period FY 2010-11 Costs	Projected FY 2011-12 Costs - Draft	Was there was a 25% annual change in this budget item? If yes, please explain.
Supportive of Program Administration (LIP Section 2.0)	143,982	134,501	134,501	no
Municipal Activities (LIP Section 5.0) Trash & Debris Control	26,447	24,300	23,665	no
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (includes Catch Basin Stenciling)	392,719	375,798	430,520	no
Municipal Activities (LIP Section 5.0) Street Sweeping	187,179	167,224	189,000	no
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	7,143	7,256	7,256	no
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	6,371	5,331	5,331	no
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	74,375	60,213	81,690	09-10 and 10-11 are actuals; 11-12 is projected
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	7,709	6,605	8,200	no
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)	35448	33770	33770	no
Requiring Construction BMPs(Supportive of Plan Check & Inspection) (LIP Section 8.0)	122325	94960	94960	no
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	93,315	66,995	66,995	all commercial sites inspected in 09-10; 20% per year in 10-11 and 11-12
Illicit Connections/Discharge Ident. & Elimination Facility Inspection,	21,611	20,353	31,129	11-12 includes new budget to test irrigation runoff samples
Agency Contribution to Regional Programs	222,722	189,202	246,769	includes new cost-shares for Bacteria TMDLs
Totals	**1,341,346**	**1,186,508**	**1,353,786**	**no**

Funding Sources

FUNDING SOURCES	Preceding Reporting Period FY 2009-10	Current Reporting Period FY 2010-11 Costs	Projected FY 2011-12 Budgeted	
General Fund	100	100	100	
TOTALS	**100%**	**100%**	**100%**	

Are there any legal restrictions on the use of any of the above funds? If yes, please explain: no no no

Fiscal Analysis - City of Laguna Niguel *(H.3., page 77)*

Capital Costs

LIP Program Elements	Preceding Period FY10-11-10 Costs	Current Reporting Period FY 2011-12 Costs	Projected FY 2012-13 Costs - Budgeted	Was there was a 25% annual change in this budget item? If yes, please explain.
Public Project BMPs relating to water quality	176,011	219,589	$2,742,485	yes; new grant funded projects in 11-12 and 12-13
Construction BMPs for Other Public Construction Projects	$268,100	125,936	$357,412	CIP expenses vary annually
Other Capital Projects/Major Equipment Purchases	3,799	5,092	5,436	no
Totals	**447,910**	**350,617**	**3,105,333**	

Operation & Maintenance Costs

LIP Program Elements	Prior Reporting Period FY10-11 Costs	Current Reporting Period FY 2011-12 Costs	Projected FY 2012-13 Costs - Budgeted	Was there was a 25% annual change in this budget item? If yes, please explain.
Supportive of Program Administration (LIP Section 2.0)	134,501	127,360	127,360	no
Municipal Activities (LIP Section 5.0) Trash & Debris Control	24,300	23,217	22,582	no
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (includes Catch Basin Stenciling)	375,798	359,358	388,850	no
Municipal Activities (LIP Section 5.0) Street Sweeping	167,224	167,000	189,000	no
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	7,256	7,470	7,470	no
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	5,331	5,439	5,439	no
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	60,213	62,766	84,038	yes; increase in Countywide shared-program cost
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	6,605	6,978	8,200	no
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)	33770	35,689	35,689	no
Requiring Construction BMPs(Supportive of Plan Check & Inspection) (LIP Section 8.0)	94960	99,832	99,832	no
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	66,995	65,792	65,792	no
Illicit Connections/Discharge Ident. & Elimination Facility Inspection,	20,353	21,880	31,650	yes; includes more investigative followup
Agency Contribution to Regional Programs	189,202	233,674	246,769	no
Totals	**1,186,508**	**1,216,455**	**1,312,671**	**no**

Funding Sources

FUNDING SOURCES	Preceding Reporting Period FY 2010-11	Current Reporting Period FY 2011-12 Costs	Projected FY 2012-13 Budgeted	
General Fund	100	95%	91%	
OCTA Measure M2 Tier 1 Grants	0	0	9%	
TOTALS	100%	100%	100%	

Are there any legal restrictions on the use of any of the above funds? If yes, please explain: no no no

no

Fiscal Analysis - City of Laguna Niguel *(H.3., page 77)*

Capital Costs

LIP Program Elements	Preceding Period FY11-12 Costs	Current Reporting Period FY 2012-13 Costs	Projected FY 2013-14 Costs - Budgeted	Was there a 25% annual change in this budget item? If yes, please explain.
Public Project BMPs relating to water quality	219,589	149,704	$4,858,294	yes; design proceeding for grant projects upcoming in FY13-14
Construction BMPs for Other Public Construction Projects	125,936	108,232	$292,443	CIP expenses vary annually
Other Capital Projects/Major Equipment Purchases	5,092	5,436	5,439	no
Totals	**350,617**	**263,372**	**5,156,176**	

Operation & Maintenance Costs

LIP Program Elements	Prior Reporting Period FY11-12 Costs	Current Reporting Period FY 2012-13 Costs	Projected FY 2013-14 Costs - Budgeted	Was there was a 25% annual change in this budget item? If yes, please explain.
Supportive of Program Administration (LIP Section 2.0)	127,360	138,030	138,030	no
Municipal Activities (LIP Section 5.0) Trash & Debris Control	23,217	21,062	22,846	no
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (includes Catch Basin Stenciling)	359,358	327,048	470,730	yes; system repairs anticipated FY13-14
Municipal Activities (LIP Section 5.0) Street Sweeping	167,000	167,149	189,000	no
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	7,470	7,518	7,518	no
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	5,439	3,642	3,642	no
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	62,766	80,655	89,618	yes; increase in Countywide shared-program cost
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	6,978	6,807	8,750	yes; increased diversion participation
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)	35,689	36,098	36,098	no
Requiring Construction BMPs(Supportive of Plan Check & Inspection) (LIP Section 8.0)	99,832	102,113	102,113	no
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	65,792	64,452	64,452	no
Illicit Connections/Discharge Ident. & Elimination Facility Inspection,	21,880	22,033	32,947	yes; includes more investigative followup
Agency Contribution to Regional Programs	233,674	330,891	245,769	yes; increased cost-share
Totals	**1,216,455**	**1,307,498**	**1,411,513**	**no**

Funding Sources

FUNDING SOURCES	Preceding Reporting Period FY 2011-12	Current Reporting Period FY 2012-13 Costs	Projected FY 2013-14 Budgeted	
General Fund	95%	91%	56%	Construction starts
OCTA Measure M2 Tier 1 and 2 Grants	0	9%	21%	Construction starts
SWRCB Stormwater Grant Program	5%	0	21%	Construction starts
MWDOC Public Spaces Grant Program	0%	0	2%	Construction starts
TOTALS	**100%**	**100%**	**100%**	

Are there any legal restrictions on the use of any of the above funds? If yes, please explain: no no no

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Capital Costs

LIP Program Elements	Preceding Period FY12-13 Costs	Current Reporting Period FY 2013-14 Costs	Projected FY 2014-15 Costs - Budgeted	Was there a 25% annual change in this budget item? If yes, please explain.
Public Project BMPs relating to water quality	149,704	471,043	$7,193,215	yes; design proceeding for grant projects upcoming in FY14-15
Construction BMPs for Other Public Construction Projects	108,232	89,198	$291,388	CIP expenses vary annually
Other Capital Projects/Major Equipment Purchases	5,436	5,439	0	no
Totals	**263,372**	**565,680**	**7,484,603**	

Operation & Maintenance Costs

LIP Program Elements	Prior Reporting Period FY12-13 Costs	Current Reporting Period FY 2013-14 Costs	Projected FY 2014-15 Costs - Budgeted	Was there was a 25% annual change in this budget item? If yes, please explain.
Supportive of Program Administration (LIP Section 2.0)	138,030	114395	114,395	no
Municipal Activities (LIP Section 5.0) Trash & Debris Control	21,062	17548	19,564	no
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (includes Catch Basin Stenciling)	327,048	365578	416,100	yes; system repairs anticipated FY13-14
Municipal Activities (LIP Section 5.0) Street Sweeping	167,149	167000	189,000	no
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	7,518	7162	7,162	no
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	3,642	3619	3,619	no
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	80,655	51236	80,753	yes; increase in Countywide shared-program cost
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	6,807	5947	9,250	yes; increased diversion participation
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)	36,098	36440	36,440	no
Requiring Construction BMPs(Supportive of Plan Check & Inspection) (LIP Section 8.0)	102,113	97798	97,798	no
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	64,452	56442	56,442	no
Illicit Connections/Discharge Ident. & Elimination Facility Inspection,	22,033	19832	28,904	yes; includes more investigative followup
Agency Contribution to Regional Programs	330,891	229912	246,769	yes; increased cost-share
Totals	**1,307,498**	**1,172,909**	**1,306,196**	**no**

Funding Sources

FUNDING SOURCES	Preceding Reporting Period FY 2012-13	Current Reporting Period FY 2013-14 Costs	Projected FY 2014-15 Budgeted	
General Fund	91%	70%	74%	Construction starts
OCTA Measure M2 Tier 1 and 2 Grants	9%	15%	13%	Construction starts
SWRCB Stormwater Grant Program	0	15%	11%	Construction starts
MWDOC Public Spaces Grant Program	0	0	2%	Construction starts
TOTALS	**100%**	**100%**	**100%**	

Are there any legal restrictions on the use of any of the above funds? If yes, please explain:	yes	yes	yes	Grant funds must be used for designated Capital Improvement projects

Fiscal Analysis - City of Laguna Niguel

Capital Costs

LIP Program Elements	Preceding Period FY13-14 Costs	Current Reporting Period FY 2014-15 Costs	Projected FY 2015-16 Costs - Budgeted	FTE (full-time staff equivalent) allocated	Was there a 25% annual change in this budget item? If yes, please explain.
Public Project BMPs relating to water quality	471,043	3,603,189	$4,766,956	varies relative to annual CIP magnitude	yes; 2 major grant- and rebate-funded runoff management CIPs under construction during reporting year
Construction BMPs for Other Public Construction Projects	93,065	138,396	$317,716	varies relative to annual CIP magnitude	yes; CIP expenses vary annually based on fiscal year CIP magnitude
Other Capital Projects/Major Equipment Purchases	5,439	-	0	varies relative to annual CIP magnitude	no
Totals	569,547	3,741,585	**5,084,672**		

Operation & Maintenance Costs

LIP Program Elements	Prior Reporting Period FY13-14 Costs	Current Reporting Period FY 2014-15 Costs	Projected FY 2015-16 Costs - Budgeted	FTE (full-time staff equivalent) allocated	Was there a 25% annual change in this budget item? If yes, please explain.
Supportive of Program Administration (LIP Section 2.0)	114,395	122,661	125,115	0.93	no
Municipal Activities (LIP Section 5.0) Trash & Debris Control	17,548	19,150	19,980	0.09	no
Municipal Activities (LIP Section 5.0) Drainage Facility Maintenance (Includes Catch Basin Stenciling)	365,578	286,994	402,128	0.39	no
Municipal Activities (LIP Section 5.0) Street Sweeping	167,000	166,652	189,000	0.00	no. Service is contracted out
Municipal Activities (LIP Section 5.0) Environmental Performance (BMP Implementation)	7,162	7,400	7,648	0.06	no
Municipal Activities (LIP Section 5.0) Pesticide & Fertilizer Management	3,619	3748	3,823	0.04	no
Public Information (LIP Section 6.0) Nonpoint Source Pollution Awareness	51,236	56,009	86,821	0.23	yes; increase in Countywide shared-program cost
Public Information (LIP Section 6.0) Household Hazardous Waste Collection	5,947	6,768	10,250	0.00	yes; increased diversion participation. Service is contracted out
Requiring New Development BMPs(Supportive of Planning, etc) (LIP Section 7.0)	36,440	37993	38,753	0.23	no
Requiring Construction BMPs(Supportive of Plan Check & Inspection) (LIP Section 8.0)	97,798	101961	104,000	0.70	no
Existing Development (LIP Section 9.0) Industrial/Comm./HOA Inspections	56,442	58994	60,174	0.56	no
Illicit Connections/Discharge Ident. & Elimination Facility Inspection.	19,832	18,643	24,905	0.17	no
Agency Contribution to Regional Programs	229,912	172,520	246,769	0.52	no
Totals	1,172,909	1,059,493	**1,319,266**	**3.92**	**no**

Funding Sources

FUNDING SOURCES	Preceding Reporting Period FY 2013-14	Current Reporting Period FY 2014-15 Costs	Projected FY 2015-16 Budgeted		
General Fund	70%	81%	80%		O&M & local match for grants
OCTA Measure M2 Tier 1 and 2 Grants	15%	16%	15%		Grant project CIPs
SWRCB Stormwater Grant Program	15%	3%	5%		Grant project CIPs
Water Conservation Rebate Programs	0	0	0%		Rebates for CIPs
TOTALS	**100%**	**100%**	**100%**		

LEGAL RESTRICTIONS ON FUNDS

Are there any legal restrictions on the use of any of the above funds? If yes, please explain:

yes - grants are CIP project-specific

yes - grants are CIP project-specific

yes - grants and rebates are CIP project-specific

DECLARATION OF LISA G. ZAWASKI, CITY OF DANA POINT

DECLARATION OF LISA G. ZAWASKI

I, LISA G. ZAWASKI, hereby declare and state as follows:

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

2. I am a Senior Water Quality Engineer for the City of Dana Point (the "City"), and have worked for the City in that capacity for 18 years. In that capacity, I oversee and coordinate the City's implementation program for stormwater management including, when it was effective, the requirements of Order No. R9-2009-0002, the National Pollutant Discharge Elimination Systems Permit ("2009 Permit") issued to the City and other cities within southern Orange County regulating discharges from Municipal Separate Storm Sewer Systems ("MS4").

3. In that capacity, I am familiar with the requirements of the 2009 Permit applicable to the City and also as to the sources of funds utilized by the City to pay for those requirements.

4. As required by the 2009 Permit, each year the City prepared and submitted an annual report regarding activities undertaken to comply with the permit, a process that I personally participated in for the last 18 years. The City either delivered its annual report to the County of Orange, which, I understand, submitted the City's report along with the other co-permittees' annual reports to the San Diego Regional Water Quality Control Board ("San Diego Water Board"), or submitted that annual report to the San Diego Water Board directly, with a copy to the County.

5. I am aware that each annual report was accompanied by a signed, certified statement, in which the signer certified under penalty of law that the annual report was prepared

under the signatories' direction or supervision and further that, based upon the signatories' inquiry of responsible persons, "the information submitted, is, to the best of [the signatories'] knowledge and belief, true, accurate, and complete."

6. One section of the annual report included fiscal information, including the identification of funding sources utilized by the City for 2009 Permit compliance related costs. Funding sources set forth in the annual report were listed under various categories, including "General Fund." I understand that the category "General Fund" referred to General Fund revenues of the City meaning that those funds were considered general tax dollars that were not dedicated to any particular use.

7. I have reviewed what I have been informed are, and which appear to be, excerpts of the 2009 Permit annual reports prepared by the City for the fiscal years between 2009-2010 and 2014-2015 setting forth information on funding sources for 2009 Permit requirements.

8. Based on my knowledge of the funding sources utilized by the City to pay for the requirements of the 2009 Permit, as well as my review of the annual report excerpts, I declare, and am further informed and believe, that the City paid for the costs of complying with the 2009 Permit during fiscal years 2009-2010 through 2014-2015 as follows:

a. In Fiscal Year ("FY") 2009-2010, 80% of costs were paid for with General Fund revenues;

b. In FY 2010-2011, 100% of costs were paid for with General Fund revenues;

c. In FY 2011-2012, 100% of costs were paid for with General Fund revenues;

d. In FY 2012-2013, 95.5% of costs were paid for with General Fund revenues;

e. In FY 2013-2014, 100% of costs were paid for with General Fund revenues (there is a typographical error in the annual report excerpt; costs paid for with General Fund revenues should have been reported as 100%, not 10%. This can be confirmed from the total for all funding sources); and

f. In FY 2014-2015, 100% of costs were paid for with General Fund revenues.

9. On or about April 1, 2015, a new San Diego Water Board MS4 permit (the "Regional Permit") took effect, superseding the 2009 Permit. The costs reported for FY 2014-2015 thus included costs for both the 2009 Permit and the Regional Permit after the latter took effect.

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

Executed August 21, 2023 at Dana Point, California.

Lisa G. Zawaski

DECLARATION OF JOSEPH AMES, CITY OF LAGUNA HILLS

DECLARATION OF JOSEPH AMES

I, JOESEPH AMES, hereby declare and state as follows:

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

2. I am Public Works Director/City Engineer for the City of Laguna Hills (the "City"). In that capacity, I oversee and coordinate the City's implementation program for stormwater management. I am also aware of certain requirements of Order No. R9-2009-0002, the National Pollutant Discharge Elimination Systems Permit ("2009 Permit") issued to the City and other cities within southern Orange County regulating discharges from Municipal Separate Storm Sewer Systems ("MS4") as they relate to the identification of funding sources for 2009 Permit requirements.

3. I am informed and believe that as required by the 2009 Permit, the City each year prepared and submitted an annual report regarding its compliance with the 2009 Permit. I am further informed and believe that because the City's MS4 was then covered by permits issued by both the San Diego Water Board and the Santa Ana Regional Water Quality Control Board ("Santa Ana Water Board"), the City's annual reports for Fiscal Years ("FY") 2009-10 through 2013-14 addressed the requirements of both permits. I am further informed and believe that for fiscal year 2014-15, the City submitted a different annual report form which met requirements adopted by the San Diego Water Board, which had adopted a new permit to replace the 2009 Permit.

4. I am informed and believe that the City either delivered its annual reports to Orange County Public Works, which I am informed forwarded them to the San Diego Water Board, or submitted the annual reports directly to the San Diego Water Board.

5. I am informed and believe that each annual report was accompanied by a signed certified statement, certifying under penalty of law that the report was prepared under the signatories' direction or supervision and further that, based upon the signatories' inquiry of responsible persons, "the information submitted, is, to the best of [the signatories'] knowledge and belief, true, accurate, and complete." I have reviewed an example of such a statement. I have also signed such statements in my current position.

6. I am informed and believe that the section of the annual reports regarding funding sources utilized by the City for permit compliance costs listed funding sources under various categories, including "General Fund." I understand that the category "General Fund" referred to General Fund revenues of the City.

7. I have reviewed what I am informed are, and which appear to be, excerpts of the annual reports submitted by the City for the fiscal years between 2009-2010 and 2014-2015.

8. Based on my review of the annual report excerpts, as well as other information which I indicate below, I am informed and believe that the City used General Fund revenues to pay for the costs of complying with the 2009 Permit during the periods 2009-2010 through 2014-2015, as follows:

In Fiscal Year ("FY") 2009-2010, 100% of costs were paid for with General Fund revenues;

In FY 2010-2011, 100% of costs were paid for with General Fund revenues;

In FY 2011-2012, an estimated 76% of costs were paid for with General Fund revenues;

In FY 2012-2013, 100% of costs were paid for with General Fund revenues;

In FY 2013-2014, 100% of costs were paid for with General Fund revenues;

In FY 2014-2015, 100% of costs were paid for with General Fund revenues.

9. I am aware that the annual report excerpt on funding sources for FY 2011-2012 states that the City used General Fund revenue for 22% of 2009 Permit costs. However, I reviewed underlying documentation in files kept by the City in the ordinary course of business and determined after that review that the 22% number represented only the capital improvements budget for stormwater, not the entire stormwater budget including operations and maintenance. Based on my knowledge of City funding sources for stormwater operations, and requirements associated with funding under County Measure M2 (which is identified in the excerpt as providing the remaining 78% of funding for FY 2011-2012), I estimated that City General Fund revenues constituted an estimated 76% of total 2009 Permit funding during that fiscal year.

10. I am informed and believe that on or about April 1, 2015, a new San Diego Water Board permit (the "Regional Permit") took effect, superseding the 2009 Permit. The costs reported for FY 2014-2015 thus included costs for both the 2009 Permit and the Regional Permit after the latter took effect.

11. Even though some annual reports contained information on the sources of funding for both the 2009 Permit and the MS4 Permit issued by the Santa Ana Water Board, I am informed and believe that the City's General Fund funding source percentage for both permits was the same.

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

Executed August 17, 2023 at Laguna Hills, California.

Joseph Ames

DECLARATION OF TREVOR AGRELIUS, CITY OF LAGUNA NIGUEL

DECLARATION OF TREVOR AGRELIUS

I, TREVOR AGRELIUS, hereby declare and state as follows:

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

2. I am the Finance Director for the City of Laguna Niguel (the "City"). In that capacity, I oversee and coordinate the City's expenditures to implement the stormwater management program. I am also aware of certain requirements of Order No. R9-2009-0002, the National Pollutant Discharge Elimination Systems Permit ("2009 Permit") issued to the City and other cities within southern Orange County which regulated discharges from the Municipal Separate Storm Sewer Systems ("MS4"), relating to the identification of funding sources for 2009 Permit compliance.

3. I am informed and believe that as required by the 2009 Permit, the City each year prepared and submitted an annual report regarding its compliance with the 2009 Permit. I am informed that the City delivered its reports to the County of Orange, which, I understand, then submitted the City's annual report along with the other co-permittees' annual reports to the San Diego Regional Water Quality Control Board ("San Diego Water Board").

4. I am informed and believe that each annual report was accompanied by a signed certified statement, certifying under penalty of law that the annual report was prepared under the signatories' direction or supervision and further that, based upon the signatories' inquiry of responsible persons, "the information submitted, is, to the best of [the signatories'] knowledge and belief, true, accurate, and complete." I have reviewed a copy of such a statement.

5. I am informed and believe that one section of the annual report included information on funding sources utilized by the City for 2009 Permit compliance related costs. I understand that funding sources were listed under various categories, including "General Fund." I understand that this category referred to General Fund revenues of the City.

7. I have reviewed what I have been informed are, and which appear to be, excerpts of annual reports prepared and submitted by the City for fiscal years between 2009-2010 and 2014-2015 that set forth information on City funding sources for 2009 Permit requirements.

8. Based on my review of the annual report excerpts, I am informed and believe that the City used General Fund revenues to pay for the costs of complying with the 2009 Permit during fiscal years 2009-2010 through 2014-2015 as follows:

In Fiscal Year ("FY") 2009-2010, 100% of costs were paid for with General Fund revenues;

In FY 2010-2011, 100% of costs were paid for with General Fund revenues;

In FY 2011-2012, 95% of costs were paid for with General Fund revenues;

In FY 2012-2013, 91% of costs were paid for with General Fund revenues;

In FY 2013-2014, 70% of costs were paid for with General Fund revenues;

In FY 2014-2015, 81% of costs were paid for with General Fund revenues.

I am informed and believe that on or about April 1, 2015, a new San Diego Water Board MS4 permit (the "Regional Permit") took effect, superseding the 2009 Permit. The costs reported for FY 2014-2015 thus included compliance costs for both the 2009 Permit and the Regional Permit after the latter took effect.

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

Executed August 18, 2023, at Laguna Niguel, California.

Trevor Agrelius

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On August 28, 2023, I served the:

- **Current Mailing List dated August 24, 2023**
- **Claimants' Comments on the Draft Proposed Decision filed August 25, 2023**
- **Finance's Comments on the Draft Proposed Decision filed August 25, 2023**
- **Water Boards' Comments on the Draft Proposed Decision filed August 25, 2023**

  California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2.; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a. and Attachment D,[1] *Adopted December 16, 2009,* 10-TC-11
  Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, San Juan Capistrano, the County of Orange, and the Orange County Flood Control District, Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 28, 2023 at Sacramento, California.

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[1] Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate and a detailed description of the new activities mandated by the state. Only the sections indicated in this caption, and Section K.3.a. and Attachment D only as they relate to the reporting checklist, have been properly pled.

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/24/23

Claim Number: 10-TC-11

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2.; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a. and Attachment D, Adopted December 16, 2009

Claimants: City of Dana Point
City of Laguna Hills
City of Laguna Niguel
City of Lake Forest
City of Mission Viejo
City of San Juan Capistrano
County of Orange
Orange County Flood Control District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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