



AMENDED TEST CLAIM FORM

Section 1

Proposed Test Claim Title:

Reporting Requirements to Control Discharges of Trash from Phase 1 MS4s.

Section 2

Local Government (Local Agency/School District) Name:

County of San Diego

Name and Title of Claimant's Authorized Official pursuant to [CCR, tit.2, § 1183.1\(a\)\(1-5\)](#):

Tracy Sandoval, Deputy Chief Administrator Officer, Auditor and Controller

Street Address, City, State, and Zip:

1600 Pacific Highway, Room 166, San Diego, California 92101

Telephone Number

Fax Number

Email Address

(619) 531-5413

(619) 531-5219

tracy.sandoval@sdcounty.ca.gov

Section 3

Claimant Representative: Timothy Barry Title: Chief Deputy

Organization: Office of County Counsel, County of San Diego

Street Address, City, State, Zip:

1600 Pacific Highway, Room 355, San Diego, California 92101

Telephone Number

Fax Number

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(619) 531-6259

(619) 531-6005

timothy.barry@sdcounty.ca.gov

<i>For CSM Use Only</i>	
Filing Date:	RECEIVED May 30, 2018 Commission on State Mandates
Test Claim #:	17-TC-05

Section 4 – Please identify all code sections (include statutes, chapters, and bill numbers; e.g., Penal Code section 2045, Statutes 2004, Chapter 54 [AB 290]), regulatory sections (include register number and effective date; e.g., California Code of Regulations, title 5, section 60100 (Register 1998, No. 44, effective 10/29/98), and other executive orders (include effective date) that impose the alleged mandate pursuant to [Government Code section 17553](#) and don't forget to check whether the code section has since been amended or a regulation adopted to implement it (refer to your completed WORKSHEET on page 7 of this form):

San Diego Regional Water Quality Control Board Order No. R9-2017-0077 Reporting Requirements to Control Discharges of Trash from Phase 1 MS4s

- Test Claim is Timely Filed on [Insert Filing Date] [select either A or B]: 05/30/2018
- A: Which is not later than 12 months following [insert the effective date of the test claim statute(s) or executive order(s)] 06/02/2017, the effective date of the statute(s) or executive order(s) pled; or
- B: Which is within 12 months of [insert the date costs were *first* incurred to implement the alleged mandate] ___/___/___, which is the date of first incurring costs as a result of the statute(s) or executive order(s) pled. *This filing includes evidence which would be admissible over an objection in a civil proceeding to support the assertion of fact regarding the date that costs were first incurred.*

([Gov. Code § 17551\(c\)](#); [Cal. Code Regs., tit. 2, §§ 1183.1\(c\) and 1187.5.](#))

Section 5 – Written Narrative:

- Includes a statement that actual and/or estimated costs exceed one thousand dollars (\$1,000). ([Gov. Code § 17564.](#))
- Includes all of the following elements for each statute or executive order alleged pursuant to [Government Code section 17553\(b\)\(1\)](#) (refer to your completed WORKSHEET on page 7 of this form):
- Identifies all sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate, including a detailed description of the *new* activities and costs that arise from the alleged mandate and the existing activities and costs that are *modified* by the alleged mandate;
- Identifies *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate;
- Identifies *actual or estimated* annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;

- Contains a statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;
FY 2017-2018 _____ Total: \$14.03-\$24.14 million
- Identifies all dedicated funding sources for this program;
State: \$131,218.23 – CA Prop 1 Grant Federal: None
Local agency's general purpose funds: \$628,657.52
Other nonlocal agency funds: None
Fee authority to offset costs: None
- Identifies prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate: Municipal Stormwater and Urban Runoff Discharges, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21; Discharge of Stormwater Runoff, Order No. R9-2007-0001, Case No.: 07-TC-09.
- Identifies a legislatively determined mandate that is on the same statute or executive order: None

Section 6 – The Written Narrative Shall be Supported with Declarations Under Penalty of Perjury Pursuant to [Government Code Section 17553\(b\)\(2\)](#) and [California Code of Regulations, title 2, section 1187.5](#), as follows (refer to your completed WORKSHEET on page 7 of this form):

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

Section 7 – The Written Narrative Shall be Supported with Copies of the Following Documentation Pursuant to [Government Code section 17553\(b\)\(3\)](#) and [California Code of Regulations, title 2, § 1187.5](#) (refer to your completed WORKSHEET on page 7 of this form):

- The test claim statute that includes the bill number, and/or executive order identified by its effective date and register number (if a regulation), alleged to impose or impact a mandate. Pages 7-1 to 7-133.

- Relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate. Pages 7-134 to 7-192.
- Administrative decisions and court decisions cited in the narrative. (Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement.) Pages 7-193 to 7-481.
- Evidence to support any written representation of fact. *Hearsay evidence maybe used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5).* Pages 6-1 to 6-16.

Section 8 – TEST CLAIM CERTIFICATION Pursuant to Government Code section 17553:

- The test claim form is signed and dated at the end of the document, under penalty of perjury by the eligible claimant, with the declaration that the test claim is true and complete to the best of the declarant's personal knowledge, information, or belief.

Read, sign, and date this section. Test claims that are not signed by authorized claimant officials pursuant to California Code of Regulations, title 2, section 1183.1(a)(1-5) will be returned as incomplete. In addition, please note that this form also serves to designate a claimant representative for the matter (if desired) and for that reason may only be signed by an authorized local government official as defined in section 1183.1(a)(1-5) of the Commission's regulations, and not by the representative.

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim is true and complete to the best of my own personal knowledge, information, or belief. All representations of fact are supported by documentary or testimonial evidence and are submitted in accordance with the Commission's regulations. (Cal. Code Regs., tit.2, §§ 1183.1 and 1187.5.)

Tracy Sandoval
Name of Authorized Local Government Official
pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

Deputy Chief Admin. Officer/ATC
Print or Type Title

Tony Salas
Signature of Authorized Local Government Official
pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

8/30/18
Date

Test Claim Form Sections 4-7 WORKSHEET

Complete Worksheets for Each New Activity and Modified Existing Activity Alleged to Be Mandated by the State, and Include the Completed Worksheets With Your Filing.

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: San Diego Regional Water Quality Control Board Order No. R9-2017-0077, June 2, 2017 ("Trash Order")

Activity: Track Selection Mandate, Trash Order Directive A.1

Initial FY: 2016-2017 Cost: \$242,941.45 Following FY: 2017-2018 Cost: \$78,954.87

Evidence (if required): Declaration of Todd Snyder All dedicated funding sources;

State: \$12,284.98 (FY 2016-17), \$29,585.12 (FY 2017-18) – CA Prop 1 Grant Federal: \$0

Local agency's general purpose funds: \$230,656.47 (FY 2016-17), \$49,369.75 (FY 2017-18)

Other nonlocal agency funds: \$0

Fee authority to offset costs: \$0

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: Trash Order

Activity: Track 1 Implementation Mandate, Trash Order Directive A.2

Initial FY: 2016-2017 Cost: \$0 Following FY: 2017-2018 Cost: \$437,979.20

Evidence (if required): Declaration of Todd Snyder All dedicated funding sources;

State: \$0 (FY 2016-17), \$89,348.13 (FY 2017-18) – CA Prop 1 Grant Federal: \$0

Local agency's general purpose funds: \$0 (FY 2016-17), \$348,631.07 (FY 2017-18)

Other nonlocal agency funds: \$0

Fee authority to offset costs: \$0

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: Trash Order

Activity: Coordination with Caltrans Mandate, Trash Order Directive A.5

Initial FY: 2016-2017 Cost: \$0 Following FY: 2017-2018 Cost: \$0

Evidence (if required): Declaration of Todd Snyder All dedicated funding sources;

State: \$0 Federal: \$0

Local agency's general purpose funds: \$0

Other nonlocal agency funds: \$0

Fee authority to offset costs: \$0

STATE of CALIFORNIA
**COMMISSION ON STATE
MANDATES**



TEST CLAIM FORM (AMENDED)

Section 1

Proposed Test Claim Title:

Reporting Requirements to Control Discharges of Trash from Phase I MS4s

For CSM Use Only

Filing Date:

Test Claim #:

Section 2

Local Government (Local Agency/School District) Name:

City of San Juan Capistrano, California

Name and Title of Claimant's Authorized Official pursuant to [CCR, tit.2, § 1183.1\(a\)\(1-5\)](#):

Benjamin Siegel, City Manager

Street Address, City, State, and Zip:

32400 Paseo Adelanto, San Juan Capistrano, CA 92675

Telephone Number

949-443-6315

Fax Number

949-493-1167

Email Address

bsiegel@sanjuancapistrano.org

Section 3

Claimant Representative: **Tim Barry** Title **Chief Deputy**

Organization: **County of San Diego**

Street Address, City, State, Zip:

1600 Pacific Highway, Rm. 355, San Diego, CA 92101

Telephone Number

619-531-6259

Fax Number

619-531-6005

Email Address

timothy.barry@sdcounty.ca.gov

Section 4 – Please identify all code sections (include statutes, chapters, and bill numbers; e.g., Penal Code section 2045, Statutes 2004, Chapter 54 [AB 290]), regulatory sections (include register number and effective date; e.g., California Code of Regulations, title 5, section 60100 (Register 1998, No. 44, effective 10/29/98), and other executive orders (include effective date) that impose the alleged mandate pursuant to Government Code section 17553 and don't forget to check whether the code section has since been amended or a regulation adopted to implement it (refer to your completed WORKSHEET on page 7 of this form):

San Diego Regional Water Quality Control Board Order No. R9-2017-0077
Reporting Requirements to Control Discharges of Trash From Phase I MS4s

Test Claim is Timely Filed on [Insert Filing Date] [select either A or B]: 05/30/18

A: Which is not later than 12 months following [insert the effective date of the test claim statute(s) or executive order(s)] 6 / 02 / 2017, the effective date of the statute(s) or executive order(s) pled; or

B: Which is within 12 months of [insert the date costs were *first* incurred to implement the alleged mandate] / / , which is the date of first incurring costs as a result of the statute(s) or executive order(s) pled. *This filing includes evidence which would be admissible over an objection in a civil proceeding to support the assertion of fact regarding the date that costs were first incurred.*

(Gov. Code § 17551(c); Cal. Code Regs., tit. 2, §§ 1183.1(c) and 1187.5.)

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Includes all of the following elements for each statute or executive order alleged pursuant to Government Code section 17553(b)(1) (refer to your completed WORKSHEET on page 7 of this form):

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Identifies *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate;

Identifies *actual or estimated* annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;

Contains a statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;
Following FY: 17 - 18 Total Costs: \$14.03 million to \$24.14 million

Identifies all dedicated funding sources for this program; State: None
Federal: None Local agency's general purpose funds: None
Other nonlocal agency funds: None
Fee authority to offset costs: None

Identifies prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate: _____

Municipal Stormwater and Urban Runoff Discharges, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21; Discharge of Stormwater Runoff, Order No. R9-2007-0001, Case No.: 07-TC-09

Identifies a legislatively determined mandate that is on the same statute or executive order: Section XII - None

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This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim is true and complete to the best of my own personal knowledge, information, or belief. All representations of fact are supported by documentary or testimonial evidence and are submitted in accordance with the Commission's regulations. (Cal. Code Regs., tit.2, §§ 1183.1 and 1187.5.)

Benjamin Siegel

City Manager

Name of Authorized Local Government Official
 pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

Print or Type Title



Signature of Authorized Local Government Official
 pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

8-29-18

Date

Test Claim Form Sections 4-7 WORKSHEET

Complete Worksheets for Each New Activity and Modified Existing Activity Alleged to Be Mandated by the State, and Include the Completed Worksheets With Your Filing.

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: San Diego Regional Water Board Order No. R9-2017-0077, eff. June 2, 2017

Activity: Track Selection Mandate at Trash Order p. 10, sec. A.1

Initial FY: 16 - 17 Cost: \$0 Following FY: 17 - 18 Cost: \$7,950

Evidence (if required): Declaration of Ben Siegel

All dedicated funding sources; State: None Federal: None

Local agency's general purpose funds: None

Other nonlocal agency funds: None

Fee authority to offset costs: None

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: San Diego Regional Water Board Order No. R9-2017-0077, eff. June 2, 2017

Activity: Track 2 Implementation Plan Mandates, Trash Order p. 10-11 at Sec. A.3

Initial FY: 16 - 17 Cost: \$0 Following FY: 17 - 18 Cost: \$45,050

Evidence (if required): Declaration of Ben Siegel

All dedicated funding sources; State: None Federal: None

Local agency's general purpose funds: None

Other nonlocal agency funds: None

Fee authority to offset costs: None

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: San Diego Regional Water Quality Control Board Order No. R9-2017-0077, eff. June 2,

Activity: Coordination with CalTrans, Directive A.5

Initial FY: 16 - 17 Cost: \$0 Following FY: 17 - 18 Cost: \$0

Evidence (if required): Declaration of Ben Siegel

All dedicated funding sources; State: None Federal: None

Local agency's general purpose funds: None

Other nonlocal agency funds: None

Fee authority to offset costs: None

SECTION 5.

AMENDED WRITTEN NARRATIVE

COUNTY OF SAN DIEGO TEST CLAIM

REPORTING REQUIREMENTS TO CONTROL DISCHARGES OF TRASH
FROM PHASE 1 MS4s

California Regional Water Quality Control Board, San Diego Region
Order No. R9-2017-0077
California Water Code Section 13383

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I. STATEMENT OF THE TEST CLAIM

The County of San Diego (“County”) and the City of San Juan Capistrano (“City”) (collectively, “Claimants”) jointly submit this Test Claim to compel reimbursement of the costs incurred in implementing the requirements imposed on it by the California Regional Water Quality Control Board, San Diego Region (“San Diego Regional Board”) pursuant to Order No. R9-2017-0077, which was issued by the San Diego Regional Board on June 2, 2017.¹

On April 7, 2015, the State Water Resources Control Board (“State Board”) adopted Resolution No. 2015-0019 (“Trash Amendments”) entitled “Amendment to the Water Quality Control Plan for Ocean Waters of California to Control Trash [“Ocean Plan”] and Part 1 Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California” (“ISWEBE Plan”).² The purpose of the Trash Amendments was to address the impacts of trash to the surface waters of California. The Trash Amendments became effective December 2, 2015.

A. Requirements of the Trash Amendments:

The Trash Amendments establish a narrative water quality objective for trash in both the Ocean Plan³ and the ISWEBE Plan.⁴ Read in tandem, the narratives provide that “trash shall not be present” in ocean waters, inland surface waters, enclosed bays, estuaries, and along shorelines or adjacent areas “in amounts that adversely affect the beneficial use or cause nuisance.”⁵

Specifically, the Trash Amendments prohibit: “[t]he discharge of trash to surface waters of the State or the deposition of Trash where it may be discharged into surface waters of the State”⁶

The Trash Amendments are not self-implementing and do not apply directly to Claimants. Rather, the Trash Amendments require regional boards to include provisions in National Pollutant Discharge Elimination System (“NPDES”) permits requiring

¹ A copy of Order No. R9-2017-0077 is included under Section 7 – Documentation to Test Claim.

² A copy of State Board Resolution No. 2015-0019 is included under Section 7 – Documentation to Test Claim.

³ A copy of Appendix D to the Trash Amendments amending the Ocean Plan is included under Section 7 – Documentation to Test Claim.

⁴ A copy of Appendix E to the Trash Amendments amending the ISWEBE Plan is included under Section 7 – Documentation to Test Claim.

⁵ Appendix D to the Trash Amendments adding Chapter II.C.5. to the Ocean Plan and Appendix E to the Trash Amendments adding Chapter III.A to the ISWEBE Plan.

⁶ Appendix D to the Trash Amendments adding Chapter III.I.6. to the Ocean Plan and Appendix E to the Trash Amendments adding Chapter IV.A.2 to the ISWEBE Plan.)

Municipal Separate Sewer Systems (“MS4”) permittees to adopt one of two tracks for complying with the Trash Amendments. The tracks are:

Track 1: Installation, operation, and maintenance of “full capture systems” for all storm drains that capture runoff from “priority land uses” (PLUs) in a permittee’s jurisdiction;⁷ or

Track 2: Installation, operation, and maintenance of any combination of “full capture systems”, “multi–benefit projects”, “other treatment controls”, and/or “institutional controls” within either the jurisdiction of the MS4 permittee and contiguous MS4 permittees. The MS4 permittees may determine the locations or land uses within its jurisdiction to implement any combination of controls. The MS4 permittee shall demonstrate that such combination achieves “full capture system equivalency”. The MS4 permittee may determine which controls to implement to achieve compliance with “full capture system equivalency”. It is, however, the State Water Board’s expectation that the MS4 permittee will elect to install “full capture systems” where such installation is not cost-prohibitive.⁸

With respect to NPDES Permits regulating MS4 permittees that have regulatory authority over Priority Land Uses, the Trash Amendments require the Regional Water Quality Control Boards (“Regional Boards”) to, within 18 months of the effective date of the Trash Amendments:

1. Modify, re-issue, or adopt the applicable MS4 permit to add provisions implementing the Trash Amendments and requiring each MS4 permittee to give written notice within three months of the effective date of the implementing permit stating whether the permittee elects to comply under Track 1 or Track 2; and for permittees that have elected to comply with Track 2, submit an implementation plan to the regional board within eighteen months of the implementing permit; or

2. Issue an order pursuant to Water Code § 13267 or 13383 requiring MS4 permittees to submit within three months from receipt of the order, written notice stating whether the permittee elects to pursue Track 1 or Track 2; and for permittees that have elected to comply with Track 2,

⁷ Appendix D to the Trash Amendments adding Chapter III, L.2.a.(1) to the Ocean Plan and Appendix E to the Trash Amendments adding Part 1, Chapter IV, A.3.a.(1) to the ISWEBE Plan. Provisions in quotes are defined in the glossaries to the Ocean Plan and the ISWEBE Plan.

⁸ Appendix D to the Trash Amendments adding Chapter III, L.2.a.(2) to the Ocean Plan and Appendix E to the Trash Amendments adding Part 1, Chapter IV, A. 3.a.(2) to the ISWEBE Plan. Provisions in quotes are defined in the glossaries to the Ocean Plan and the ISWEBE Plan.

submit an implementation plan to the regional board within eighteen months of the implementing order.⁹

In addition, the Trash Amendments require the implementing permit to include provisions:

1. Requiring MS4 permittees that elect to pursue Track 1 to state that full compliance with the trash discharge prohibition shall occur within ten (10) years of the effective date of the first implementing permit. In addition, the implementing permit must require the MS4 permittees to demonstrate achievements of interim milestones such as average load reductions of ten percent (10%) per year or other progress to full implementation. In no case may the final compliance date, which will be included in the implementing permit, be later than fifteen (15) years from the effective date of the Trash Amendments;¹⁰

2. Requiring MS4 permittees that elect to pursue Track 2 to state that full compliance shall occur within ten (10) years of the effective date of the first implementing permit and requiring the permittees to demonstrate achievement of interim milestones such as average load reductions of ten percent (10%) per year or other progress to full implementation. In no case may the final compliance date, which will be included in the implementing permit, be later than fifteen (15) years from the effective date of the Trash Amendments;¹¹

3. Requiring MS4 permittees that elect to pursue Track 1 to monitor and annually report to the regional board demonstrating installation, operation, maintenance, and the Geographic Information System (GIS) mapped location and drainage area served by its full capture systems;¹² and

4. Requiring MS4 permittees that elect to pursue Track 2 to develop and implement a monitoring plan that demonstrates the effectiveness of its compliance systems and to report the results of such monitoring to the regional board on an annual basis;¹³ and

⁹ Appendix D to the Trash Amendments adding Chapter III.L.4.a.(1)A and B to the Ocean Plan and Appendix E to the Trash Amendments adding Chapter IV.A.5.a.(1)A and B to the ISWEBE Plan.

¹⁰ Appendix D to the Trash Amendments adding Chapter III.L.4.a.(2) to the Ocean Plan and Appendix E to the Trash Amendments adding Chapter IV.A.5.a.(2) to the ISWEBE Plan.

¹¹ Appendix D to the Trash Amendments adding Chapter III.L.4.a.(3) to the Ocean Plan and Appendix E to the Trash Amendments adding Chapter IV.A.5.a.(3) to the ISWEBE Plan.

¹² Appendix D to the Trash Amendments adding Chapter III.L.5.a. to the Ocean Plan and Appendix E to the Trash Amendments adding Chapter IV.A.6.a. to the ISWEBE Plan.

¹³ Appendix D to the Trash Amendments adding Chapter III.L.4.a.(4) to the Ocean Plan and Appendix E to the

5. Requiring MS4 permittees that elect to pursue Track 2 to develop and implement a monitoring plan that demonstrates the effectiveness of its compliance systems and to report the results of such monitoring to the regional board on an annual basis which include GIS-mapped locations and drainage area served by each compliance system.¹⁴

B. Order No. R9-2017-0077

On June 2, 2017, the San Diego Regional Board issued Order No. R9-2017-0077 (“Trash Order”). The stated purpose of the Trash Order was to establish “the initial steps in planning for the implementation of the Trash Amendments ... in accordance with Water Code section 13383.”¹⁵

The Trash Order imposes the following requirements on NPDES MS4 permittees within the San Diego Region¹⁶ that are subject to the Trash Amendments, including Claimants:

1. Within three (3) months of the date of the Trash Order (September 5, 2017), each MS4 permittees must provide written notice to the San Diego Regional Board stating which track the MS4 permittee intends to implement.¹⁷

2. Within eighteen (18) months of the date of the Trash Order (December 3, 2018), MS4 permittees that elect to implement Track 1 must:

a. Develop and submit a jurisdictional map identifying PLUs, the corresponding storm drain network including all storm drain inlets and drainage, proposed full capture system installation locations and associated drainage areas; and

Trash Amendments adding Chapter IV.A.5.a.(4) to the ISWEBE Plan.

¹⁴ Appendix D to the Trash Amendments adding Chapter III.L.5.b. to the Ocean Plan and Appendix E to the Trash Amendments adding Chapter IV.A.6.b. to the ISWEBE Plan.

¹⁵ Trash Order, pp. 1-2, Section 3. The NPDES Permit for the San Diego Region was not up for renewal until May 2018, more than 18 months after the issuance of Resolution No. 2015-0019. As a result, the San Diego Regional Board issued an interim order as authorized by Water Code § 13383 in preparation for the renewal of the NPDES Permit later in 2018 or early in 2019.

¹⁶ Trash Order, p. 2, Section 4, for a list of the MS4 permittees that are subject to the Order.

¹⁷ *Id.* at 10, A.1.

b. Develop and submit a time schedule to achieve full compliance with the trash discharge prohibition, including interim milestones (such as average load reductions of ten percent per year or other progress) to full implementation, with a final compliance date no later than fifteen (15) years after the effective date of the Trash Amendments (December 2, 2030).¹⁸

3. Within eighteen (18) months of the date of the Trash Order (December 3, 2018), MS4 permittees that elect to implement Track 2 must submit an implementation plan that describes:

a. The combination of controls selected by the MS4 permittee and the rationale for each selection;

b. How the combination of controls is designed to achieve full capture system equivalency;

c. How full capture system equivalency will be demonstrated;

d. How the implemented controls identified in the trash implementation plans will be monitored and assessed in jurisdictional runoff management programs or WQIP Annual Reports;

e. Proposals by MS4 permittees if any, to substitute PLUs described in Finding 9 of the Trash Order with other locations or land uses, provided that the total trash generated in other locations or land uses is equivalent to, or greater than, the total trash generated in the PLU being substituted; and

f. A time schedule to achieve full compliance with the trash discharge prohibition, including interim milestones (such as average load reductions of ten percent per year or other progress) to full implementation. The proposed final

¹⁸ *Id.* at 10, A.2.a. and b.

compliance date must not be later than fifteen (15) years from the effective date of the Trash Amendments (December 2, 2030).¹⁹

4. The Riverside County Flood Control and Water Conservation District must submit a report identifying land uses or locations within its jurisdiction including but not limited to, facilities, drainage structures, and easements that generate a substantial amount of trash within eighteen months from the date of the order (December 3, 2018).²⁰

5. No later than eighteen (18) months from the date of the Trash Order (December 3, 2018), each MS4 permittee must develop and submit a description of how MS4 permittees will coordinate their efforts to install, operate, and maintain full capture systems, multi-benefit projects, and other controls with Caltrans in significant trash generating areas and/or PLUs, as applicable.²¹

In addition to the activities expressly mandated by the Trash Order, the Order provides that “[t]hrough the issuance of this Order ... the San Diego Regional Board intends the MS4 permittees to incorporate the requirements of Trash Amendments into either the existing Water Quality Improvement Plans [WQIPs], the JRMPs [Jurisdictional Runoff Management Plans], or a combination of the two after reissuance of the Regional MS4 Permit.” In addition, the Trash Order provides that “[r]eporting on implementation measures to comply with the Trash Amendments will be required through jurisdictional runoff management program annual report forms, which are submitted as part of the [WQIP] Annual Reports.”²²

II. PROGRAM BACKGROUND

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

¹⁹ *Id.* at 10-11, A.3.a. through f.

²⁰ *Id.* at 11, A.4.

²¹ *Id.* at 11, A.5.

²² *Id.* at 9, Section 12.

One primary difference between Porter-Cologne and the CWA is the role Congress intended the CWA to play in the state regulatory scheme. When adopting the CWA, Congress preserved the states' ability to impose more stringent water quality controls, allowing the CWA to be a federal baseline for water quality.²³

A. Federal Law

Adopted in 1972, the CWA is the principal federal law regulating water quality. Since 1987, an NPDES permit issued under the CWA is required if the United States Environmental Protection Agency ("US EPA") or the state determine that discharges from MS4s serving a population of more than 100,000 or from systems contribute to a violation of a water quality standard or represent a significant contribution of pollutants to waters of the United States.²⁴ The CWA establishes three basic requirements for all MS4 permits. The MS4 permits:

1. May be issued on a system or jurisdiction-wide basis;
2. Shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
3. Shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.²⁵

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

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

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

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

²⁵ 33 U.S.C. § 1342, subd. (p)(3)(B).

[A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.²⁶

The US EPA has the initial authority to administer the NPDES permitting program within a state.²⁷ The US EPA is required to suspend the federal permitting program and to authorize a state “to administer its own permit program” when that state presents “the program it proposes to establish and administer *under state law*” and demonstrates that “the *laws of such State . . .* provide adequate authority to carry out the described program.”²⁸ NPDES permits issued under state laws must be consistent with the requirements of the suspended federal program.²⁹ States may issue permits with requirements exceeding the requirements of the federal program; states cannot, however, issue permits with requirements less stringent than the requirements of the federal program.³⁰ This structure establishes two separate permitting programs: (1) a federal program administered by the EPA, and (2) a state program, if authorized by the EPA, which operates under state law and is subject to limited EPA oversight.

B. California Law

Immediately after the enactment of the CWA in 1972, California became the first state authorized to implement a state permitting program under state law when it incorporated the CWA’s NPDES program into its existing regulatory structure. The California Legislature (“Legislature”) determined that assuming the responsibility was “in the interest of the people of the state, *in order to avoid direct regulation by the federal government of persons already subject to regulation under state law* pursuant to this division”³¹ The State Board and the Regional Boards comprise “the principal state agencies with primary responsibility for the coordination and control of water quality.”³²

²⁶ 40 C.F.R. § 122.26, subd. (d)(2)(iv).

²⁷ 33 U.S.C. § 1342, subds. (a), (b).

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

²⁹ 33 U.S.C. § 1342, subd. (b).

³⁰ 33 U.S.C. § 1370.

³¹ Water Code, § 13370, subd. (c) [emphasis added].

³² Water Code, § 13001; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

California’s permitting system is a state program operating under state law, not a federal program, although, as noted, it must meet the requirements of the federal program. The CWA:

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

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

The State Board, Regional Boards, and courts have repeatedly acknowledged that many aspects of NPDES permits issued in California exceed the minimum requirements of the CWA or are not otherwise required by federal law. In a decision on the merits of the 2001 Permit for San Diego County, the State Board acknowledged that since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect “waters of the state,” rather than being limited to “waters of the United States.”³⁴ As the State Board expressed, “the inclusion of ‘waters of the state’ allows the protection of groundwater, which is generally not considered to be ‘waters of the United States.’”³⁵

On June 16, 2015, the State Board adopted Order No. WQ 2015-0075 “In the Matter of Review of Order No. R4-2010-0176, NPDES Permit No. CAS004001” (“Los Angeles Order”).³⁶ The Los Angeles Order recognizes the dual permitting structure and asserts that “the State Water Board has discretion under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, [and] the State Water Board may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality

³³ *Id.* at 627-628.

³⁴ *In Re Building Industry Association of San Diego County and Western States Petroleum Association*, State Board Order WQ 2001-15.

³⁵ *Ibid.*

³⁶ Statement of Decision, State Water Resources Control Board Order No. WQ 2015-0075 In Re Order No. R4-2012-0175, SWRCB/OCC Files A-2236(a)-(kk) (“Los Angeles Order”).

standards for MS4 discharges.”³⁷ It further recognized that the State Board and Regional Boards have discretion under federal law to express Water Quality Based Effluent Limitations (WQBELS) for TMDLs [Total Maximum Daily Loads (TMDLs)] incorporated into a permit “either as numeric effluent limitations or as BMPs [Best Management Practices].”³⁸

The Regional Boards have also acknowledged in official documents that many of the requirements of MS4 permits exceed the requirements of federal law and are based, therefore, on the broader authority of Porter-Cologne. For example, a December 13, 2000 staff report regarding the San Diego Regional Board’s draft 2001 Permit found 40% of the draft permit requirements “exceed the federal regulations” because they are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.³⁹

In *Burbank v. State Board*, *supra*, 35 Cal. 4th 613, the California Supreme Court acknowledged that NPDES permits may contain requirements that exceed federal CWA, and held that to the extent such provisions are not required by federal law, the state and Regional Boards are required to consider state law restrictions on agency action.⁴⁰ Implicit in the court’s decision is the requirement that orders issued by the state and Regional Boards are subject to State Constitutional restrictions, including those on funding set forth in article XIII B § 6 of the California Constitution.

In a decision issued by the California Court of Appeal in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the appellate court specifically considered whether permit terms in an MS4 Permit issued by the San Diego Regional Board involving compliance with numeric effluent limits, were either “authorized” or “required” by the CWA. The court held that: “it is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law.”⁴¹ In short, the court in *BIA v. State Board* found that the San Diego Regional Board had the “discretion” to impose certain permit terms that were not “required” by the CWA.⁴²

³⁷ *Id.* at 11.

³⁸ *Id.* at 57.

³⁹ A copy of the Staff Report is included under Section 7 – Documentation to these Test Claims.

⁴⁰ *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 618.

⁴¹ *Building Industry Association of San Diego County v. State Water Resources Control Board* (2002) 124 Cal.App.4th 866, 881.

⁴² *Id.* at 886 [“That provision gives the EPA *discretion* to determine what pollutant controls are appropriate,” *citing* *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1167-67 (emphasis added)].

More recently in *Department of Finance v. Commission on State Mandates*, (2016) 1 Cal.5th 749, the California Supreme Court found that provisions in an NPDES permit issued to the County of Los Angeles, the Los Angeles County Flood Control District and 84 cities within Los Angeles County were reimbursable state mandates and were not imposed to meet a federally imposed mandate. Specifically, the Court held that:

If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if the 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.⁴³

Most recently, the Supreme Court’s decision in *Department of Finance* was followed in a case by the same name out of the Court of Appeal, Third Appellate District. In *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, review denied 2018 Cal. LEXIS 2647, April 11, 2018, the court of appeal found that requirements in an NPDES permit issued to San Diego County and the cities located within the County in 2007, were state, not federal mandates. Specifically, the court found that the requirements imposed by the permit were not expressly required by federal law but instead were imposed by the state pursuant to the state’s exercise of discretion and were therefore reimbursable state mandates.⁴⁴ In addition, the court of appeal rejected the state’s argument that the finding by the San Diego Regional Board that the permit requirements were “necessary” to meet the federal “maximum extent practicable” standard equated to a finding that the permit requirement was the *only* means of meeting the standard holding that “[i]t is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.”⁴⁵

Finally, Porter-Cologne authorizes the State Board “to adopt water quality control plans ...” for waters that require water quality standards under the Clean Water Act.⁴⁶ The Ocean and ISWEBE Plans are water quality control plans.⁴⁷ The objectives in a water quality control plan are not self-implementing, but must be implemented through a permit, such as an NPDES permit, or other order.⁴⁸

⁴³ *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

⁴⁴ *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th, 661, 683-684.

⁴⁵ *Id.* at 682-683 citing *Department of Finance, supra*, 1 Cal.5th at p. 768.

⁴⁶ Water Code § 13170.

⁴⁷ Trash Amendments, State Board Resolution No. 2015-0019.

⁴⁸ See, e.g., *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1438, reh'g denied and opinion modified (June 28, 1989) (water quality plans do “not dictate the manner in which a [person] can meet the standard”).

As part of the Porter-Cologne Act, Water Code § 13383 authorizes the state or Regional Boards to issue orders to certain local government agencies, among others, and provides the following:

(a) The state board or a regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements . . . for any person who discharges, or proposes to discharge, to navigable waters, any person who introduces pollutants into a publicly owned treatment works, any person who owns or operates, or proposes to own or operate, a publicly owned treatment works or other treatment works treating domestic sewage, or any person who uses or disposes, or proposes to use or dispose, of sewage sludge.

(b) The state board or the regional boards may require any person subject to this section to establish and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods, sample effluent as prescribed, and provide other information as may be reasonably required...

The San Diego Regional Board issued the Trash Order pursuant to its discretionary authority under § 13383 of the Water Code.⁴⁹

III. STATE MANDATE LAW

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

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

The purpose of § 6 “is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”⁵⁰ The section “was designed to protect the tax revenues of local governments from state mandates that would require expenditure of

⁴⁹ Trash Order, p. 1, section 3.

⁵⁰ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

such revenues.”⁵¹ In order to implement § 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims.⁵² Under this scheme, the Legislature established the parameters regarding what constitutes a state mandated cost, defining “costs mandated by the state” to include:

any increased costs which a local agency ... is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution.⁵³

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

- (a) The claim is submitted by a local agency . . . that requests . . . legislative authority for that local agency . . . to implement the program specified in the statute, and that statute imposes costs upon that local agency . . . requesting the legislative authority. . . .
- (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts. . . .
- (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. . . .
- (d) The local agency . . . has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. . . .
- (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local

⁵¹ *County of Fresno, supra*, 53 Cal.3d at 487; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 984-985.

⁵² Gov. Code § 17500, et seq.; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 333 (statute establishes “procedure by which to implement and enforce § 6”).

⁵³ Gov. Code § 17514.

agencies . . . that result in no net costs to the local agencies. . . , or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. . . .

- (f) The statute or executive order imposes duties that are necessary to implement, or expressly included in, a ballot measure approved by the voters in a statewide or local election. . . .
- (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

The Trash Order imposes state mandated activities and costs on Claimants, and none of the exceptions in Government Code § 17556 excuse the state from reimbursing Claimants for the costs associated with implementing the Trash Order. The Trash Order therefore represents a state mandate for which Claimants are entitled to reimbursement pursuant to § 6.

IV. MANDATED ACTIVITIES AND COSTS

The Trash Order issued by the San Diego Regional Board mandates many new programs and activities not required by federal law, California law, or the regional MS4 permit adopted by the San Diego Water Board, R9-2013-001, as amended.

The new programs and activities imposed on permittees, including Claimants, are as follows:

A. New Requirement – Track Selection Mandate

1. Challenged Program Requirement

Directive A.1 of the Trash Order provides as follows:

Written Notices. Each MS4 permittee identified in Finding 4 must submit to the San Diego Water Board, **no later than three (3) months from the date of this Order (September 5, 2017)**, a written notice stating whether the MS4 permittee will implement Track 1 or Track 2 to comply with the trash discharge prohibition in the Ocean Plan and ISWEBE Plan.

(Emphasis in original).

2. Description of Newly Mandated Activities

As part of the Track Selection mandate, Claimants were required to:⁵⁴

- a. Identify Priority Land Use areas within Claimants' jurisdictions;
- b. Assess whether Claimants have authority to install Full Capture Systems in all Priority Land Use areas;
- c. Assess the feasibility of installing Full Capture Systems in Priority Land Use areas;
- d. Assess the availability and feasibility of Multi-Benefit Projects and other Treatment or Institutional Controls available to Claimant in Priority Land Use areas;
- e. Assess whether alternative land use designations were better suited for implementing Full Capture Systems or alternative trash control requirements; and
- f. Assess the availability and feasibility of demonstrating Full Capture System Equivalency.

3. Description of Existing Requirements and Costs

Existing requirements do not include any of the above obligations imposed by the Trash Order, and therefore there are no related costs.

4. Actual Increased Costs Incurred During Fiscal Year 2016-2017

To knowledgably determine which track to pursue, Claimants were required to conduct numerous assessments and studies during Fiscal Year 2016-2017.⁵⁵ Total costs incurred by Claimants during that time amounted to at least \$242,941, including:⁵⁶

- a. At least \$21,523 in staff and consultant time to interpret the Trash Order, including internal meetings with County staff and external meetings with co-permittees, review and analyze Priority Land Use areas, research available full capture devices, and conduct a financial analysis of compliance options;

⁵⁴ Declaration of Todd Snyder ("Snyder Dec."), ¶ 13.a.1.) through 6.); Declaration of Benjamin Siegel ("Siegel Dec."), ¶13.a.1) through 6).

⁵⁵ During Fiscal Year 2015-2016, Claimants also incurred costs exceeding \$92,877 as part of the track selection process. Snyder Dec., ¶ 15.

⁵⁶ Snyder Dec., ¶ 22.

b. At least \$118,139 in staff and consultant time to conduct a Trash Amendments Phase 1 Baseline Study consisting of the installation of 27 full capture devices within the County to determine trash generation rates for Priority Land Uses within the unincorporated County area;

c. At least \$37,002 in staff and consultant time to conduct a Trash BMP Effectiveness Study of the San Diego River watershed for trash BMPs, including non-structural BMPs, and analyze the data and information obtained through the study;⁵⁷

d. At least \$38,776 in staff and consultant time to conduct perform a Regional Trash Baseline Study consisting of the installation of 17 full capture devices throughout the County to determine trash generation rates for Priority Land Uses, and staff and consultant costs to analyze the data and information obtained through the study; and

e. At least \$27,500 in staff and consultant time to conduct a Track 2 Approach and Cost Estimate Trash Study to identify preliminary Priority Land Use mapping, review literature or previous trash studies, explore construction and maintenance costs associated with Track 1 and Track 2 compliance pathways, and analyze and the data and information obtained through the study.

5. Actual Increased Costs Incurred During Fiscal Year 2017-2018

During Fiscal Year 2017-2018, Claimants continued to conduct assessments and studies to determine which track to pursue prior to the September 5, 2017 track selection deadline. Total costs incurred by Claimants during that time amounted to at least \$86,904 (\$78,954 for County and \$7,950 for City), including:⁵⁸

a. At least \$23,053 (\$15,103 for County and \$7,950 for City) in staff and consultant time to interpret the Trash Order, including internal meetings with staff and external meetings with co-permittees; review and analyze Priority Land Use areas; research available full capture devices; and conduct a financial analysis of compliance options;

b. At least \$16,369 (County only) in staff and consultant time to conduct a Trash Amendments Phase 1 Baseline Study consisting of the installation of 27 full capture devices within the County to determine trash

⁵⁷ The County recovered \$12,284 of these costs from a California Proposition 1 Grant received through the Water Quality, Supply, and Infrastructure Improvement Act of 2014 (“Prop 1 Grant”). Snyder Dec., ¶ 35.

⁵⁸ Snyder Dec., ¶ 23; Siegel Dec., ¶ 21.a.

generation rates for Priority Land Uses within the unincorporated County area;

c. At least \$29,585 in staff and consultant time to conduct a Trash BMP Effectiveness Study of the San Diego River watershed for trash BMPs, including non-structural BMPs, and analyze the data and information obtained through the study;⁵⁹

d. At least \$7,814 (County only) in staff and consultant time to conduct a Regional Trash Baseline Study consisting of the installation of 17 full capture devices throughout the County to determine trash generation rates for Priority Land Uses, and analyze the data and information obtained through the study; and

e. At least \$10,082 (County only) in staff and consultant time to conduct a Trash Amendments Sediment Evaluation Study evaluating the operation of full capture devices for inlets that receive significant sediment input for the purpose of better understanding tributary land uses that could pose complications for installation of full capture devices, and analyze the data and information obtained through the study.

B. New Requirement – Track 1 Implementation Mandate

1. Challenged Program Requirement

Directive A.2 of the Trash Order provides as follows:

Track 1 Jurisdictional Maps and Time Schedule. Each MS4 permittee identified in Finding 4 electing to comply with Track 1 must submit the following information **no later than eighteen (18) months from the date of this Order [Order No. R9-2017-0077] (December 3, 2018):**

a. A jurisdictional map identifying Priority Land Uses, the corresponding storm drain network including all storm drain inlets and drainage, proposed full capture system installation locations and associated drainage areas; *and*

b. A time schedule to achieve full compliance with the trash discharge prohibition, including interim milestones (such as average load reductions of ten percent per year or other progress) to full implementation. The final compliance date must be not later than fifteen (15) years from the effective date of the Trash Amendments (i.e. December 2, 2030).

(Emphasis in original.)

⁵⁹ The County recovered \$29,585 of these costs from the Prop 1 Grant. Snyder Dec., ¶ 35.

2. Description of Newly Mandated Activities

As part of the Track 1 Implementation mandate, Claimants were required to:⁶⁰

a. Prepare and submit a jurisdictional map identifying Priority Land Uses, the corresponding drain network including all storm drain inlets and drainage, proposed full capture system installation locations and associated drainage areas; and

b. Develop and submit a time schedule to achieve full compliance with the Trash Amendments, including interim milestones to full implementation.

3. Description of Existing Requirements

Existing requirements do not include any of the above obligations imposed by the Trash Order, and therefore there are no related costs.

4. Actual Increased Costs Incurred During Fiscal Year 2016-2017

The County elected to implement Track 1 but did not incur any costs during Fiscal Year 2016-2017.⁶¹

5. Actual Increased Costs Incurred During Fiscal Year 2017-2018

The County began implementing Track 1 during Fiscal Year 2017-2018. Total costs incurred by the County during that time amounted to at least \$437,979, which included:⁶²

a. At least \$76,194 in staff and consultant time to interpret the Trash Order, including internal meetings with County staff and external meetings with co-permittees, review and analyze Priority Land Use areas, research available full capture devices, and conduct a financial analysis of compliance options;

b. At least \$63,659 in staff and consultant time to conduct a Trash Amendments Phase 1 Baseline Study consisting of the installation of 27 full capture devices within the County to determine trash generation rates for Priority Land Uses within the unincorporated County area;

⁶⁰ Snyder Dec., ¶ 13.b.1.) and 2.); Siegel Dec., ¶13.b.1.) and 2.).

⁶¹ Snyder Dec., ¶ 24.

⁶² *Id.* at ¶ 25.

c. At least \$89,348 in staff and consultant time to conduct a Trash BMP Effectiveness Study of the San Diego River watershed for trash BMPs, including non-structural BMPs, and analyze the data and information obtained through the study;⁶³

d. At least \$63,997 in staff and consultant time to conduct a Regional Trash Baseline Study consisting of the installation of 17 full capture devices throughout the County to determine trash generation rates for Priority Land Uses, and analyze the data and information obtained through the study;⁶⁴

e. At least \$39,266 in staff and consultant time to conduct a Trash Amendments Sediment Evaluation Study evaluating the operation of full capture devices for inlets that receive significant sediment input for the purpose of better understanding tributary land uses that could pose complications for installation of full capture devices, and analyze the data and information obtained through the study;

f. At least \$84,647 in staff and consultant time to conduct a Trash Amendments Spring Valley Pilot Study to identify Priority Land Use mapping, drainage areas and inlet information to address trash amendment requirements in a sample watershed, and analyze the data and information obtained through the study;⁶⁵ and

g. At least \$20,865 in staff and consultant time to map County storm drain inlets and associated drainage areas required as part of the California State Water Resources Control Board Trash Amendment December 3, 2018 submittal.

⁶³ The County recovered \$89,348 of these costs from the Prop 1 Grant. Snyder Dec., ¶ 35.

⁶⁴ The study was partly funded by co-permittees within the greater San Diego Area. Costs claimed by Claimants are the net costs incurred by Claimants, excluding any costs paid by the co-permittees.

⁶⁵ The study outlined both Track 1 and Track 2 approaches to compliance, evaluated regional and distributed approaches, and coordinated with appropriate County departments.

C. **New Requirement – Track 2 Implementation Mandate**

1. **Challenged Program Requirement**

Directive A.3 of the Trash Order provides as follows:

Track 2 Implementation Plans. Each MS4 permittee identified in Finding 3 electing to comply with Track 2 must submit, **no later than eighteen (18) months from the date of this Order (December 3, 2018)**, an implementation plan that describes:

- a. The combination of controls selected by the MS4 permittee and the rationale for each selection;
- b. How the combination of controls is designed to achieve full capture system equivalency;
- c. How full capture system equivalency will be demonstrated;
- d. How the implemented controls identified in the trash implementation plans will be monitored and assessed in jurisdictional runoff management programs or Water Quality Improvement Plan Annual Reports;⁶⁶
- e. Proposals by MS4 permittees if any, to substitute Priority Land Uses described in Finding 9 above with other locations or land uses, provided that the total trash generated in other locations or land uses is equivalent to, or greater than, the total trash generated in the Priority Land use being substituted; *and*
- f. A time schedule to achieve full compliance with the trash discharge prohibition, including interim milestones (such as average load reductions of ten percent per year or other progress) to full implementation. The proposed final compliance date must not be later than fifteen (15) years from the effective date of the Trash Amendments (i.e. December 2, 2030).

(Emphasis in original.)

⁶⁶ This requirement is listed only as part of the Track 2 Implementation mandate. However, Finding 12 indicates permittees selecting either Track 1 or Track 2 must meet this requirement. *See* Trash Order, p. 9.

2. Description of Newly Mandated Activities

As part of the Track 2 Implementation mandate, Claimants were required to:⁶⁷

- a. Prepare and submit an implementation plan that describes:
 - i. the combination of controls selected by the MS4 permittee and the rationale for each selection;
 - ii. how the combination of controls that would achieve full capture system equivalency;
 - iii. how full capture system equivalency will be demonstrated;
 - iv. how the implemented controls identified in the trash implementation plans will be monitored and assessed in Jurisdictional Runoff Management Program or Water Quality Improvement Plan Annual Reports;
 - v. the proposals by MS4 permittees, if any, to substitute Priority Land Uses with other locations or land uses, provided that the total trash generated in other locations or land uses is equivalent to, or greater than, the total trash generated in the Priority Land Use being substituted; and
 - vi. the time schedule to achieve full compliance with the Trash Amendments, including interim milestones to full implementation.
- b. Staff and consultant time and capital costs, if necessary, in anticipation of the incorporation of the requirements of the Trash Amendments into either the Water Quality Improvement Plans, the JRMPs or a combination of the two, after reissuance of the Regional MS4 Permit.

3. Description of Existing Requirements

Existing requirements do not include any of the above obligations imposed by the Trash Order, and therefore there are no related costs.

⁶⁷ Snyder Dec. ¶ 13.c.1.)i.) through vi.); Siegel Dec., ¶ 13.c.1.)i.) through vi.).

4. Actual Increased Costs Incurred During Fiscal Year 2016-2017

The City elected to implement Track 2 but did not incur any costs during Fiscal Year 2016-2017.⁶⁸

5. Actual Increased Costs Incurred During Fiscal Year 2017-2018

The City began implementing Track 2 during Fiscal Year 2017-2018. During that time, the City incurred at least \$45,050 in costs associated with staff and consultant time to develop the implementation plan.⁶⁹

D. New Requirement – Coordination with Caltrans Mandate

1. Challenged Program Requirement

Directive A.5 provides as follows:

Coordination with Caltrans. Each MS4 permittee identified in Finding 4 must submit, **no later than eighteen (18) months from the date of this Order (December 3, 2018)**, a description of how MS4 permittees will coordinate their efforts to install, operate, and maintain full capture systems, multi-benefit projects, and other controls with Caltrans in significant trash generating areas and/or priority land uses, as applicable.

(Emphasis in original.)

2. Description of Newly Mandated Activities

As part of the Caltrans mandate, Claimants were required to initiate and attend a meeting with Caltrans District 11 staff to coordinate efforts to install, operate, and maintain full capture systems, multi-benefit projects, and other controls with Caltrans in significant trash generating areas and/or priority land uses.

3. Description of Existing Requirements

Existing requirements do not include any of the above obligations imposed by the Trash Order, and therefore there are no related costs.

4. Actual Increased Costs Incurred During Fiscal Year 2016-2017

Claimants did not incur any costs related to their coordination with Caltrans during Fiscal Year 2016-2017.

⁶⁸ Siegel Dec., ¶ 21.b.

⁶⁹ *Ibid.*

5. Actual Increased Costs Incurred During Fiscal Year 2017-2018

Claimants incurred minimal costs related to their coordination with Caltrans during Fiscal Year 2017-2018.⁷⁰

V. COSTS INCURRED BY CLAIMANTS TO COMPLY WITH THE TRASH ORDER

As detailed above, in order to knowledgeably make the determinations identified above, Claimants were required to expend staff time, retain consultants and experts and conduct studies. As a result, Claimants have incurred and will continue to incur substantial costs which include hundreds of hours of staff time as well as consultant and expert fees and costs to prepare the necessary studies and to analyze the data from those studies. Through the end of Fiscal Year 2017-2018, Claimants' costs to comply exceeded \$866,875.⁷¹

VI. MANDATED ACTIVITIES ARE REIMBURSIBLE

In *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, the Supreme Court was called upon to interpret the phrase "new program or higher level of service" that was approved by the voters when they passed Proposition 4 in 1979 adding article XIII B to the California Constitution. In reaching its decision, the Court held that:

...the term 'higher level of service' ... must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' But the term 'program' itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state.⁷²

The definition as set forth in *County of Los Angeles* has two alternative prongs, only one of which has to apply in order for the mandate to qualify as a program. *Carmel*

⁷⁰ Claimants' costs to comply with the Caltrans Coordination mandate requirement are unknown at this time. However, Claimants expect their costs to exceed \$1,000 during Fiscal Year 2018-2019.

⁷¹ Snyder Dec., Exhibit A; Siegel Dec, Exhibit A.

⁷² *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

Valley Fire Protection Dist. v. State of California (1987) 190 Cal. App. 3d 521, 537. The activities mandated by the Trash Order, meet both prongs. The activities mandated by the Trash Order “impose unique requirements on local governments” that do not generally apply to all residents and entities in the state and they are intended to “implement a state policy.”

A. The Mandated Activities are Unique to Local Government

Claimants seek reimbursement for the mandated activities required by the Trash Order. There are no provisions in the Trash Order that extend the requirements to any non-governmental entities. The specific mandated activities for which Claimants seek reimbursement are unique to local government.

B. The Mandated Activities Carry Out a State Policy

The stated goal of the Trash Amendments is to “address the impacts of trash to the surface waters of California through the establishment of a statewide narrative water quality objective and implementation requirements to control trash, including the prohibition against the discharge of trash.”⁷³ The stated purpose of the Trash Order was to establish “the initial steps in planning for the implementation of the Trash Amendments ... in accordance with Water Code § 13383.”⁷⁴ There is no doubt that the Trash Order was intended do and does in fact carry out the state’s policy of prohibiting the discharge of trash to the surface waters of the state.

VII. DETAILED DESCRIPTION OF EXISTING MANDATED ACTIVITIES AND COSTS

Current law does not impose any of the obligations imposed by the Trash Order.

VIII. ACTUAL COSTS INCURRED IN FISCAL YEARS 2016-2017 AND 2017-2018 AND ESTIMATED COSTS FOR FISCAL YEAR 2018-2019

A. County Costs

As soon as the State Board issued the Trash Amendments on April 7, 2015, the County began to incur costs in preparation for the issuance of the Trash Order.⁷⁵ During

⁷³ Trash Amendments, p. 2, ¶ 8.

⁷⁴ Trash Order, pp. 1-2, Section 3. The NPDES Permit for the San Diego Region was not up for renewal until May 2018, more than 18 months after the issuance of Resolution No. 2015-0019. As a result, the San Diego Regional Board issued an interim order as authorized by statute in preparation for the renewal of the NPDES Permit later in 2018 or early in 2019.

⁷⁵ During Fiscal Year 2015-2016, Claimants incurred costs exceeding \$92,877 as part of the track selection process. Snyder Dec., ¶ 15.

Fiscal Year 2016-2017, costs incurred by the County to comply with the Trash Order totaled \$242,941.⁷⁶ During Fiscal Year 2017-2018, these costs totaled \$516,934.⁷⁷ The County expects to incur approximately \$545,000 in costs during Fiscal Year 2018-2019.⁷⁸ Therefore, the County's total expected costs through Fiscal Year 2018-2019 are \$1,304,875.

B. City Costs

The City began incurring costs to comply with the Trash Order in Fiscal Year 2017-2018.⁷⁹ In Fiscal Year 2017-2018, the City incurred costs of program development and consultant fees in the amount of \$53,000. In Fiscal Year 2018-2019, the City expects the costs of program development and consultant fees to be \$54,000.⁸⁰ Therefore, the City's total expected costs through Fiscal Year 2018-2019 are \$107,000. The City estimates the costs of developing alternative land uses, conducting annual monitoring and reporting, enhanced catch basin cleaning, equipment, and cleaning costs for Fiscal Years 2019-2020 through 2029-2030 to be \$1,239,210.⁸¹

IX. STATEWIDE COST ESTIMATE

The County's estimated cost of compliance with the Trash Order is expected to be approximately \$1,304,875. There are more than 512,000 residents in the unincorporated areas of San Diego County. Therefore, the per capita cost incurred and to be incurred by the County to comply with the Trash Order will be approximately \$2.55.⁸² The City's estimated cost of compliance with the Trash Order is expected to be approximately \$107,000. There are more than 36,000 residents in the City. Therefore, the per capita cost incurred and to be incurred by the City to comply with the Trash Order will be approximately \$2.97.⁸³

The Trash Order only applies to permittees within the San Diego Regional Water Quality Control Board's jurisdiction. There are 38 Phase 1, MS4 co-permittees within its jurisdiction. The population of these co-permittees exceeds 4.3 million. Assuming that the costs incurred by these other jurisdictions to comply with the Trash Order are within the range of \$2.55 to \$2.97 per capita, the estimated costs incurred by all co-permittees

⁷⁶ Snyder Dec., ¶¶ 22 and 24.

⁷⁷ *Id.* at ¶¶ 23 and 25.

⁷⁸ *Id.* at ¶ 27.

⁷⁹ Siegel Dec., Exhibit A.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Snyder Dec., ¶ 28.

⁸³ *Id.* at ¶ 30.

within the San Diego Region to comply with the Trash Order is between \$10.96 million and \$12.77 million.⁸⁴

In addition, there are approximately 16.4 million residents within Phase 1 MS4 jurisdictions throughout the state.⁸⁵ Assuming that the costs incurred by these other jurisdictions are within the range of \$2.55 to \$2.97 per capita, the estimated costs incurred by all Phase 1 MS4 jurisdictions within the state to comply with similar Trash Orders issued by their Regional Boards is \$41.82 million and \$48.71 million.

Finally, the State Board conducted an economic evaluation of the cost of implementing the Trash Amendments on a per capita basis for certain jurisdictions subject to the Trash Amendments.⁸⁶ The Cost Study was developed pursuant to the economic analysis requirements of Water Code § 13170 and 13241(d) and not pursuant to the requirements applicable to this Test Claim.⁸⁷ Notwithstanding these limitations, the Cost Study estimated the statewide cost per capita per year for Phase 1 MS4 entities, such as Claimants, to comply with the Trash Amendments ranged from \$4 to \$10.67. With an estimated statewide population of 16.4 million included within the jurisdictions of Phase 1 MS4's subject to the Trash Amendments, the Cost Study estimates statewide costs for Phase 1 MS4 entities subject to the Trash Amendments to be between \$65.60 million and \$174.99 million per year.⁸⁸

X. FUNDING SOURCES

The County received a California Proposition 1 Grant through the Water Quality, Supply, and Infrastructure Improvement Act of 2014 to be used to complete a Trash BMP Effectiveness Study of the San Diego River watershed for trash BMPs, including non-structural BMPs. During Fiscal Years 2016-2017 and 2017-2018, the County utilized \$131,218 of the grant funds. Of that amount, \$41,869 was used to comply with the Track Selection Mandate, with \$12,284 used in Fiscal Year 2016-2017 and \$29,585 in Fiscal Year 2017-2018. The remaining \$89,348 was used to comply with the Track 1 Implementation Mandate during Fiscal Year 2017-2018.

In addition, the County's Regional Trash Baseline Study was partially funded by MS4 co-permittees within the greater San Diego Area. The costs claimed by the County are net of the costs paid by the other co-permittees subject to the Trash Order.

⁸⁴ *Id.* at ¶ 31.

⁸⁵ State Water Resources Control Board Resolution No. 2015-0019, Fact Sheet Appendix C-1, fns. 25 and 26.

⁸⁶ State Water Resources Control Board Resolution No. 2015-0019, Fact Sheet Appendix C ("Cost Study").

⁸⁷ *Id.* at C-1.

⁸⁸ *Id.* at C-1, fns. 25 and 26.

Other than as noted, Claimants are unaware of any dedicated state, federal or other nonlocal agency funding sources.

A. Claimants Do Not Have Fee Authority to Offset Their Costs

The state is required to reimburse Claimants' costs of complying with the Trash Order mandates because Claimants lack authority to levy service charges, fees, or assessments sufficient to pay for the mandates in the Trash Order.⁸⁹ Case law has recognized three general categories of local agency fees or assessments available to pay for state mandates: (1) special assessments based on the value of benefits conferred; (2) development fees exacted in return for permits or other government privileges; and (3) regulatory fees imposed as an exercise of police power.⁹⁰ This Commission has determined that "a local agency does not have sufficient fee authority within the meaning of Government Code § 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners."⁹¹

Virtually all revenue-generating devices enacted by a local government are considered taxes subject to voter-approval requirements unless the revenue-generating device falls within certain exceptions enumerated under Article XIII of the California Constitution.⁹² § 1(d) of Article XIII C of the California Constitution defines a tax as "any levy, charge or exaction of any kind imposed by a local government, except the following:

- (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
- (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
- (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations,

⁸⁹ Gov. Code § 17556(d).

⁹⁰ *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874; Commission on State Mandates Statement of Decision ("Statement of Decision"), Discharge of Stormwater Runoff, Test Claim 07-TC-09, at 102.

⁹¹ Statement of Decision 07-TC-09 at 105-106 (determining that a local agency lacks sufficient authority within the meaning of Government Code § 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners.)

⁹² Cal. Const. art. XIII D § 2(b), (d).

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.⁹³

Further, assessments and property-related fees imposed on owners or occupants of real property by their ownership or use of property constitutes a property-related fee governed by Article XIII D of the California Constitution.⁹⁴ Article XIII D requires majority voter approval of property related fees, “[e]xcept for fees or charges for sewer, water, and refuse collection services[.]”⁹⁵

As explained in the following sections, Claimants lack sufficient “authority” to pay for the mandates in the Trash Order within the meaning of Government Code § 17556 because any charge, fee, or assessment is contingent on the outcome of an election by voters or property owners and because a development fee is not available to fund the activities mandated by the Trash Order.

1. Activities Mandated by the Trash Order do not Convey Unique Benefits or Deal With Unique Burdens Being Imposed on Claimants by Individual Persons, Businesses or Property Owners.

Claimants lack authority to pay for the Trash Order mandates using special assessments because the mandated activities do not provide a benefit directly to any potential payor that is not provided to those not charged.⁹⁶ In order for a special assessment to qualify for an exemption from the definition of “tax,” and thus for an exemption from the voter-approval requirement, the amount of the fee must be no more than necessary to cover the reasonable costs of the governmental activity, and the manner

⁹³ Cal. Const. art. XIII C § 1(d).

⁹⁴ Cal. Const. art. XIII D §§ 2(h), 3(a).

⁹⁵ Cal. Const. art. XIII D § 6(c).

⁹⁶ Cal. Const. art. XIII C §§ 1(e)(1), (2).

in which those costs are allocated to a payor must bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the activity funded by the fee.⁹⁷ The person or business being charged the fee may only be charged a fee based on the portion of the total government costs attributable to burdens being placed on the government by that payor or an amount based on the direct benefits the payor receives from the program or facility being funded by the fee.

The Trash Amendments were intended “to address the impacts trash to surface waters of California.”⁹⁸ The mandates contained in the Trash Order are part of the Trash Amendments’ larger goal to improve water quality by reducing the presence of trash in MS4s.⁹⁹ By furthering the goal of improving water quality throughout Claimants’ jurisdictions, the benefits of Claimants’ activities under the Trash Order are conferred on all persons within Claimants’ jurisdictions. As set forth in more detail in the discussion of the *Salinas* case in Section X.A.2., *infra*, the costs associated with implementing the mandates in the Trash Order cannot be tied to a direct benefit or service experienced by any individual businesses, property owners, or residents.¹⁰⁰ Thus, although the Trash Order focuses on “Priority Land Uses” as areas that should ultimately receive Full Capture Systems, Claimants’ selection between Track 1 and Track 2 does not create any direct or specific benefits for people or properties within Priority Land Uses.¹⁰¹ The mandated costs are study-or plan-related costs that are intended to benefit water quality jurisdiction-wide.¹⁰² For these reasons, it would be impossible to identify benefits from the mandates in the Trash Order that any individual resident, business, or property owner receives that are distinct from benefits conferred on all persons within the jurisdiction.¹⁰³

Because the benefits conferred by the activities mandated by the Trash Order apply to all people and property in Claimants’ jurisdictions, Claimants cannot levy a special assessment or fee on certain payors based on their unique benefit or service received. Any fee charged by Claimants for costs related to the Trash Order mandates, therefore, would not meet the requirement of article XIII C §§ 1(e) (1) and 1(e) (2) and would be subject to voter approval.

⁹⁷ Cal. Const. art. XIII C §§ 1(e)(1), (2).

⁹⁸ Trash Amendments at p. 1.

⁹⁹ Trash Amendments at ¶¶ 1-6.

¹⁰⁰ Snyder Dec., ¶ 33; Siegel Dec., ¶ 24.

¹⁰¹ *Ibid.* at ¶ 27.

¹⁰² Trash Order, p. 1.

¹⁰³ Snyder Dec., ¶ 33; Siegel Dec., ¶ 24.

2. Property-Related Fees to Fund Trash Order Mandates Require Voter Approval

Claimants lack authority to impose property-related fees without voter approval because fees imposed to cover the costs associated with the mandated activities in the Trash Order are not “charges for sewer, water, and refuse collection services” and do not qualify for an exemption from the voter-approval requirement.¹⁰⁴ The costs of complying with the Trash Order mandates are costs related to Claimants’ operation of their MS4s.¹⁰⁵

Any tax that is intended to fund a specific program such as a stormwater management program is a “special tax” subject to the requirements of article XIII A, § 4, and article XIII C, § 2(d). Article XIII A, § 4 and article XIII C, § 2(d) require special taxes be approved by 2/3 of the voters of the portion of the jurisdiction subject to the fee.

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

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

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

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

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

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

¹⁰⁴ Cal. Const. art. XIII D § 6(c); see also *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358 (determining that fees imposed to fund stormwater management activities are property-related fees that are not exempted from voter-approval as sewer, water or refuse collection services).

¹⁰⁵ See Trash Order, p. 1 (“trash is typically generated on land and transported to surface water, predominantly through storm water discharges from MS4s.”).

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

In *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 (*Salinas*), the court of appeal struck down a fee that the City of Salinas attempted to enact to fund the city’s stormwater management program. The court held that a stormwater fee was a property related fee governed by article XIII D and that such a fee could not be imposed unless it was approved by the voters.

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

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

The City asserted that the fee did not require voter approval requirements of article XIII D § 6(c) on two grounds. First, the City argued that the fee was not a “property related” fee but rather a “user fee” which the property owner could avoid simply by maintaining a storm water management facility on the property. The City argued that because it was possible to own property without being subject to the fee that it was not a fee imposed “as an incident of property ownership.”¹⁰⁶ Second, the City argued that, even if the fee could be characterized as a property related fee, it was exempted from the voter approval requirements by provisions of article XIII D § 6(c) that allow local

¹⁰⁶ *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal. App. 4th 1351, 1354.

governments to enact fees for sewer and water services without prior voter approval.¹⁰⁷ The court rejected both arguments.

The court in *Salinas* found that because the fee was not directly based on or measured by use, comparable to the metered use of water or the operation of a business, it could not be characterized as a use fee. Rather the fee was based on ownership or occupancy of a parcel and was based on the size of the parcel and therefore must be viewed as a property related fee.¹⁰⁸

The court observed:

The City itself treats storm drainage differently from its other sewer systems. The stated purpose of [the City storm drainage fee ordinance] was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of “non-storm water” into the storm drainage system, which channels storm water into state waterways ... the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water.¹⁰⁹

The court concluded that the storm drainage fee “burden[s] landowners *as landowners*,” and thus it was in reality a property related fee subject to the requirements of article XIII D and not a user fee. The fee was therefore subject to the voter-approval requirements of article XIII D unless one of the exceptions in § 6(c) of that section applied.¹¹⁰

The court then went on to reject that the City’s contention that the fee fell within exemption from the voter-approval requirement applicable to fees for sewer or water services in § 6(c). The court concluded that that the term “sewer services” was ambiguous in the context of both § 6(c) and article XIII D as a whole. The court found that, because article XIII D was enacted through the initiative process, the rule of judicial construction that an enactment must be strictly construed required the court to take a narrow reading of the sewer exemption. The court went on to hold that the sewer services exception in article XIII D § 6(c) was applicable only to sanitary sewerage and *not* to services related to stormwater.¹¹¹

¹⁰⁷ *Ibid.*

¹⁰⁸ *Id.* at 1355.

¹⁰⁹ *Id.* at 1358.

¹¹⁰ *Ibid.*

¹¹¹ *Id.* at 1357-1358.

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

... we cannot subscribe to the City’s suggestion that the storm drainage fee is ‘for . . . water services.’ *Government Code section 53750*, enacted to explain some of the terms used in articles XIII C and XIII D, defines “[w]ater” as ‘any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water.’ (Gov. Code, § 53750, subd. (m).) The average voter would envision ‘water service’ as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.¹¹²

Consistent with the court’s rejection of Salinas’s fee as a user fee and as a sewer or water service fee, any fee imposed to cover the costs of the Trash Order mandates would be a property-related fee, and that fee would not qualify as a fee for water, sewer, or fee “refuse collection.”¹¹³ Further, the type of trash at issue in the Trash Order cannot be collected through typical refuse collection services.¹¹⁴ This trash is specifically targeted by the Trash Order because it evades collection through typical refuse collection services and ends up in storm water runoff.¹¹⁵

3. Costs of Complying with the Trash Order Mandates are not Related to Property Development

Claimants lack authority to pay for the Trash Order mandates using development fees because Claimants’ costs are not associated with any development activity. The Trash Order is designed to address trash generated as a result of already-developed properties.¹¹⁶ For this reason, the costs associated with the Trash Order’s mandates cannot be linked to a discrete permit or service provided to any development project.

4. Conclusion

In summary, articles XIII A, XIII C, and XIII D of the California Constitution require voter approval of any funding mechanism available to Claimants to fund the costs of complying with the Trash Order mandates. Any fees developed by Claimants to fund the mandates in the Trash Order could only be imposed by some form of special tax or

¹¹² *Ibid.*

¹¹³ Cal. Const. art. XIII D § 6(c).

¹¹⁴ Snyder Dec., ¶ 35; Siegel Dec., ¶ 26.

¹¹⁵ Trash Order, p. 1.

¹¹⁶ *Id.* at 2.

property related fee that would require approval by either a 2/3 vote of the electorate subject to the tax; or a majority vote of the property owners subject to the property related fee. Claimants thus lacks sufficient “authority” for purposes of Government Code § 17556 to levy service charges, fees, or assessments to pay for the Trash Order’s mandates.

XI. PRIOR MANDATE DETERMINATIONS

Municipal Stormwater and Urban Runoff Discharges, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21.

Discharge of Stormwater Runoff, Order No. R9-2007-0001, Case No.: 07-TC-09.

XII. PRIOR LEGISLATIVELY DETERMINED MANDATES

None.

XIII. CONCLUSION

The Trash Order imposes state mandated activities and costs on Claimants. Those state mandated costs are not exempted from the subvention requirements of § 6 and Claimants lack authority to develop and impose fees to fund any of these new state mandated activities. Claimants therefore respectfully requests that the Commission find that the mandated activities set forth in this Test Claim are state mandates that require subvention under § 6.

SECTION 6

AMENDED DECLARATION OF TODD SNYDER

IN SUPPORT OF COUNTY OF SAN DIEGO TEST CLAIM

REPORTING REQUIREMENTS TO CONTROL DISCHARGES OF TRASH
FROM PHASE I MS4s

California Regional Water Quality Control Board,
San Diego Region
Order No. R9-2017-0077
California Water Code Section 13383

DECLARATION OF TODD SNYDER

I, Todd Snyder, declare as follows:

1. I make this declaration based upon my own personal knowledge, except for those matters set forth 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. Specifically, all of the statements herein are based on my personal knowledge, except for the statement set forth in Paragraph 29, and as to that statement, I believe it to be true.

2. I have received the following degrees and certifications: Bachelor of Arts in Political Science and History and a Master's Degree in Public Policy.

3. I am employed by the County of San Diego ("County") as the Land Use & Environment Group Program Manager of the Watershed Protection Program in the Department of Public Works.

4. I have held my current position for approximately 4 years. My duties include: operational oversight of staff in several program areas, including water quality monitoring, stormwater code compliance, inspection and enforcement, public education, watershed structural treatment controls, and regulatory reporting and program assessment. I also coordinate the County's stormwater compliance efforts with the municipal stormwater co-permittees.

5. The State Water Resources Control Board adopted Resolution No. 2015-0019, known as the Trash Amendments, on April 7, 2015. The Trash Amendments became effective December 2, 2015. I have reviewed and I am familiar with the Trash Amendments.

6. The Trash Amendments, among other things, ordered Regional Water Quality Control Boards to include the requirements set forth in the Trash Amendments in permits issued, and to be issued, to MS4 permittees.

7. In compliance with the Trash Amendments, the California Regional Water Quality Control Board, San Diego Region (“Regional Board”) issued Order No. R9-2017-0077 (the “Trash Order”) on June 2, 2017. I have reviewed and am familiar with the Trash Order.

8. The Regional Board issued the Trash Order to the County as the owner or operator of a municipal separate storm sewer system (“MS4”) and as a co-permittee under Regional Board Order No. R9-2013-0001, which regulates discharges to and from the MS4.

9. The Trash Order directed the County to select between two “tracks” intended to implement a prohibition of trash discharge to surface waters of the state and to report that selection to the Regional Board.

10. Track 1 requires the installation of stormwater treatment control systems (called “Full Capture Systems”), meeting specific design criteria, in all storm drains that capture runoff from developed, high-density residential, industrial, commercial, mixed urban, and public transportation sites, facilities and land uses (called “Priority Land Uses”).

11. Track 2 requires installation of a combination of full capture systems, multi-benefit projects, or other treatment or institutional controls that reduce the same trash load that would be reduced if full capture systems were installed, operated, and maintained for all storm drains that capture runoff from Priority Land Uses.

12. The Trash Order established several deadlines: (1) select a track and notify the Regional Board in writing of such selection (the “Trash Selection Mandate”) within three (3) months of the date of the Trash Order (September 5, 2017); (2) if Track 1 is selected, prepare and submit a map identifying Priority Land Uses, corresponding storm drain networks, locations of proposed full capture systems, and a time schedule for achieving full compliance (Track 1 Implementation Mandates”) within eighteen months

of the Trash Order (December 3, 2018); and (3) if Track 2 is selected, submit an implementation plan (the “Track 2 Implementation Plan Mandates”).

13. Through my employment with the County, I am involved in the County’s activities required to comply with the Trash Order. The activities required to comply with the Trash Order include the following (collectively the “Mandated Activities”):

a. Track Selection Mandate (Trash Order, Directive A.1)

- 1.) Identify Priority Land Use areas within the County’s jurisdiction;
- 2.) Assess whether the County has authority to install Full Capture Systems in all Priority Land Use areas;
- 3.) Assess the feasibility of installing Full Capture Systems in Priority Land Use areas;
- 4.) Assess the availability and feasibility of Multi-Benefit Projects and other Treatment or Institutional Controls available to the County in Priority Land Use areas;
- 5.) Assess whether alternative land use designations were better suited for implementing Full Capture Systems or alternative trash control requirements;
- 6.) Assess the availability and feasibility of demonstrating Full Capture System Equivalency;

b. Track 1 Implementation Mandate (Trash Order, Directive A.2)

- 1.) Prepare and submit a jurisdictional map identifying Priority Land Uses, the corresponding drain network including all storm drain inlets and drainage, proposed full capture system installation locations and associated drainage areas; and
- 2.) Develop and submit a time schedule to achieve full compliance with the Trash Amendments, including interim milestones to full implementation.

c. Track 2 Implementation Plan Mandate (Trash Order, Directive A.3)

1.) Prepare and submit an implementation plan that describes:

- i.) the combination of controls selected by the MS4 permittee and the rationale for each selection;
- ii.) how the combination of controls would achieve full capture system equivalency;
- iii.) how full capture system equivalency will be demonstrated;
- iv.) how the implemented controls identified in the trash implementation plans will be monitored and assessed in Jurisdictional Runoff Management Program or Water Quality Improvement Plan Annual Reports;
- v.) the proposals by MS4 permittees, if any, to substitute Priority Land Uses with other locations or land uses, provided that the total trash generated in other locations or land uses is equivalent to, or greater than, the total trash generated in the Priority Land Use being substituted; and
- vi.) the time schedule to achieve full compliance with the Trash Amendments, including interim milestones to full implementation.

d. Miscellaneous Mandates (Trash Order, Directives A.4 and A.5)

1.) The Riverside County Flood Control and Water Conservation

District is required to prepare and submit a report, no later than eighteen (18) months from the date of the Trash Order identifying land uses or locations within its jurisdiction including but not limited to, facilities, drainage structures, and easements that generate a substantial amount of trash; and

2.) Each MS4 permittee must prepare and submit, no later than

eighteen (18) months from the date of the Trash Order, a description of how MS4 permittees will coordinate their efforts to install, operate, and maintain full capture

systems, multi-benefit projects, and other controls with Caltrans in significant trash generating areas and/or priority land uses, as applicable.

14. The County ultimately selected Track 1.

15. Shortly after the Trash Amendments were issued by the State Board, the County began planning its compliance with the Trash Order that was eventually issued on June 2, 2017. Though the Trash Order was not yet issued, the County first incurred costs to comply with the Trash Order in Fiscal Year 2015-2016. These costs totaled \$92,877.92.

16. The Trash Order requires the County to perform new activities that are unique to local governmental entities, which are not required by federal law.

17. In order to comply with the Trash Order, the County has entered into numerous consulting contracts with third party vendors. I have reviewed each of those contracts and am personally familiar with the terms and conditions of each contract.

18. My staff, at my direction, reviews and approves invoices from the vendors for the services rendered pursuant to such contracts.

19. I have also been personally involved with developing the estimated increased costs the County expects to incur implementing the Trash Order.

20. I have reviewed and am familiar with the books and records maintained by the County in the ordinary course of business relating to the County's efforts to comply with the Trash Order. The information set forth in this declaration accurately reflects the information contained in those records.

21. The actual increased costs associated with implementing the Trash Order during Fiscal Years 2016-2017 and 2017-2018 are detailed in Exhibit A to this Declaration, which is incorporated herein by reference. As detailed in Exhibit A, costs incurred by the County exceeded \$1,000.

22. During Fiscal Year 2016-2017, the County incurred at least \$242,941 in costs to comply with the Track Selection Mandate. The County performed the following activities and incurred the following costs to comply:

a. Staff and consultant time and costs to interpret the Trash Order including internal meetings with County staff and external meetings with co-permittees, review and analyze Priority Land Use areas within the County, research available full capture devices, and conduct a financial analysis of compliance options. In Fiscal Year 2016-2017, these costs exceeded \$21,523.

b. Staff and consultant time and costs to conduct a Trash Amendments Phase I Baseline Study consisting of the installation of 27 full-capture devices within the County to determine trash generation rates for Priority Land Uses within the unincorporated County area. This study was necessary because the rates developed for the Regional Trash Baseline Study may not be representative of certain land uses in the County's jurisdiction. In Fiscal Year 2016-2017, these costs exceeded \$118,139.

c. Staff and consultant time and costs to conduct a Trash BMP Effectiveness Study of the San Diego River watershed for trash BMPs, including non-structural BMPs, and analyze the data and information obtained through the study. In Fiscal Year 2016-2017, these costs exceeded \$37,002.

d. Staff and consultant time and costs to conduct a Regional Trash Baseline Study consisting of the installation of 17 full-capture devices throughout the County to determine trash generation rates for Priority Land Uses, and analyze the data and information obtained through the study. In Fiscal Year 2016-2017, these costs exceeded \$38,776.

e. Staff and consultant time and costs to conduct a Track 2 Approach and Cost Estimate Trash Study to identify preliminary Priority Land Use mapping, review literature or previous trash studies, explore construction and maintenance costs associated with Track 1 and Track 2 compliance pathways, and analyze and the data and

information obtained through the study. In Fiscal Year 2016-2017, these costs exceeded \$27,500.

23. During Fiscal Year 2017-2018, the County incurred at least \$78,954 in costs to comply with the Track Selection Mandate. The County performed the following activities and incurred the following costs to comply:

a. Staff and consultant time and costs to interpret the Trash Order including internal meetings with County staff and external meetings with co-permittees, review and analyze Priority Land Use areas within the County, research available full capture devices, and conduct a financial analysis of compliance options. In Fiscal Year 2017-2018, these costs exceeded \$15,103.

b. Staff and consultant time and costs to conduct a Trash Amendments Phase I Baseline Study consisting of the installation of 27 full-capture devices within the County to determine trash generation rates for Priority Land Uses within the unincorporated County area. This study was necessary because the rates developed for the Regional Trash Baseline Study may not be representative of certain land uses in the County's jurisdiction. In Fiscal Year 2017-2018, these costs exceeded \$16,369.

c. Staff and consultant time and costs to conduct a Trash BMP Effectiveness Study of the San Diego River watershed for trash BMPs, including non-structural BMPs, and analyze the data and information obtained through the study. In Fiscal Year 2017-2018, these costs exceeded \$29,585.

d. Staff and consultant time and costs to conduct a Regional Trash Baseline Study consisting of the installation of 17 full-capture devices throughout the County to determine trash generation rates for Priority Land Uses, and analyze the data and information obtained through the study. In Fiscal Year 2017-2018, these costs exceeded \$7,814.

e. Staff and consultant time and costs to conduct a Trash Amendments Sediment Evaluation Study evaluating the operation of full capture devices for inlets that

receive significant sediment input for the purpose of better understanding tributary land uses that could pose complications for installation of full capture devices, and analyze the data and information obtained through the study. In Fiscal Year 2017-2018, these costs exceeded \$10,082.

24. During Fiscal Year 2016-2017, the County did not perform any activities and therefore incurred no costs to comply with the Track 1 Implementation Mandate.

25. During Fiscal Year 2017-2018, the County incurred at least \$437,979 in costs to comply with the Track 1 Implementation Mandate. The County performed the following activities and incurred the following costs to comply:

a. Staff and consultant time and costs to interpret the Trash Order including internal meetings with County staff and external meetings with co-permittees, review and analyze Priority Land Use areas within the County, research available full capture devices, and conduct a financial analysis of compliance options. In Fiscal Year 2017-2018, these costs exceeded \$76,194.

b. Staff and consultant time and costs to conduct a Trash Amendments Phase I Baseline Study consisting of the installation of 27 full-capture devices within the County to determine trash generation rates for Priority Land Uses within the unincorporated County area. This study was necessary because the rates developed for the Regional Trash Baseline Study may not be representative of certain land uses in the County's jurisdiction. In Fiscal Year 2017-2018, these costs exceeded \$63,659.

c. Staff and consultant time and costs to conduct a Trash BMP Effectiveness Study of the San Diego River watershed for trash BMPs, including non-structural BMPs, and analyze the data and information obtained through the study. In Fiscal Year 2017-2018, these costs related to the Track 1 Implementation mandate exceeded \$89,348.

d. Staff and consultant time and costs to conduct a Regional Trash Baseline Study consisting of the installation of 17 full-capture devices throughout the

County to determine trash generation rates for Priority Land Uses, and analyze the data and information obtained through the study. In Fiscal Year 2017-2018, these costs exceeded \$63,997.

e. Staff and consultant time and costs to conduct a Trash Amendments Sediment Evaluation Study evaluating the operation of full capture devices for inlets that receive significant sediment input for the purpose of better understanding tributary land uses that could pose complications for installation of full capture devices, and analyze the data and information obtained through the study. In Fiscal Year 2017-2018, these costs exceeded \$39,266.

f. Staff and consultant time and costs to conduct a Trash Amendments Spring Valley Pilot Study to identify Priority Land Use mapping, drainage areas and inlet information to address trash amendment requirements in a sample watershed, and analyze the data and information obtained through the study. As part of this study, staff and consultants outlined both Track 1 and Track 2 approaches to compliance, evaluated regional and distributed approaches, and coordinated with appropriate County departments. In Fiscal Year 2017-2018, these costs exceeded \$84,674.

g. Staff and consultant time and costs to map County storm drain inlets and associated drainage areas required as part of the California State Water Resources Control Board Trash Amendment December 3, 2018 submittal. In Fiscal Year 2017-2018, these costs exceeded \$20,865.

26. Therefore, the total cost to the County to comply with the Trash Order during Fiscal Years 2016-2017 and 2017-2018 was \$759,875.52 (\$242,941 + \$78,954 + \$437,979).

27. In addition, the County has budgeted to expend \$545,000 in Fiscal Year 2018-19 to comply with the Trash Order. This will bring the total amount expended and budgeted by the County to comply with the Trash Order to approximately \$1,304,875.

28. There are more than 512,000 residents in the unincorporated areas of San Diego County. See Cal. Dep't of Finance, Population Estimates for 2017 and 2018, available at: <http://www.dof.ca.gov/Forecasting/Demographics/Estimates/E-1/> (last visited Aug. 20, 2018). Therefore, the per capita cost to be incurred by the County to comply with the Trash Order will be approximately \$2.55. The per capita cost incurred by the County during Fiscal Year 2017-2018 was approximately \$0.86.

29. I am informed that the City of San Juan Capistrano ("City") has expended and budgeted approximately \$107,000 to comply with the Trash Order, with approximately \$53,000 incurred during Fiscal Year 2017-2018.

30. There are more than 36,000 residents in the City. See Cal. Dep't of Finance, Population Estimates for 2017 and 2018, available at: <http://www.dof.ca.gov/Forecasting/Demographics/Estimates/E-1/> (last visited Aug. 20, 2018). Therefore, the per capita cost to be incurred by the City to comply with the Trash Order will be approximately \$2.97. The per capita cost incurred by the City during Fiscal Year 2017-2018 was approximately \$1.47.

31. There are 38 Phase I, MS4 co-permittees within the Regional Board's jurisdiction. The population of these co-permittees exceeds 4.3 million. Assuming the costs incurred by these other jurisdictions to comply with the Trash Order are within the range of \$2.55 to \$2.97 per capita, the estimated costs incurred by all co-permittees within the San Diego Region to comply with the Trash Order is between \$10.96 million and \$12.77 million.

32. In addition, there are approximately 16.4 million residents that reside within Phase I, MS4 jurisdictions throughout the state. Assuming the costs incurred by these other jurisdictions are within the range of \$2.55 to \$2.97 per capita, the estimated costs incurred by all Phase I, MS4 jurisdictions within the state to comply with similar Trash Orders issued by their regional boards is \$41.82 million and \$48.71 million. Assuming the costs incurred by these other jurisdictions during Fiscal Year 2017-2018

are within the range of \$0.86 to \$1.47 per capita, the estimated costs incurred by all Phase I, MS4 jurisdictions within the state to comply with similar Trash Orders issued by their regional boards during Fiscal Year 2017-2018 is \$14.03 million and \$24.14 million.

33. The actual increased costs do not include costs associated with implementing the County-selected track. The San Diego Regional Board is expected issue a separate order to the County requiring implementation of its selected track.

34. The actual increased costs do not include costs associated with coordinating with Caltrans, as required by Directive A.5 in the Trash Order. The cost to the County to comply with this mandate is unknown at this time, though the County expects to incur at least \$1,000 in costs during Fiscal Year 2018-2019.

35. The County received a California Proposition 1 Grant through the Water Quality, Supply, and Infrastructure Improvement Act of 2014 to complete a Trash BMP Effectiveness Study of the San Diego River watershed for trash BMPs, including non-structural BMPs. During Fiscal Years 2016-2017 and 2017-2018, the County applied at least \$131,218 towards the study. Of that amount, \$41,869 was used to comply with the Track Selection Mandate, with \$12,284 used in Fiscal Year 2016-2017 and \$29,585 in Fiscal Year 2017-2018. The remaining \$89,348 received from the grant was used to comply with the Track 1 Implementation Mandate during Fiscal Year 2017-2018.

36. The County conducted a Regional Trash Baseline Study that was partly funded by the County's MS4 co-permittees during Fiscal Years 2016-2017 and 2017-2018. The County's costs are net of any funds received from those co-permittees.

37. I am not aware of any dedicated state or federal funds that are or will be available to pay for the Mandated Activities.

38. The costs associated with implementing the Trash Order do not arise from a direct benefit or service experienced by any individual businesses, property owners, or residents, including people or properties within Priority Land Uses.

39. The costs associated with implementing the Trash Order are study- and plan-related costs that are intended to benefit water quality jurisdiction-wide.

40. The trash control features contemplated by the Trash Order cannot be implemented or tracked through typical refuse collection services.

41. It is not possible to link the costs with any benefits to any individual resident, business, or property owner receives that are distinct from benefits conferred on all persons within the County's jurisdiction.

42. I am not aware of any authority to assess a fee to offset these increased costs to perform the Mandated Activities.

43. Other than identified above, I am not aware of any non-local agency funds that are or will be available to pay for the increased costs for performing the Mandated Activities.

44. Other than identified above, the only available source to pay the Mandated Activities are and will be the County's general purpose funds.

45. Pursuant to Section 1183.1 of Title 2 of the California Code of Regulations and based on my information and belief, I attest that:

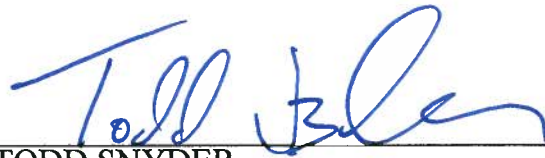
a. the state-mandated costs set forth in this declaration result from an executive order which the City is also subject to and under which the City incurred state mandated costs;

b. the City and County agree on all issues of this Test Claim; and

c. the City and County have designated one person to act as the sole representative for all claimants.

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

Executed this 30th day of August, 2018, in San Diego, California.



TODD SNYDER

EXHIBIT A

Summary of Unfunded Mandate Costs by Permit Requirement and Year of Expense

Trash Order Mandate	Year	Task A	Task B	Task C	Task D	Task E	Task F	Task G	Task H	Total
Track Selection	16/17	\$21,523.00	\$118,139.04	\$37,002.89	\$38,776.52	\$27,500.00	\$0.00	\$0.00	\$0.00	\$242,941.45
Track Selection	17/18	\$15,103.98	\$16,369.01	\$29,585.12	\$7,814.38	\$0.00	\$10,082.38	\$0.00	\$0.00	\$78,954.87
Total Costs – Track Selection										\$321,896.32
Track 1 Implementation	16/17	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Track 1 Implementation	17/18	\$76,194.85	\$63,659.62	\$89,348.13	\$63,997.54	\$0.00	\$39,266.24	\$84,647.24	\$20,865.58	\$437,979.20
Total Cost – Track 1 Implementation										\$437,979.20
TOTAL COST OF TRACK SELECTION AND TRACK 1 IMPLEMENTATION (FISCAL YEARS 2016-2017 AND 2017-2018)										\$759,875.52

Task A - County of San Diego Staff Costs: Staff and consultant costs to interpret the Order, including internal meetings with County staff and external meetings with co-permittees, review and analyze Priority Land Use areas within the County, research available full capture devices, and conduct a financial analysis of compliance options.

Task B - Trash Amendments Phase I Baseline Study: Staff and consultant costs to perform a Trash Amendments Phase I Baseline Study consisting of the installation of 27 full capture devices within the County to determine trash generation rates for Priority Land Uses within the unincorporated County area. This study was necessary because the rates developed for the Regional Trash Baseline Study may not be representative of certain land uses in the County’s jurisdiction.

Task C - Prop 1 Trash BMP Effectiveness Study: Staff and consultant cost to perform a Trash BMP Effectiveness Study of the San Diego River watershed for trash BMPs, including non-structural BMPs, and analyze the data and information obtained through the study. Part of this study was funded by a California Proposition 1 Grant through the Water Quality, Supply, and Infrastructure Improvement Act of 2014.

Task D - Conduct Regional Trash Baseline Study: Staff and consultant cost to perform a Regional Trash Baseline Study consisting of the installation of 17 full capture devices throughout the County to determine trash generation rates for Priority Land Uses, and analyze the data and information obtained through the study. Part of the cost of this study was funded by co-permittees within the greater San Diego Area.

Task E - Development of Track 2 Approach and Cost Estimate: Staff and consultant time to perform a Track 2 Approach and Cost Estimate Trash study to identify preliminary Priority Land Use mapping, review literature or previous trash studies, explore construction and maintenance costs associated with Track 1 and Track 2 compliance pathways, and analyze and the data and information obtained through the study.

Task F - Trash Amendments Sediment Evaluation: Staff and consultant cost to perform a Trash Amendments Sediment Evaluation study evaluating the operation of full capture devices for inlets that receive significant sediment input for the purpose of better understanding tributary land uses that could pose complications for installation of full capture devices, and analyze the data and information obtained through the study.

Task G - Trash Amendments Spring Valley Pilot Study: Staff and consultant time to perform a Trash Amendments Spring Valley Pilot Study to identify Priority Land Use mapping, drainage areas and inlet information to address trash amendment requirements in a sample watershed, and analyze the data and information obtained through the study. As part of the study, staff and consultants outlined both Track 1 and Track 2 approaches to compliance, considered regional and distributed approaches, and coordinated with appropriate County departments.

Task H - Inlet Delineations: Staff and consultant time to map County storm drain inlets and associated drainage areas required as part of the California State Water Resources Control Board Trash Amendment December 3, 2018 submittal.

SECTION 6

DECLARATION OF BENJAMIN SIEGEL

IN SUPPORT OF COUNTY OF SAN DIEGO TEST CLAIM

REPORTING REQUIREMENTS TO CONTROL DISCHARGES OF TRASH
FROM PHASE I MS4s

California Regional Water Quality Control Board, San Diego Region – Order No.
R9-2017-0077
California Water Code Section 13383

DECLARATION OF BENJAMIN SIEGEL

I, Benjamin Siegel, declare as follows:

1. I make this declaration based upon my own personal knowledge, except for those matters set forth 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. Specifically, all of the statements herein are based on my personal knowledge, except for the statement set forth in the last paragraph of this Declaration, and as to that statement, I believe it to be true.

2. I am employed by the City of San Juan Capistrano (“City”) as the City Manager.

3. I have held my current position for approximately 2.5 years.

4. My duties as City Manager include overseeing all departments in the City, including the Public Works Department and its stormwater management duties.

5. The State Water Resources Control Board adopted Resolution No. 2015-0019, known as the Trash Amendments, on April 7, 2015. The Trash Amendments became effective December 2, 2015. I have reviewed and I am familiar with the Trash Amendments.

6. The Trash Amendments, among other things, ordered Regional Water Quality Control Boards to include the requirements set forth in the Trash Amendments in permits issued, and to be issued, to MS4 permittees.

7. In compliance with the Trash Amendments, the California Regional Water Quality Control Board, San Diego Region (“Regional Board”) issued Order No. R9-2017-0077 (the “Trash Order”) on June 2, 2017. I have reviewed and am familiar with the Trash Order.

8. The Regional Board issued the Trash Order to City as the owner or operator of a municipal separate storm sewer system (“MS4”) and as a co-permittee under

Regional Board Order No. R9-2013-0001, which regulates discharges to and from the MS4.

9. The Trash Order directed City to select between two “tracks” intended to implement a prohibition of trash discharge to surface waters of the state and to report that selection to the Regional Board.

10. Track 1 requires the installation of stormwater treatment control systems (called “Full Capture Systems”), meeting specific design criteria, in all storm drains that capture runoff from developed, high-density residential, industrial, commercial, mixed urban, and public transportation sites, facilities and land uses (called “Priority Land Uses”).

11. Track 2 requires installation of a combination of full capture systems, multi-benefit projects, or other treatment or institutional controls that reduce the same trash load that would be reduced if full capture systems were installed, operated, and maintained for all storm drains that capture runoff from Priority Land Uses.

12. The Trash Order established several deadlines: (1) Select a track and notify the Regional Board in writing of such selection (the “Trash Selection Mandate”) within three (3) months of the date of the Trash Order (September 5, 2017). The Track Selection Mandate is found on page 10 of the Trash Order (Section A.1); (2) if Track 1 is selected, to prepare and submit a map identifying Priority Land Uses, corresponding storm drain networks, locations of proposed full capture systems, and a time schedule for achieving full compliance (Track 1 Implementation Mandates”) within eighteen months of the Trash Order (December 3, 2018). Track 1 Implementation Mandates are found on page 10 of the Trash Order at Section A.2; and (3) if Track 2 was selected, to submit an implementation plan (the “Track 2 Implementation Plan Mandates”). The Track 2 Implementation Plan Mandates are found on pages 10-11 of the Trash Order, Section A.3.

13. Through my employment with City, I am involved in City's activities required to comply with the Trash Order. The activities required to comply with the Trash Order include the following (collectively the "Mandated Activities"):

a. Track Selection Mandates:

- 1.) Identify Priority Land Use areas within City's jurisdiction;
- 2.) Assess whether City has authority to install Full Capture Systems in all Priority Land Use areas;
- 3.) Assess the feasibility of installing Full Capture Systems in Priority Land Use areas;
- 4.) Assess the availability and feasibility of Multi-Benefit Projects and other Treatment or Institutional Controls available to City in Priority Land Use areas;
- 5.) Assess whether alternative land use designations were better suited for implementing Full Capture Systems or alternative trash control requirements;
- 6.) Assess the availability and feasibility of demonstrating Full Capture System Equivalency;

b. Track 1 Implementation Mandates:

- 1.) Prepare and submit a jurisdictional map identifying Priority Land Uses, the corresponding drain network including all storm drain inlets and drainage, proposed full capture system installation locations and associated drainage areas; and
- 2.) Develop and submit a time schedule to achieve full compliance with the Trash Amendments, including interim milestones to full implementation.

c. Track 2 Implementation Plan Mandates:

- 1.) Prepare and submit an implementation plan that describes:
 - i.) the combination of controls selected by the MS4 permittee and the rationale for each selection;
 - ii.) how the combination of controls that would achieve full capture system equivalency;

iii.) how full capture system equivalency will be demonstrated;

iv.) how the implemented controls identified in the trash implementation plans will be monitored and assessed in Jurisdictional Runoff Management Program or Water Quality Improvement Plan Annual Reports;

v.) the proposals by MS4 permittees, if any, to substitute Priority Land Uses with other locations or land uses, provided that the total trash generated in other locations or land uses is equivalent to, or greater than, the total trash generated in the Priority Land Use being substituted; and

vi.) the time schedule to achieve full compliance with the Trash Amendments, including interim milestones to full implementation.

d. Miscellaneous Requirements:

1.) Each MS4 permittee must prepare and submit, no later than eighteen (18) months from the date of the Trash Order, a description of how MS4 permittees will coordinate their efforts to install, operate, and maintain full capture systems, multi-benefit projects, and other controls with Caltrans in significant trash generating areas and/or priority land uses, as applicable.

14. City ultimately selected Track 2.

15. Shortly after the Trash Amendments were issued by the State Board, City began its planning for compliance with the Trash Order that was eventually issued on June 2, 2017. City first incurred costs to comply with the Trash Order in fiscal year 2017-2018.

16. The Trash Order requires City to perform new activities that are unique to local governmental entities, which are not required by federal law.

17. In order to comply with the Trash Order, City has entered into a consulting contract with a third party consultant. I am personally familiar with the terms and conditions of the contract.

18. My staff, at my direction, reviews and approves invoices from the vendors for the services rendered pursuant to such contracts.

19. I have reviewed and I am familiar with the books and records maintained by the City in the ordinary course of business relating to the City's efforts to comply with the Trash Order and the information set forth in this declaration accurately reflects the information contained in those records.

20. The actual and estimated increased costs associated with implementing the Trash Order are detailed in Exhibit A to this Declaration, which are incorporated herein by reference. As detailed in Exhibit A, costs incurred by City exceed \$1,000.

21. To date, City has incurred costs to comply with the Trash Order as follows:

a. Staff and consultant time and costs to undertake the activities described in Paragraph 13.a of this Declaration, relating to selection of the appropriate track. In Fiscal Year 2016-2017, the City incurred \$0 in costs related to the Track Selection mandate requirement. In Fiscal Year 2017-2018, the City incurred \$7,950 in costs related to the Track Selection mandate requirement.

b. Staff and consultant time and costs to undertake the activities described in Paragraph 13.c of this Declaration, relating to preparation of a Track 2 Implementation Plan. In Fiscal Year 2016-2017, the City incurred \$0 in costs related to the Track 2 Implementation Plan Mandates. In Fiscal Year 2017-2018 the City incurred \$45,050 in costs related to the Track 2 Implementation Plan Mandates.

22. The actual and estimated increased costs do not include costs associated with fully implementing City's selected track. The City expects to expend \$54,000 in Fiscal Year 2018-2019 to comply with the Trash Order. This will bring the total amount expended and expected by the City to comply with the Trash Order during Fiscal Years 2016-17 through 2018-19 to \$107,000.

23. I am not aware of any dedicated state or federal funds that are or will be available to pay for the Mandated Activities.

24. The costs associated with implementing the Trash Order do not arise from a direct benefit or service experienced by any individual businesses, property owners, or residents, including people or properties within Priority Land Uses.

25. The costs associated with implementing the Trash Order are study- and plan-related costs that are intended to benefit water quality jurisdiction-wide.

26. The trash control features contemplated by the Trash Order cannot be implemented or tracked through typical refuse collection services.

27. It is not possible to link the costs with any benefits to any individual resident, business, or property owner receives that are distinct from benefits conferred on all persons within City's jurisdiction.

28. I am not aware of any authority to assess a fee to offset these increased costs to perform the Mandated Activities.

29. Other than identified above, I am not aware of any non-local agency funds that are or will be available to pay for the increased costs for performing the Mandated Activities.

30. Other than identified above, the only available source to pay the Mandated Activities are and will be City's general purpose funds.

31. Pursuant to Section 1183.1 of Title 2 of the California Code of Regulations and based on my information and belief, I attest that:

a. the state-mandated costs set forth in this declaration result from an executive order which the County of San Diego, California ("County") is also subject to and under which the County incurred state mandated costs;

b. the City and County agree on all issues of this Test Claim; and

c. the City and County have designated one person to act as the sole representative for all claimants.

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

Executed this 29th day of August, 2018, in San Juan Capistrano, California.



Benjamin Siegel

EXHIBIT A

Fiscal Year	Program Development Consultant / Staff (Track Selection)	Program Development Consultant/ Staff (Track 2 Imp. Plan)	Development of Alternative Land Use TGRs	Annual Monitoring & Reporting	Enhanced Catch basin Cleaning	Procurement of (5) Hydrodynamic Separators (HDS)	HDS Cleaning Costs (\$1,755 per event, 2x per year)
FY 17/18	\$7,950	\$45,050					
FY 18/19		\$54,000					
FY 19/20			\$25,000	\$20,000	\$3,0810		
FY 20/21			\$25,000	\$20,000	\$3,0810	\$1,000,000	\$3,510
FY 21/22			\$25,000	\$20,000	\$3,0810		\$3,510
FY 22/23				\$20,000	\$3,0810	\$1,000,000	\$7,020
FY 23/24				\$20,000	\$3,0810		\$7,020
FY 24/25				\$20,000	\$3,0810	\$1,000,000	\$10,530
FY 25/26				\$20,000	\$3,0810		\$10,530
FY 26/27				\$20,000	\$3,0810	\$1,000,000	\$14,040
FY 27/28				\$20,000	\$3,0810		\$14,040
FY 28/29				\$20,000	\$3,0810	\$1,000,000	\$17,550
FY 29/30				\$20,000	\$3,0810		\$17,550
Subtotal		\$107,000	\$75,000	\$220,000	\$338,910	\$500,000	\$105,300
Grand Total				\$1,346,210			

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**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION 2015-0019**

AMENDMENT TO THE WATER QUALITY CONTROL PLAN FOR OCEAN WATERS OF CALIFORNIA TO CONTROL TRASH AND PART 1 TRASH PROVISIONS OF THE WATER QUALITY CONTROL PLAN FOR INLAND SURFACE WATERS, ENCLOSED BAYS, AND ESTUARIES OF CALIFORNIA

WHEREAS:

1. The State Water Resources Control Board (State Water Board) adopted the Water Quality Control Plan for the Ocean Waters of California (Ocean Plan) in 1972 and last revised it in 2012.
2. On March 15, 2011, the State Water Board adopted the California Ocean Plan Triennial Review Workplan by [Resolution 2011-0013](#), directing State Water Board staff to review the high priority issues identified in the workplan, including the control of plastic debris and other trash, and make recommendations for any necessary changes to the Ocean Plan.
3. Trash in the State's surface waters is a pervasive problem and adversely affects numerous beneficial uses including, but not limited, to wildlife habitat, marine habitat, preservation of rare and endangered species, fish migration, navigation, and water contact and non-contact recreation.
4. Studies show that trash is predominantly generated on land and then transported to a receiving water body. The main transport pathway of trash to receiving water bodies is through storm water transport.
5. In accordance with Clean Water Act section 303(d), the 2010 Integrated Report identifies seventy-three water segments as impaired for trash or debris in California.
6. Water quality objectives adopted by the nine Regional Water Quality Control Boards (referred to collectively as Regional Water Boards and individually as Regional Water Board) vary for trash. The State Water Board and Regional Water Boards implement trash controls through various means, including storm water permits, adopting and implementing total maximum daily loads (TMDLs), and waste discharge requirements. Waters continue to be impaired by trash, the regulatory control approaches vary, and there is a need for statewide uniformity to control trash.
7. The State Water Board is authorized to revise and adopt water quality control plans in accordance with the provisions of Water Code sections 13240 through 13244 for waters for which water quality standards are required by the federal Clean Water Act. (Water Code § 13170.)

8. The goal of the Amendment to the Ocean Plan and Part I Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan) (collectively referred to as the Trash Amendments or individually as Trash Amendment) is to address the impacts of trash to the surface waters of California through the establishment of a statewide narrative water quality objective and implementation requirements to control trash, including a prohibition against the discharge of trash.
9. The Staff Report developed for the Trash Amendments, titled “Proposed Final Staff Report, including the Substitute Environmental Documentation” is a detailed technical document that analyzes and describes the necessity and rationale for the development of the statewide water quality objective and the implementation plan to control trash.
10. Pursuant to Water Code section 13170, a water quality control plan adopted by the State Water Board supersedes a water quality control plan adopted by a Regional Water Board, to the extent any conflict exists for the same waters. There are no conflicts between the Trash Amendments and any existing water quality control plan.
11. The Trash Amendments apply to all surface waters of the State, with the exception of those waters within the jurisdiction of the Los Angeles Regional Water Board where trash or debris TMDLs are in effect prior to the effective date of the Trash Amendments.
12. The water quality objective shall be implemented through the prohibition of discharge and other implementation requirements through permits issued pursuant to section 402, subsection (p), of the Clean Water Act, waste discharge requirements, or waivers of waste discharge requirements.
13. In accordance with Water Code section 13241, in establishing the narrative water quality objective for trash, the State Water Board considered, as discussed more fully in the Staff Report (at Section 9 and Appendix C), the applicable factors in establishing the narrative water quality objective for trash: the past, present, and probable future beneficial uses of surface waters that can be impacted by trash; environmental characteristics of these waters; water quality conditions that could reasonably be achieved through a coordinated control effort, and economic considerations. Adoption of the Trash Amendments is unlikely to affect housing needs or the development or use of recycled water.
14. In developing, considering, and adopting the Trash Amendments, the State Water Board complied with the procedural requirements contained in the regulations applicable to the State Water Board’s certified exempt regulatory programs to comply with the California Environmental Quality Act (CEQA) (23 Cal. Code Regs. §§ 3720-3780):
 - a. On June 26, 2007, the State Water Board held a public scoping meeting in San Francisco regarding a potential amendment to the Ocean Plan to address trash and solicited comments from the public and public agencies on the scope of the project, alternatives, reasonably foreseeable methods of compliance, and the content of the environmental analysis to be considered in the development of the project.
 - b. On October 7 and 14, 2010, the State Water Board sought public consultation in Rancho Cordova and Chino, respectively, regarding a statewide policy for controlling trash in waters of the state, and solicited comments on the scope and content of the environmental information to be considered in the development of the project.

- c. The State Water Board convened a Public Advisory Group composed of ten stakeholders representing municipalities, California Department of Transportation, industry, and environmental groups. The Public Advisory Group met on July 26, 2011, August 30, 2011, October 12 and 13, 2011, May 22, 2012, August 13, 2012, and March 6, 2013 to provide comments on, and feedback to, the development of the proposed Trash Amendments and Draft Staff Report.
 - d. In March, April, and May 2013, State Water Board held fourteen focused stakeholder meetings to provide an overview of the development of the proposed Trash Amendments and to receive feedback on key issues prior to the development and distribution of the proposed Trash Amendments and the Draft Staff Report.
 - e. On June 10, 2014, the State Water Board provided notice to members of the public and public agencies of the opportunity to submit written comments on the proposed Trash Amendments and the Draft Staff Report; the written comment period; and the dates for the public workshop and public hearing to receive oral comments and evidence regarding the proposed Trash Amendments.
 - f. During the written public comment period, the State Water Board conducted a public workshop on July 16, 2014, and a public hearing on August 5, 2014, to solicit public comment and testimony regarding the proposed Trash Amendments and Draft Staff Report.
 - g. The State Water Board provided written responses to seventy-six written public comment letters timely received and three written comment letters received after the comment deadline.
 - h. Based on the oral and written comments, the State Water Board revised the proposed Trash Amendments and Draft Staff Report. On December 31, 2014, the State Water Board distributed and posted the proposed Final Trash Amendments and proposed Final Staff Report.
 - i. On February 12, 2015, the State Water Board provided a forty-five day notice to the public that the State Water Board would hold a public meeting to consider the adoption of the proposed Final Trash Amendments and approval of the Final Staff Report.
15. The Staff Report satisfies the substantive requirements applicable to the State Water Board's certified exempt regulatory programs to comply with CEQA.
- a. The Staff Report contains a description of the project, a completed environmental checklist, an identification of any significant or potentially significant adverse impacts of the project; an analysis of reasonable alternatives to the project and mitigation measures; and an environmental analysis of the reasonably foreseeable methods of compliance, including a reasonable range of environmental, economic, and technical factors, population and geographic areas. (23 Cal. Code Regs. § 3777, subds. (a)-(c).)

- b. The State Water Board is the lead agency for the proposed Trash Amendments. In preparing the Staff Report's environmental analysis pertaining to the reasonably foreseeable methods of compliance, the State Water Board is "not required to conduct a site-specific project level analysis of the methods of compliance, which CEQA may otherwise require of those agencies who are responsible for complying with the plan or policy when they determine the manner in which they will comply." (Id. § 3777, subd. (c).) Dischargers that have the Trash Amendment's implementation requirements incorporated into their respective permits will be required to select the specific method or methods to employ to achieve compliance. Project-level analysis is expected to be conducted by the appropriate public agency prior to implementation of project-specific methods of compliance for the proposed Trash Amendments. The environmental analysis in the Staff Report assumes that the project specific methods of compliance would be designed, installed, and maintained following all applicable state and local laws, regulations, and ordinances.
 - c. The Final Substitute Environmental Documentation consists of the Draft Staff Report dated June 10, 2014, the Proposed Final Staff Report, comments and responses to comments on the Draft Staff Report and the proposed Trash Amendments, the environmental checklist, and this resolution. (Id. §§, 3777, 3779.5, subd. (b).)
16. Pursuant to Health and Safety Code section 57004, the Draft Staff Report and proposed Trash Amendments underwent external scientific peer review through an interagency agreement with the University of California. Peer review was solicited on March 10, 2014 and completed on July 14, 2014.
 17. Adoption of the Trash Amendments is consistent with the State Antidegradation Policy (State Water Board [Resolution 68-16](#)) and the federal Antidegradation Policy (40 CFR § 131.12).
 18. The Trash Amendments do not become effective until approved by the State Office of Administrative Law (OAL) and the Trash Amendments' narrative water quality objective for trash does not become effective until approved by the United States Environmental Protection Agency (U.S. EPA).

THEREFORE, BE IT RESOLVED THAT:

1. In accordance with California Code of Regulations, title 23, section 3779.5, subdivision (c), and California Code of Regulations, title 14, section 15091, subdivision (a)(2), the State Water Board hereby finds there are potentially significant impacts to air quality, biological resources, cultural resources, geology/soil resources, hazards and hazardous materials, hydrology/water quality, noise and vibration, public services, transportation/traffic, and utilities/ service systems and potentially cumulative significant impacts related to noise and vibration, air quality, transportation and circulation, utilities and service systems, and greenhouse gas emissions by some of the reasonably foreseeable methods of compliance. As discussed in the Staff Report, potentially significant impacts to air quality and potentially cumulative significant impacts related to noise and vibration, air quality, transportation and circulation, utilities and service systems, and greenhouse gas emissions may arise from the installation and maintenance of one or more the different types of the full capture systems and street sweeping. Also as discussed in the Staff Report, potentially significant impacts

to biological resources, cultural resources, geology/soil resources, hazards and hazardous materials, hydrology/water quality, noise and vibration, public services, transportation/traffic, and utilities/ service systems may arise from the installation and maintenance of one or more the different types of the full capture systems. The Staff Report explains that measures are available for each method of compliance that, if implemented, can reduce or eliminate those impacts. Selection of the methods of compliance and mitigation measures are not under the control or discretion of the State Water Board, and to the extent they are within the responsibility and jurisdiction of other public agencies, such public agencies will be required to comply with CEQA in approving the methods of compliance. Such agencies have the ability to implement the mitigation measures, can and should implement the mitigation measures, and are required under CEQA to consider whether to implement the mitigation measures when the agencies undertake their own evaluation of impacts associated with specific activities to comply with the Trash Amendments.

2. The State Water Board hereby approves and adopts the Final CEQA Substitute Environmental Documentation, which was prepared, where appropriate, in accordance with the provisions applicable to the State Water Board's certified exempt regulatory programs, California Code of Regulations, title 23, sections 3777 through 3779.
3. After considering the entire administrative record, including all oral testimony and comments received at the adoption meeting, the State Water Board hereby adopts the Trash Amendments, which are specifically titled the [Amendment to the Water Quality Control Plan for Ocean Waters of California to Control Trash \(Appendix D of the Staff Report\)](#) and [Part I Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California \(Appendix E of the Staff Report\)](#).
4. The State Water Board directs State Water Board staff, in consultation with the California Stormwater Quality Association, other interested stakeholders, and the Regional Water Boards, to evaluate whether Treatment Controls TC-10, TC-11, TC-12, TC-22, TC-32, and TC-40, as set forth in the New Development and Redevelopment BMPs Handbook (California Stormwater Quality Association, 2003) meet the requirements for certification as "full capture system" as defined in the Trash Amendments and report on same to the State Water Board within six months of the adoption of the Trash Amendments.
5. The State Water Board directs staff, as part of the Stormwater Strategic Initiative, to evaluate strategies to address generation of trash in "hot spots." Staff, at a minimum, shall consider discharges, including but not limited to, from homeless encampments, high-use beaches as defined under Assembly Bill 411, and parks adjacent to waters of the State.
6. The State Water Board directs State Water Board staff, in consultation with the Ocean Protection Council and other governmental agencies and stakeholders, to assess potential performance measures, including receiving water monitoring, for evaluating the environmental outcomes of Trash Amendments implementation.
7. The State Water Board directs State Water Board staff, in conjunction with the Regional Water Boards, to periodically report to the State Water Board on the status of the implementation of the Trash Amendments, at a minimum within three and seven years following the first implementing permit.


8. The State Water Board directs the Los Angeles Water Board to convene a public meeting within a year of the effective date of the Trash Amendments to reconsider the scope of its trash TMDLs, with the exception of the TMDLs for the Los Angeles River and Ballona Creek watersheds, and to consider an approach that would focus municipal separate storm sewer systems (MS4) permittees' trash control-efforts on high-trash generation areas within their jurisdiction.
9. The Regional Water Boards, within eighteen months of the effective date of the Trash Amendments, and for each NPDES MS4 permittee within their respective region subject to either of the Trash Amendments, shall comply with the time schedules contained therein.
10. The State Water Board, within eighteen months of the effective date of the Trash Amendments, and for each NPDES MS4 permittee subject to either of the Trash Amendments, shall comply with the time schedules contained therein.
11. The Executive Director or designee is authorized to submit the Trash Amendments to OAL and the U.S. EPA for review and approval.
12. The Executive Director or designee is authorized to make minor, non-substantive modifications to the language of the Trash Amendments, if OAL determines that such changes are needed for clarity or consistency, and inform the State Water Board of any such changes.
13. The State Water Board directs State Water Board staff, upon approval by OAL, to file a Notice of Decision with the Secretary for Natural Resources and transmit payment of the applicable fee as may be required to the Department of Fish and Wildlife pursuant to Fish and Game Code section 711.4.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 7, 2015.

AYE: Chair Felicia Marcus
 Vice Chair Frances Spivy-Weber
 Board Member Tam M. Doduc
 Board Member Steven Moore
 Board Member Dorene D'Adamo

 NAY: None
 ABSENT: None
 ABSTAIN: None



 Jeanine Townsend
 Clerk to the Board

APPENDIX C: ECONOMIC CONSIDERATIONS FOR THE FINAL AMENDMENT TO THE WATER QUALITY CONTROL PLAN FOR THE OCEAN WATERS OF CALIFORNIA TO CONTROL TRASH AND PART 1 TRASH PROVISIONS OF THE WATER QUALITY CONTROL PLAN FOR INLAND SURFACE WATERS, ENCLOSED BAYS, AND ESTUARIES OF CALIFORNIA

CONTACT: Rafael Maestu, Economist
Office of Research, Planning and Performance
State Water Resources Control Board
Email: Rafael.Maestu@waterboards.ca.gov

Summary and Findings

California communities spend more than \$428 million annually to control trash from entering waters of the state, or \$10.71 per capita. This economic analysis estimates that between \$2.93 and \$7.77 more per resident might need to be spent each year for the next ten years to implement the final Trash Amendments. The economic analysis also finds that communities in the Los Angeles Region implementing a trash and debris Total Maximum Daily Load (TMDL) are spending an average of \$5.3 per resident per year more than communities not implementing a trash or debris TMDL.

This economic analysis provides an estimate of the compliance costs and considers the incremental costs applicable National Pollutant Discharge Elimination System (NPDES) permitted storm water dischargers and other dischargers may need to incur based on the implementation provisions and time schedules in the final Trash Amendments. The NPDES storm water permits addressed in this economic analysis include Municipal Separate Storm Sewer Systems (MS4s) Phase I and Phase II, Department of Transportation (Caltrans), Industrial General Permit (IGP), and the Construction General Permit (CGP).

Two basic methods²⁴ to estimate the incremental cost of compliance were used in this economic analysis. The first method is based on cost of compliance per capita, and the second method is based on land cover.

The estimated incremental annual cost to comply with the requirements of the final Trash Amendments ranged from \$4²⁵ to \$10.67²⁶ per year per capita for MS4 Phase I NPDES permittees and from \$7.77²⁷ to \$7.91²⁸ per year per capita for smaller communities regulated

²⁴ The introduction includes a more detailed description of the methods used in this economic analysis.

²⁵ The estimated incremental cost of \$4.09 is based on a mixture of full capture systems and institutional controls. See Table 18 (\$67 M divided by a population of 16.4 M).

²⁶ The estimated cost is based on all capital expenditures occurring in one single year. See Table 13 (\$176 M divided by a population of 16.4 M).

²⁷ The estimated incremental cost of \$7.77 is based on a mixture of full capture systems and institutional controls. See Table 25 (\$32.9 M divided by a population of 4.2 M).

under MS4 Phase II NPDES permits. For IGP facilities, the estimated compliance cost is \$33.9 million or \$3,671²⁹ per facility. Caltrans currently spends \$52 million on trash control³⁰. To comply with the final Trash Amendments, expenditures by Caltrans are estimated to increase by \$34.5 million in total capital costs and \$14.7 million per year for operation and maintenance of structural controls³¹. A summary of the findings are presented in Table 1 with detailed discussion in body of the economic analysis.

In addition to employing trash control, permittees would need to prepare implementation plans and submit monitoring reports. Cost associated with implementation plans and monitoring and reports were not included in this analysis due to the uncertainty of the costs of implementing these new requirements.

This economic analysis fulfills the requirements of Water Code sections 13170 and 13241, subdivision (d) that require the State Water Board to consider economics when establishing water quality objectives. This economic analysis is not a cost-benefit analysis, but a consideration of potential costs of a suite of reasonably foreseeable measures to comply with the final Trash Amendments.

²⁸ The estimated cost is based on all capital expenditures occurring in one single year. See Table 21 (\$33.5 M divided by a population of 4.2 M).

²⁹ See Table 28 and Table 30. Total cost divided by number of facilities.

³⁰ McGowen, Scott. California Department of Transportation. Letter to Diana Messina, State Water Resources Control Board. November 7, 2014.

³¹ See Table 30.

Table 1. Summary of Estimated Compliance Costs of the Final Trash Amendments for NPDES Storm Water Permits

NPDES Storm Water Permit	Number of Entities Accessed	Population /Size	Baseline of Current Trash Control Costs: Total and Per Capita Per Year	Estimated Incremental Cost for Track 1: Total and Per Capita Per Year	Estimated Incremental Cost for Track 2: Total and Per Capita Per Year (at Year 10)
MS4 Phase I (Based on per capita estimate approach)	193 communities	16,498,556	<p>\$160 M Total (\$9.7 per capita)</p> <p>\$22 M for Full Capture System costs (\$1.36 per capita)</p> <p>\$138 M Institutional Controls (\$8.34 per capita)</p>	<p>Highest Annual Incremental Cost^a:</p> <p>\$65 M (total)</p> <p>\$3.95 (per capita)</p> <p>Total Capital Cost^b:</p> <p>\$123M (total)</p> <p>\$7.47 (per capita)</p> <p>Operation & Maintenance:</p> <p>\$52.8 M per year</p> <p>\$3.20 (per capita)</p>	<p>\$67,481,061</p> <p>\$4.09 per capita</p>
MS4 Phase II (Based on per capita estimate approach)	148 communities	4,310,345	<p>\$49 M Total (\$11.53 per capita)</p> <p>\$6.8 M for Full Capture System (\$1.62 per capita)</p> <p>\$42 M Institutional Controls (\$9.91 per capita)</p>	<p>Highest Annual Incremental Cost^a:</p> <p>\$12.4 M (total)</p> <p>\$2.93 (per capita)</p> <p>Total Capital Cost^b:</p> <p>\$23.4M</p> <p>\$5.54 (per capita)</p> <p>Operation & Maintenance:</p> <p>\$10 M per year</p> <p>\$2.37 (per capita)</p>	<p>\$32,922,053</p> <p>\$7.77 per capita</p>
MS4 Phase I and Phase II (Based on Land Coverage Approach)	262,302 acres of developed, high intensity land coverage	20,736,141	<p>\$209 M Total (\$10.1 per capita)</p> <p>\$29 M for Full Capture System (\$1.39 per capita)</p> <p>\$180 M Institutional Controls (\$8.68 per capita)</p>	<p>Highest Annual Incremental Cost^a:</p> <p>\$81 M (total)</p> <p>\$3.93 (per capita)</p> <p>Total Capital Cost^b:</p> <p>\$188.6 M (total)</p> <p>\$9.1 (per capita)</p> <p>Operation & Maintenance:</p> <p>\$80.8 M per year</p> <p>\$3.90 (per capita per year)</p>	Not Estimated

Industrial General Permit	9,251 facilities	N/A	Unknown	\$33.9 M ^d \$3,671 per facility	
Construction General Permit	6,121 facilities	N/A	Unknown	No expected increase	No expected increase
Caltrans	N/A	50,000 lane miles (15,000 centerline miles)	\$80 M per year	Total Capital Cost: \$34.5M Operation & Maintenance: \$14.7 M per year	N/A

^a Annual cost at Year 10 (highest cost year) is assumed to be 10% of the total capital cost plus the total operation and maintenance cost for treatment controls.

^b Total capital costs are incremental total costs to achieve full compliance with the final Trash Amendments.

^c Operation and maintenance costs are annual costs after full installation of all required treatment controls.

^d Since the current baseline costs are unknown, all trash control costs are conservatively assumed to be incremental.

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1. INTRODUCTION

The presence of trash in surface waters, especially coastal and marine waters, is a serious issue in California. The State Water Resources Control Board (State Water Board) is proposing an Amendment to the Water Quality Control Plan for Ocean Waters of California to Control Trash and Part 1 Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California. This economic analysis shall collectively refer to the amendment to control trash and Part 1 Trash Provisions as “Trash Amendments”.³² The final Trash Amendments would amend the Water Quality Control Plans for Ocean Waters of California (Ocean Plan) and be incorporated to the forthcoming Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan). The final Trash Amendments aim to provide statewide consistency for the Water Boards’ regulatory approach to protect aquatic life and public health beneficial uses, and reduce environmental issues associated with trash in state waters, while focusing limited resources on high trash generating areas.

The final Trash Amendments would apply to all surface waters of the state: ocean waters, enclosed bays, estuaries, and inland surface waters, with the exception of those waters within the jurisdiction of the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) with trash or debris TMDLs that are in effect prior to the effective date of the Trash Amendments. The provisions proposed in the final Trash Amendments include six elements: (1) water quality objective, (2) applicability, (3) prohibition of discharge, (4) implementation provisions, (5) time schedule, and (6) monitoring and reporting requirements.

A central element of the final Trash Amendments is a land-use based compliance approach to focus trash control to areas with high trash generation rates. Within this land-use based approach, a dual alternative compliance Track approach is proposed for permitted storm water dischargers (i.e., MS4 Phase I, MS4 Phase II, Caltrans, IGP, and CGP) to implement the prohibition of discharge for trash. Table 2 outlines the proposed alternative compliance Tracks for permitted storm water dischargers. Specifics of the final Trash Amendments are described in Section 2 of the Final Staff Report.

³² The State Water Board intends to amend the Water Quality Control Plan for Enclosed Bays and Estuaries of California to create the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan (ISWEBE Plan). The State Water Board intends that the Part 1 Trash Provisions will be incorporated into the ISWEBE Plan, once it is adopted.

Table 2. Overview of Proposed Compliance Tracks for NPDES Storm Water Permits

	Track 1	Track 2
NPDES Storm Water Permit	MS4 Phase I and II IGP/CGP*	MS4 Phase I and II Caltrans IGP/CGP*
Plan of Implementation	Install, operate and maintain full capture systems in storm drains that capture runoff from one or more of the priority land uses/facility/site.	Implement a plan with a combination of full capture systems, multi-benefit projects, institutional controls, and/or other treatment controls to achieve full capture system equivalency.
Time Schedule	10 years from first implementing permit but no later than 15 years from the effective date of the Trash Amendments.**	10 years from first implementing permit but no later than 15 years from the effective date of the Trash Amendments.**
Monitoring and Reporting	Demonstrate installation, operation, and maintenance of full capture systems and provide mapped location and drainage area served by full capture systems.***	Develop and implement set of monitoring objectives that demonstrate effectiveness of the selected combination of controls and compliance with full capture system equivalency.***

* IGP/CGP permittees would first demonstrate inability to comply with the outright prohibition of discharge of trash.

** MS4 permittees designated after the effective date of the implementing permit would be in full compliance ten years after the date of designation. Where a permitting authority makes a determination that a specific land use or location generates a substantial amount of trash, the permitting authority has the discretion to determine a time schedule with a maximum of ten years. IGP/CGP permittees would demonstrate full compliance with deadlines contained in the first implementing permit.

*** No trash monitoring requirements for IGP/CGP, however, IGP/CGP permittees would be required to report trash controls.

This economic analysis provides an estimate of the compliance costs and considers the incremental costs permitted storm water dischargers and other dischargers may need to incur based on the implementation provisions and time schedules proposed in the final Trash Amendments. The economic analysis was conducted under a set of assumptions identified in each section. All costs are expressed in February 2014 dollars, unless otherwise noted.

a. Data Sources, Methodology and Assumptions, Limitations and Uncertainties

This analysis applies general economic principles and generally accepted methods of economic analysis. This section provides an overview of the data sources, a description of the methodology used, the assumptions and the limitations of the analysis.

Data Sources

The data used in this analysis has been obtained from secondary sources and previous studies conducted by universities and other organizations. All data and reports used are publicly available.

Data has been obtained primarily from three sources:

- Cost Considerations conducted for trash and debris TMDLs by the Los Angeles Water Board.
- Studies and surveys conducted by:
 - Kier Associates. The Cost of West Coast Communities of Dealing with Trash, Reducing Marine Debris. September 2012. Prepared for United States Environmental Protection Agency (U.S. EPA).
 - Kier Associates. Waste in Our Water: The Annual Cost to California Communities of Reducing Litter that Pollutes Our Waterways. August 2013. Prepared for the National Resources Defense Council (NRDC).
 - Black & Veatch. Quantification Study of Institutional Measures for Trash TMDL Compliance. November 2012. Prepared for the City of Los Angeles.
- Office of Water Programs, California State University. NPDES Stormwater Cost Survey. January 2005. Prepared for State Water Board.

The economic analysis used Federal 2010 Census data for estimates of land use, population and median household income. For other social and economic information, we relied on the information publicly released by the Demographic Research Unit of the California Department of Finance³³.

We compiled the available cost data and analyzed it by categories of costs³⁴. Average and per capita costs were computed and tallied for each category based on the size of the communities. To control for anomalous spending patterns in communities, total annual expenditures were divided by total populations to yield weighted averages (within each population size group).

Methodology and Assumptions

This economic analysis provides a summary overview of the costs associated with reasonably foreseeable means of compliance permittees may select to be in compliance with the final Trash Amendments. This economic analysis is conducted at the macro level to assess the estimated overall impact of the final Trash Amendments. It does not specify the compliance cost for specific permittees. A more detailed analysis would be needed to estimate costs at the micro or project-specific level for each individual permittee.

With respect to MS4s Phase I and Phase II permittees, this economic analysis uses data gathered from individual municipalities regarding current trash control expenditures to establish the baseline of control costs. The economic analysis considers two potential methods to estimate compliance costs with the final Trash Amendments. The first method estimates the current expenditures of trash control per capita and the per capita costs to comply with the final Trash Amendments. The second method estimates the per acre cost for high intensity land cover, e.g., proxy for priority land uses.

The cost factors were used to estimate the potential cost of compliance with the final Trash Amendments to MS4 Phase I and Phase II permittees based on respective population sizes and urban areas classified as high intensity. The estimated incremental compliance costs represent the cost of the additional level of trash control above and beyond the current level of costs

³³ The Economic Research Unit prepares economic forecasts and analyses of various economic developments, advises state departments and local government agencies, and provides economic information to the public. Available at: http://www.dof.ca.gov/research/economic_research_unit/

³⁴ Categories of cost include, street sweeping, storm drain cleaning and maintenance, storm water capture devices, manual cleanup and public education.

incurred by MS4 Phase I or Phase II permittees subject to the final Trash Amendments. To avoid the disproportionate influence on the overall average cost of large communities, compliance costs were estimated based on population size group.

For IGP permittees, we assumed that smaller facilities would choose to comply with the final Trash Amendments implementing institutional controls rather than full capture systems. It is likely that only larger facilities would choose to install full capture systems. We identified two groups based on facility size. For Track 1 analysis, we estimated similar installation and annual operation and maintenance costs as the municipalities. For Track 2 analysis, we estimated the costs of institutional controls to include a \$500 initial training and an annual cost of \$300 in other measures. This approach is described in more detail in Section 7.

For Caltrans, the final Trash Amendments focus trash control to significant trash generating areas within its jurisdiction. Currently, there is a lack of information about the specific locations where additional trash control will be implemented. Using a GIS analysis, we made the conservative assumption that significant trash generating areas could be approximated using a percentage of Caltrans facilities located within urban areas. We estimated similar installation and annual operation and maintenance costs as the municipalities. This approach is described in more detail in Section 8.

Estimates Based on Costs per Capita

Humans are the only source of trash as defined in the final Trash Amendments. It is reasonable to assume that the amount of trash generated is directly proportional to the population of each community. Areas with high trash generation rates are influenced by land use type and population density. Factors to take into consideration when evaluating cost of compliance are the size of the community, population density and land use types³⁵.

To estimate the potential incremental costs of compliance with the final Trash Amendments for MS4 Phase I and Phase II permittees not included in the Los Angeles Region, the average annual per capita cost of implementing full capture systems (Track 1) is estimated using the current average per capita annual cost of areas that are already in compliance with the trash and debris TMDLs within the Los Angeles Region. Per capita cost factors were applied to the entire population in each MS4 Phase I and Phase II. By using this method, the potential cost of compliance with the final Trash Amendments is likely overestimated since not all members of the population would be living in high trash generating areas. At the same time, this method is more accurate at estimating the cost of complying with institutional controls that are proportional to the population size group. To address this potential source of error, we developed specific cost estimates for each MS4 Phase I and Phase II by population size group. This should mitigate for potential variability, such as an observed proportional relationship between high trash generating land uses and MS4 Phase I and Phase II population size groups³⁶.

Estimates Based on Land Uses

Trash generation rates can vary by land use, therefore a second method was used to estimate the compliance cost of a full capture system based on land coverage³⁷. The number of storm

³⁵ Available land coverage data was used in proxy of land use information. See Section 6 of the Economic Analysis.

³⁶ See Section 4(b)(i) for a discussion of high density residential areas in proportion to population.

³⁷ Land cover data was utilized as a proxy to predictively identify priority land uses subject to the final Trash Amendments. The analysis assumes that priority land uses correlates with land cover information. This assumption may underestimate the total area subject to compliance with the final Trash Amendments.

drains per acre varies, depending on the type of land use (e.g., high density residential, commercial, mixed urban, and public transportation stations).

Land coverage data was used to calculate the number of storm drains within each segmented road and land cover. Information on land coverage specific for each specific community regulated under an MS4 Phase I and Phase II permit is not readily available. A total statewide number is estimated based on land coverage of high intensity³⁸.

This method is the most accurate method to estimate the cost of implementing full capture systems (Track 1)³⁹. Using land coverage to estimate the total cost of compliance focuses on the actual priority land use area that would be impacted and excludes other low density populated areas. This methodological approach may reduce the error generated when using per capita estimates on large communities with large populations and proportionally low developed density. This method, however, may overestimate costs by including high intensity land coverage that is not part of an MS4. Since the final Trash Amendments define priority land uses based on the different types of land uses, using land coverage for the analysis may be underestimating the area subject to trash controls.

Limitations and Uncertainties

The economic analysis estimates the potential cost of compliance following two methodologies. The two selected methods have advantages and limitations. The first method is based on average cost per capita and may overestimate the total cost of compliance by assuming that all populations in each community will bear the cost of implementing full capture systems. The second method is based on area defined as developed, high-intensity land coverage, which is assumed to be a proxy for priority land uses as defined in the final Trash Amendments. The analysis, based on cost per capita, would provide best estimates for small and medium size communities with a smaller ratio of resident per acre of high density residential; however this may inflate the total cost for large communities with a small acreage of low density residential areas or communities with an even acreage range of low to high density residential areas. This method is more accurate to estimate the cost of complying with institutional controls that are proportional to the population size group, but this method is less accurate to estimate the cost of implementing full capture systems. Using both methods of analysis would help minimize the potential error in the estimates inherent to each method individually.

Assumption Regarding Compliance Schedules

The final Trash Amendments provide ten years from the first implementing permit for certain permittees to achieve full compliance⁴⁰. Cost estimates for compliance in this economic analysis include the operational costs of treatment and institutional controls. These cost estimates assume a 10% per year expenditure of capital cost in order to achieve full implementation in ten years.

³⁸ USGS Multi-Resolution Land Characteristics Consortium Land Cover Data 2006. Available at: http://www.mrlc.gov/nlcd06_leg.php

³⁹ It would be less accurate when estimating the cost of implementing Track 2, because means of compliance through Track 2 has high diversity with available trash controls. Some institutional trash control options, such as education, are not simply relatable to land use area in contrast to locations of full capture systems.

⁴⁰ The final Trash Amendments include a 15-year cap, so if a Water Board delays in adopting or reissuing, permittees may not have the full ten years to comply.

b. Organization of This Economic Analysis

The economic analysis is organized as follows. Sections 1, 2, and 3 describe the permitted storm water dischargers subject to the final Trash Amendments and their current trash control expenditures that are used as the baseline for the remainder of the economic analysis. Sections 4 and 5 estimate the potential incremental costs for MS4 Phase I and II permittees based on cost per capita. Section 6 estimates the potential incremental costs of compliance based on land coverage for MS4 Phase I and II permittees implementing full capture systems. Section 7 estimates the potential costs for facilities regulated under the IGP. Section 8 estimates the potential costs for Caltrans. Finally, Section 9 includes information on other dischargers subject to the final Trash Amendments. A summary of the conclusions reached in each section is stated at the outset of each section, for the convenience of the reader.

2. PERMITTEES SUBJECT TO THE FINAL TRASH AMENDMENTS

One of the main transport mechanisms of trash to receiving waters is through the storm water system. The final Trash Amendments therefore focus on trash control by requiring that NPDES storm water permits, specifically the MS4 Phase I and Phase II Permits, Caltrans Permit, the CGP, and the IGP, to contain implementation provisions that require permittees to comply with the prohibition of discharge. These provisions focus on trash control in the locations with high trash generation rates, in order to maximize the value of limited resources spent on addressing the discharge of trash into state waters.

As of August 6, 2013, the Water Boards reported⁴¹ 16,996 storm water facilities regulated under the Storm Water Construction Facilities, Storm Water Industrial Facilities, and Storm Water Municipal NPDES Permits (Table 3).

Table 3. Facilities and Municipalities Regulated Under the Storm Water Permitting Program

Regional Water Board	Construction	Industrial	Municipal (Phase I and Phase II)	Total
1	179	337	14	538
2	1,069	1,316	109	2,494
3	457	401	45	903
4	1,193	2,683	100	3,976
5F	554	453	25	1,032
5R	173	198	3	374
5S	887	1,094	67	2,048
5 all.	1,614	1,745	95	3,454
6A	72	40	5	117
6B	307	190	5	502
6 all.	379	230	10	619
7	253	172	19	444
8	1,136	1,583	62	2,781
9	924	784	79	1,787
TOTAL	7,204	9,251	532	16,996

a. MS4 Phase I and Phase II Permits

The State Water Resources Control Board and Regional Water Quality Control Board's (collectively, the Water Boards) Municipal Storm Water Permitting Program regulates storm water discharges from MS4s. Storm water is runoff from rain or snow melt that runs off surfaces such as rooftops, paved streets, highways or parking lots and can carry with it trash. The runoff

⁴¹ Water Boards' Fiscal Year 2012-2013 Performance Report released on September 2013. Available at: http://www.waterboards.ca.gov/about_us/performance_report_1213/regulate/21200_npdes_sw_facilities.shtml

with trash can then drain directly into a local stream, lake or bay. The MS4⁴² permits are issued in two categories or phases: MS4 Phase I and MS4 Phase II.

Some permittees have provisions specific to the control of trash. For example, the San Francisco Bay Municipal Regional Stormwater Permit requires discharges to meet water quality objectives and ensure the protection of the beneficial uses of receiving waters and their associated habitats. Permittees must demonstrate compliance with trash-related receiving water limitations through implementation of structural controls and institutional controls to reduce trash loads from MS4s. The San Francisco Bay Water Board set load reductions for trash from storm water discharges at 40% by 2014.

In the Los Angeles Region, fifteen TMDLs were adopted for trash and debris by either the Los Angeles Water Board or U.S. EPA. The Los Angeles Water Board's trash and debris TMDLs set the numeric target for trash in the applicable water bodies to zero, as derived from the water quality objective in the basin plans. The TMDLs have all also defined trash to be "man-made litter," as defined by the California Government Code (§ 68055.1(g)). Implementation plans vary slightly but are mostly based on phased percent reduction goals that can be achieved through discharge permits, best management practices (BMPs), and structural controls.

In this economic analysis, the communities regulated under the MS4 NPDES program have been grouped based on factors such as size, land use zones, and population.

b. California Department of Transportation

Caltrans is responsible for the design, construction, management, and maintenance of the state highway system, including freeways, bridges, tunnels, Caltrans' facilities, and related properties. Caltrans is subject to the permitting requirements of CWA section 402(p). Caltrans' discharges consist of storm water and non-storm water discharges from state owned rights-of-way.

Before July 1999, discharges from Caltrans' MS4 were regulated by individual NPDES permits issued by the Regional Water Boards. On July 15, 1999, the State Water Board issued a statewide permit (Order No. 99-06-DWQ) which regulated all discharges from Caltrans MS4s, maintenance facilities and construction activities. On September 19, 2012, the Caltrans' permit was re-issued (Order No. 2012-0011-DWQ) and became effective on July 1, 2013.

Caltrans' System-Wide Management Program describes the procedures and practices used to reduce or eliminate the discharge of pollutants to storm drainage systems and receiving waters. A revised System-Wide Management Program must be submitted to the State Water Board for approval by July 1, 2014.

c. Permitted Storm Water Industrial and Construction Facilities

Under the industrial program, the State Water Board issues an NPDES Industrial General Permit to 9,200 dischargers associated with ten broad categories of industrial activities (Order No. 97-03-DWQ). The permit also requires that dischargers develop a Storm Water Pollution Prevention Plan (SWPPP) and a monitoring plan. Through the SWPPP, dischargers are

⁴² **Municipal Stormwater Phase I Facilities:** The Municipal Storm Water Permits regulate storm water discharges from MS4s. Under Phase I, which began in 1990, the Water Boards have issued NPDES MS4 permits to permittees serving populations greater than 100,000 people. Many of these permits are issued to a group of co-permittees encompassing an entire metropolitan area. These permits are reissued as the permits expire.

Municipal Stormwater Phase II Facilities: Under Phase II, the State Water Board adopted a General Permit for the Discharge of Storm Water from Small MS4s (WQ Order No. 2003-0005-DWQ) to provide permit coverage for smaller municipalities (10,000 to 100,000 people), including non-traditional small MS4s which are governmental facilities such as military bases, public campuses, prisons and hospital complexes.

required to identify sources of pollutants, and describe the means to manage the sources to reduce storm water pollution. For the monitoring plan, facility operators may participate in group monitoring programs to reduce costs and resources. The regulated industrial sites by regional water board are presented in Table 4.

Table 4: Facilities Regulated under the Storm Water Industrial and Construction Program (as of June 30, 2013)

Regional Water Board	Industrial Storm Water Facilities	Construction Storm Water Facilities
1	334	134
2	1,319	922
3	396	391
4	2,689	1,072
5	1,721	1,341
6	227	313
7	172	219
8	1,573	892
9	770	835
TOTAL	9,201	6,121

CGP permittees are already required to comply with a prohibition of debris discharge from construction sites⁴³. Although current costs for trash control by CGP permittees are unknown, there is no expected increase of costs as a result of the final Trash Amendments.

d. Other Facilities and Activities Subject to the Proposed Trash Amendments

The final Trash Amendments include a prohibition of discharge for discharges not regulated under NPDES permits, waste discharge requirements (WDRs) or waivers of WDRs. The prohibition also applies to the discharge of preproduction plastic by manufacturers of preproduction plastics, transporters and users of preproduction plastics to surface waters of the state.

Also, the final Trash Amendments include a provision allowing the Water Boards to require trash controls in areas or facilities that may generate trash, such as high usage campgrounds, picnic areas, beach recreation areas, or marinas.

Due to the uncertainty surrounding the activities and facilities potentially subject to these requirements, these groups were not included in the economic analysis.

⁴³ State Board Action 2009-0009-DWQ amended by 2010-0014-DWQ & 2012-0006-DWQ. Prohibition III. D. page 21. Available at:

http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo2009_0009_dwq.pdf
Debris is defined as "Litter, rubble, discarded refuse, and remains of destroyed inorganic anthropogenic waste."

3. CURRENT TRASH CONTROL EXPENDITURES

Communities in California spend approximately \$428 million per year to combat and cleanup trash, which is \$10.71 per resident⁴⁴. Communities within the jurisdiction of the Los Angeles Water Board are already complying with trash and debris TMDLs, and they are currently spending⁴⁵ \$15.04 on average per resident per year to do so. This is 55% higher than the communities not implementing trash or debris TMDLs⁴⁶.

Caltrans spends approximately \$80 million a year on “litter removal” (i.e., trash control), or approximately \$1,600 per lane-mile⁴⁷.

Specific information about the current costs that IGP permittees incur to control trash is unknown. CGP permittees are already required to comply with a prohibition of debris discharge from construction sites⁴⁸, so though current costs for trash control by CGP permittees are unknown, they are not expected to increase as a result of the f Trash Amendments.

a. Summary of Existing Trash Control Studies

In 2012, Kier Associates published a study⁴⁹ for U.S. EPA to quantify the overall costs of managing trash. The study found that, on average, small and medium West Coast communities (in California, Oregon and Washington) spend at least \$14 per year per resident in trash management and marine debris reduction efforts. The study concluded that the largest cities did not enjoy much in the way of “economies of scale”. The largest cities are spending, conservatively, \$13 per year per resident on trash management and marine debris reduction efforts.

In August 2013, NRDC released another study⁵⁰ (NRDC Study) assessing the annual cost to California communities of reducing litter that pollutes waterways. The NRDC Study is based on a direct survey of 221 randomly selected communities. The NRDC Study found that California communities spend \$428,400,000 each year to combat and clean up litter and to prevent it from ending up in the state’s rivers, lakes, canals and oceans. The NRDC Study indicated a large disparity in the annual average compliance cost per capita ranging between \$8.94 and \$18.33 per resident to manage litter (Table 5). The annual average statewide spending was \$10.71 per resident (Figure 1). The highest reported expenditure was the City of Del Mar in San Diego County with an average of \$71 per resident.

⁴⁴ Kier Associates. 2013. Waste in Our Water: The Annual Cost to California Communities of Reducing Litter That Pollutes Our Waterways. Prepared for NRDC. Available at: http://docs.nrdc.org/oceans/files/oce_13082701a.pdf, page 19.

⁴⁵ Not including costs associated with beach cleanups specific to coastal communities.

⁴⁶ Communities not implementing trash or debris TMDL are spending an average of \$9.68 per resident per year.

⁴⁷ See fn. 32, *ante*.

⁴⁸ State Board Action 2009-0009-DWQ amended by 2010-0014-DWQ & 2012-0006-DWQ. Prohibition III. D. page 21. Available at: http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo2009_0009_dwq.pdf. Debris is defined as “Litter, rubble, discarded refuse, and remains of destroyed inorganic anthropogenic waste.”

⁴⁹ Kier Associates. 2012. The Cost to West Coast Communities of Dealing with Trash, Reducing Marine Debris. Prepared for U.S. EPA, Region 9. Available at: <http://www.epa.gov/region9/marine-debris/cost-w-coast-debris.html#report>

⁵⁰ Kier Associates. 2013. Waste in Our Water: The Annual Cost to California Communities of Reducing Litter That Pollutes Our Waterways. Prepared for NRDC. Available at: http://docs.nrdc.org/oceans/files/oce_13082701a.pdf

The NRDC Study collected information from 95 communities ranging from 700 residents (Etna in Siskiyou County) to more than 4 million residents (the City of Los Angeles) regarding six categories of litter management:

- Waterway and beach cleanup
- Street sweeping
- Installation of storm water capture devices
- Storm drain cleaning and maintenance
- Manual cleanup of litter
- Public education

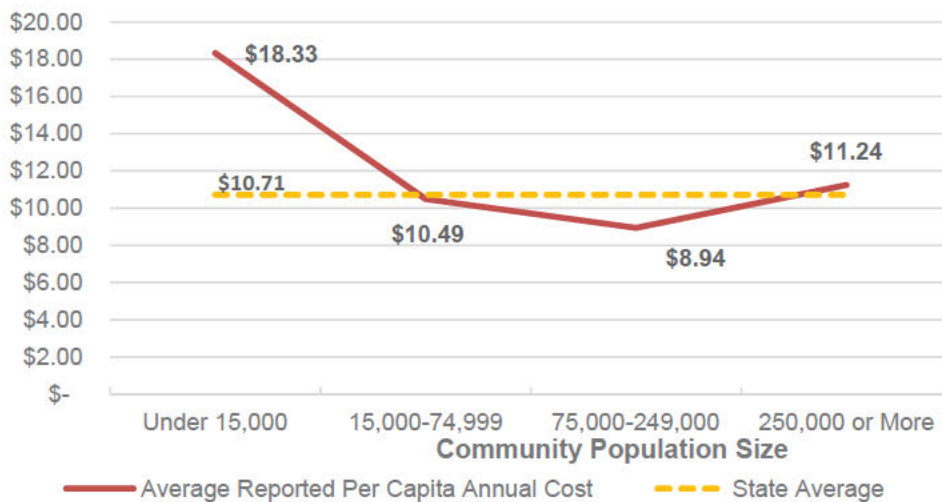
Table 5 and Figure 1 summarize the findings of the NRDC Study.

Table 5. Estimated Current Annual Costs of Trash Control

Community Size	Population Range	Range of Annual Reported Cost	Average Reported Annual Costs	Average Reported Per Capita Cost
Largest	250,000 or more	\$2,877,400-\$36,360,669	\$13,929,284	\$11.24
Large	75,000-249,000	\$350,158-\$2,379,746	\$1,131,156	\$8.94
Midsize	15,000-74,999	\$44,100-2,278,877	\$457,001	\$10.49
Small	Under 15,000	\$300-\$890,000	\$144,469	\$18.33

Source: NRDC Study 2013

Figure 1. Trash Annual Control Costs Per Capita by Community Population Size Group



b. Use of Existing Studies in This Economic Analysis

The final Trash Amendments include an exception for waters of the state where existing trash and debris TMDLs adopted by the Los Angeles Water Board or U.S. EPA are in effect prior to the final Trash Amendments. This may result in some limitations in extrapolating statewide costs directly from the studies described above. To address this limitation, we combined the data in the NRDC Study and the Kier Associates' U.S. EPA Study to calculate a baseline of current costs. The costs were stratified based on community type and size. The summary of the average annual cost per capita for communities outside of the Los Angeles Water Board boundaries by type of trash control type are presented in Table 6.

Table 6. Estimated Current Annual Average Cost Per Capita by Type of Trash Control and by Community Size of MS4 Phase I and Phase II (Not Including Communities within the Los Angeles Region)

MS4 Communities by Population Size (Not Including Los Angeles Communities)	Street Sweeping	Storm Drain Cleaning & Maint.	Storm Water Capture Devices	Manual Cleanup	Public Education	Total Annual Cost Per Capita
>500,000	\$4.19	\$3.28	\$1.19	\$1.27	\$0.65	\$10.41
100,000-500,000	\$3.73	\$2.24	\$1.18	\$0.51	\$0.55	\$7.64
75,000-100,000	\$5.65	\$1.07	\$0.93	\$1.89	\$0.51	\$9.15
50,000-75,000	\$5.33	\$3.15	\$1.53	\$1.57	\$0.42	\$10.20
25,000-50,000	\$3.94	\$2.75	\$1.90	\$1.86	\$0.37	\$9.73
10,000-25,000	\$3.61	\$1.21	\$3.26	\$2.21	\$0.50	\$10.09
0-10,000	\$9.26	\$2.31	\$1.25	\$2.32	\$1.69	\$15.34
All MS4 Communities	\$4.38	\$2.79	\$1.29	\$1.28	\$0.58	\$9.68

Source: NRDC Study 2013

In comparison, the average cost per capita in communities within Los Angeles Water Board boundaries are presented in Table 7.

Table 7. Estimated Current Annual Average Cost Per Capita by Type of Trash Control and by Community Size within the Los Angeles Region

Los Angeles Region MS4 Communities by Population Size	Street Sweeping	Storm Drain Cleaning & Maint.	Storm Water Capture Devices	Manual Cleanup	Public Education	Total Annual Average Cost Per Capita
>500,000	\$6.52	\$1.23	\$2.64	\$4.16	\$1.21	\$15.76
100,000-500,000	\$5.22	\$2.26	\$1.57	\$0.05	\$0.15	\$9.22
75,000-100,000	\$7.62	\$0.26	\$7.92	\$1.19	\$0.39	\$16.79
50,000-75,000	\$6.57	\$0.50	\$6.42	\$1.81	\$0.22	\$14.46
25,000-50,000	\$5.28	\$1.52	\$0.75	\$1.20	\$0.46	\$7.79
10,000-25,000	\$10.58	\$4.62	\$16.00	\$4.10	\$0.85	\$29.84
0-10,000						
All Los Angeles MS4 Communities	\$6.72	\$1.87	\$6.54	\$2.25	\$0.48	\$15.04

Source: NRDC Study 2013

On average, the annual expenditures per capita in communities in the Los Angeles Region are 55% greater than the average cost in the rest of California. The data was collected in 2011 and 2012; as such not all communities were in full compliance with the Los Angeles Water Board's existing trash and debris TMDLs.

Table 8 compares the total estimated annual current expenditures (including those in the Los Angeles Region) for trash control with economic factors such as State Domestic Product, per capita income, and other economic indicators. For example, the City of Los Angeles budget for FY 13-14⁵¹ is \$7.69 billion. The City of Los Angeles' annual total expenditures related to trash control identified in the NRDC Study are \$36,360,669⁵² which represents 0.473% of its annual budget. The City of San Diego⁵³ spends 0.51%⁵⁴ of its annual budget on trash control. At the other end of the spectrum, the City of San Anselmo, with a population of 12,336, expends \$161,000 in trash controls or approximately 1.3% of its annual budget of \$12.4 million⁵⁵.

Caltrans annually spends \$80 million⁵⁶ on litter removal. This is approximately 6.7% of their \$1.2 billion maintenance budget for FY 13-14. Caltrans manages over 50,000 lane-miles of roadways; owns and operates 265 state highways; and owns and manages 12,300 bridges and

⁵¹ City of Los Angeles Budget for FY 13-14. Available at: <http://cao.lacity.org/budget/summary/2013-14BudgetSummaryBooklet.pdf>

⁵² Kier Associates. Waste in Our Water. Appendix A, page XVI, Table 13.

⁵³ City of San Diego. Proposed 2014 Budget. Available at: <http://www.sandiego.gov/fm/proposed/pdf/2014/vol1/v1executivesummary.pdf>

⁵⁴ Calculated from Kier Associates-WASTE IN OUR WATER, Appendix B, page ii, Table 9 and City of San Diego's Proposed 2014 Budget.

⁵⁵ City of San Anselmo. 2012 Budget. Available at: http://www.marinij.com/ci_21546177/san-anselmo-council-approves-2012-budget

⁵⁶ See fn. 32, *ante*.

665 buildings and other structures. Caltrans spends an average of \$1,600 per lane-mile on litter removal.

Table 8. Existing Trash Control Expenditures in Perspective

Statistic	Budget/Value	Annual Expenditures on Trash Control	Conclusion
California 2012 Gross State Domestic Product	\$2.0035 trillion	\$428 ⁵⁷ million	Californians spend 0.02% of the State Domestic Product in trash controls.
California 2013 average income per capita	\$28,341	\$10.71	Californians spend 0.03% of their average income per capita in trash controls.
California State Budget for FY 2013-14	\$145.3 billion	\$428 million	The California State budget is 7.25% of the California State Domestic product. The cost of trash controls is approximately 0.3% of the State Budget.
The City of Los Angeles Budget for FY 13-14	\$7.69 billion	\$36.3 million	The City of Los Angeles spends 0.47% of their annual budget on trash control.
City of San Diego Budget for FY 2014	\$2.75 billion	\$14 ⁵⁸ million	The City of San Diego spends 0.51% of their annual budget on trash control.
City of San Anselmo Budget (population of 12,336)	\$12.4 million	\$161,000 ⁵⁹	The City of San Anselmo spends 1.31% of their annual budget on trash control.
Caltrans Division of Maintenance	\$1.2 billion	\$80 million	Caltrans spends 6.7% of their annual maintenance budget on litter removal (approximately \$1,600 per lane-mile).

c. Cost Information from Adopted Trash and Debris TMDLs

In the Los Angeles Region, fifteen TMDLs were adopted for trash and debris by either the Los Angeles Water Board or U.S. EPA. Six of the fifteen trash and debris TMDLs include cost considerations that identify the least expensive method of compliance to be catch basin inserts (CBI), which is a type of full capture system (Table 9). The six trash TMDLs were selected as a representative baseline for the cost of adopted trash TMDLs to provide a cost comparison to the proposed Trash Amendments. The existing trash and debris TMDLs are assumed an installation cost factor for a CBI unit of \$800 and annual operations and maintenance cost of \$342⁶⁰ per unit. Catch basin inserts must be monitored frequently and must be used in conjunction with frequent street sweeping. Based on the six trash TMDLs, the annual costs to

⁵⁷ Kier Associates. 2013. Waste in Our Water: The Annual Cost to California Communities of Reducing Litter That Pollutes Our Waterways. Prepared for NRDC. Available at: http://docs.nrdc.org/oceans/files/oce_13082701a.pdf, page 19.

⁵⁸ Kier Associates. Waste in Our Water. Appendix A, page XVII, Table 13.

⁵⁹ Kier Associates. Waste in Our Water. Appendix A, page XIX, Table 14.

⁶⁰ Los Angeles Water Board. 2007. Trash TMDL for Los Angeles River Watershed Final Staff Report dated August 9, 2007. Available at: http://www.waterboards.ca.gov/losangeles/board_decisions/basin_plan_amendments/technical_documents/2007-012/09_0723/L.%20A.%20River%20Trash%20TMDL_Final%20%20Staff%20Report_August%209.%202007.pdf Section VIII. Cost Considerations. Subsection B. Cost of Implementing Trash TMDL. Subdivision 1. Catch Basin Inserts. Paragraph 1. Page 38. The annual operations and maintenance of \$342 is estimated based on the information provided in the Trash TMDL and is the result of dividing the \$51.3 million required in servicing and capital costs (see Table 9 on page 38 of the Los Angeles River Trash TMDL) by the 150,000 catch basins that would need to be retrofitted with inserts to cover 574 square miles of the watershed. See paragraph 1 on page 38 of Los Angeles River 2007 trash TMDL.

install and operate full capture systems range between \$5 per capita to \$22.95 per capita, with an average of \$14.33 cost per capita (Table 9).

Table 9. Costs Identified in Trash and Debris TMDLs Adopted by the Los Angeles Water Board

TMDL	Adoption Date	Population/ Household	Total Area and Developed, High Intensity Areas (in acres)	Capital Cost	Operations and Maintenance Annual Cost	Total Annualized Cost	Total Annual Cost Per Capita	Annual Cost Per Acre "Developed, High Intensity"
Los Angeles River Watershed 2007-012	Sept. 23, 2008	4,414,748 1,367,890 households	531,612 (42,730)	\$120 million	\$51.3 million	\$63.3 million	\$14.33	\$1,481
Ventura River Estuary 2007-008	Mar. 6, 2008	15,630 4,867 households	26,176 (58)	\$607,200	\$303,600	\$425,000	\$27.19	\$7,350
Malibu Creek 2008-007	July 7, 2009	59,461 21,794 households	48,438 (29)	\$1,600,000	\$785,000	\$1,099,800	\$18.5	\$38,040
Ballona Creek 2004-023	Aug. 11, 2005	1,501,881 597,311 households	81,972 (16,264)	\$25 million	\$12.5 million	\$15 million	\$10	\$922
Dominguez Channel 2007-006	Mar. 6, 2008	245,000 82,000 households	13,452 (7,680)	\$1,805,000	\$902,000	\$1,082,500	\$4.41	\$141
Calleguas Creek 2007-007	Mar. 6, 2008	65,000 21,000 households	32,326 (505)	\$1,200,000	\$596,000	\$835,000	\$12.88	\$1,653

Assumptions used in the TMDLs' cost considerations: Capital costs are fully spent in ten years. Operations and maintenance cost is based on full implementation. After ten years, full capture systems need to be fully replaced (10% a year). Total cost is estimated after implementation. Average of three persons per household. CBIs are considered the lowest cost method of compliance.

As part of the economic analysis, we analyzed the potential compliance costs for MS4 communities within the Los Angeles Water Board's jurisdiction implementing trash TMDLs as if they have to comply with the final Trash Amendments instead of full compliance with their current trash TMDLs.

The most significant difference between the Los Angeles Region trash and debris TMDLs and the final Trash Amendments is the focus on trash control in high trash generating areas. We estimated the compliance cost with Track 1 or the installation of full capture systems in "developed, high intensity" land coverage in Los Angeles Region, and compared the results with the current compliance costs.

The current annualized cost of compliance (Table 10) for the selected trash and debris TMDLs in the Los Angeles Region is calculated to be \$81.7 million (\$12.97 per capita). The estimated cost for the same communities if complying with only the final Trash Amendments would be \$28.4 (\$4.5 per capita); therefore those communities would have saved approximately \$53 million a year (\$8.47 per capita) if they had to comply only with the final Trash Amendments.

Table 10. Compliance Costs for Municipalities Complying with Select⁶¹ Trash TMDLs Compared to Estimated Compliance Costs for the Final Trash Amendments

Trash TMDL	Population	Area "Developed, High Intensity" (acres)	Estimated Total Capital Cost (to comply with Trash Amendments only)	Estimated Cost Per Capita (to comply with Trash Amendments only)	Estimated O&M Annual Cost (to comply with Trash Amendments only)	Estimated Annualized Cost (to comply with Trash Amendments only)	Current Annualized Costs of Compliance with trash TMDLs	Current Cost Per Capita
<u>Los Angeles River 2007-012</u>	4,414,748	42,730	\$34,184,000	\$4.08	\$14,613,660	\$18,032,060	\$63,300,000	\$14.33
<u>Ventura River 2007-008</u>	15,630	58	\$46,400	\$1.57	\$19,836	\$24,476	\$425,000	\$27.19
<u>Malibu Creek 2008-007</u>	59,461	29	\$23,200	\$0.21	\$9,918	\$12,238	\$1,099,800	\$18.50
<u>Ballona Creek 2004-023</u>	1,501,881	16,264	\$13,011,200	\$4.57	\$5,562,288	\$6,863,408	\$15,000,000	\$10.00
<u>Dominguez Channel 2007-006</u>	245,000	7,680	\$6,144,000	\$13.23	\$2,626,560	\$3,240,960	\$1,082,500	\$4.41
<u>Calleguas Creek 2007-007</u>	65,000	505	\$404,000	\$3.28	\$172,710	\$213,110	\$835,000	\$12.88
TOTAL	6,301,720	67,266	\$53,812,800	\$4.50	\$23,004,972	\$28,386,252	\$81,742,300	\$12.97

⁶¹ The six presented trash TMDLs in Table are the most representative trash TMDL that cover areas similar to the high trash generating areas of the final Trash Amendments.

4. MS4 PHASE I PERMITTEES: COST PER CAPITA METHOD

a. MS4 Phase I Statistics

Data was obtained for MS4 Phase I permittees using the California Integrated Water Quality System (CIWQS). MS4 Phase I permittees were then grouped by population size. Of the 376 MS4 Phase I permittees, the permittees associated with Caltrans and those records that did not have complete information necessary for the analysis, such as population, were removed from the analysis. The remaining 289 MS4 permittees were used in this analysis (Table 11).

Table 11. MS4 Phase I Permittees by Regional Water Board

Number of MS4 Phase I Communities by Population Size	Regional Water Board									Grand Total
	1	2	3	4	5	6	7	8	9	
>500,000		1		2	1				1	5
100,000-500,000		11	1	16	4			17	4	53
75,000-100,000		5		10	2			6	5	28
50,000-75,000		12		13	4			15	6	50
25,000-75,000		20		24	3		6	8	9	70
10,000-25,000		12		22	3	1	3	9	5	55
0-10,000		8		10	1	2	1	4	2	28
Grand Total		69	1	97⁶²	18	3	10	59	32	289

Out of the 289 MS4 Phase I permittees identified for the economic analysis, 192⁶³ are located outside the Los Angeles Water Board boundaries and would be subject to the final Trash Amendments. Table 12 shows the population living in locations regulated under a Phase I MS4 permit.

⁶² The 97 facilities are subject to an existing trash and debris TMDLs and thus removed from this economic analysis.

⁶³ Of the 193 MS4 Phase I permittees outside the Los Angeles Region, one was a duplicate in the database and removed from the analysis.

Table 12. Population Regulated Under MS4 Phase I Permits

MS4 Phase I Communities by Population Size	Regional Water Board									Grand Total
	1	2	3	4	5	6	7	8	9	
>500,000		894,943		4,917,745	799,407				1,223,400	7,835,495
100,000- 500,000		1,715,218	150,441	2,380,622	1,498,871			3,191,801	911,063	9,848,016
75,000- 100,000		407,979		865,587	175,603			523,614	411,052	2,383,835
50,000- 75,000		749,499		785,896	234,054			889,346	339,605	2,998,400
25,000- 75,000		658,814		904,866	112,580		233,462	323,637	356,748	2,590,107
10,000- 25,000		201,038		385,651	62,781	23,609	59,535	157,235	104,895	994,744
0-10,000		40,063		36,533	1,420	8,890	3,816	28,528	5,609	124,859
Grand Total		4,667,554	150,441	10,276,900	2,884,716	32,499	296,813	5,114,161	3,352,372	26,775,456

The number of MS4 Phase I permittees considered in this economic analysis is limited to 289, which represents a total population of 26,775,456 or 72% of the population of California (37,253,959⁶⁴). The 192 MS4 Phase I permittees outside the Los Angeles Region have a total population of 16,498,556 or 45% of California population.

b. Potential Compliance Options

The final Trash Amendments propose a dual alternative Track approach for compliance with the prohibition of discharge of trash.

i. Track 1: Full Capture Systems

To determine the incremental cost of compliance, we needed to establish the baseline cost for the MS4 Phase I permittees in this analysis using available cost data from the NRDC (Table 6). For those permittees without the NRDC Study cost data, the average NRDC Study cost factors were applied for each permittee size group (assuming a similar level of current expenditures). Based on that data, the 192 MS4 Phase I permittees are spending \$22,412,501 (\$1.36 per capita) per year to install, operate and maintain full capture systems.

Generally, larger communities have a larger proportion of developed, high intensity in proportion to their population. To compensate for this, a Geographic Information Systems (GIS) analysis was used to determine the ratio of high intensity land coverage for each permittee population size group. We estimated separate per capita cost for each community size based on existing land coverage data for permittees outside the Los Angeles Region. The areas of San Francisco and Sacramento serviced by a combined sewer system were excluded. We used the actual

⁶⁴ U.S. Census Bureau. 2010.

land coverage area classified as high intensity to estimate, for each community size, the number of acres that would need to install full capture systems. The estimated capital cost for each full capture system were assumed as \$800, the annual operations and maintenance is \$342, and an average of one full capture system per acre. The cost estimate assumes all costs are incurred in the same year (Year 10).

The increased cost of implementing full capture systems is estimated to be \$176 million or \$10.67 more on average per capita per year, assuming all full capture systems are installed in a year. This estimate includes the operation and maintenance of the full capture systems (Table 13). This incremental cost per capita varies based on the size of the permittee. For example, some permittees may have an increase of \$13.76 per capita per year, while others may only see an increase of \$5.61 on average per capita per year.

Table 13. Incremental Cost of Compliance for MS4 Phase I Communities Using Full Capture Systems by Community Size

MS4 Phase I Community Size	MS4 Phase I Communities	Total Population (A)	Current Cost (baseline)	Current Cost Per Capita (baseline B)	Estimated Annual Cost Per Capita (After Full Implementation in Year 10) (C+D)	Estimated Total Capital Costs Per Capita (C)	Estimated Annual O&M Per Capita (in Year 10) (D)	Total Estimated Incremental Cost Of Compliance (C+D-B) X A
>500,000	3	2,917,750	\$2,451,409	\$0.84	\$14.60	\$10.22	\$4.38	\$40,077,769
100,000-500,000	37	7,467,394	\$10,469,051	\$1.40	\$12.80	\$8.96	\$3.84	\$85,245,951
75,000-100,000	18	1,518,248	\$1,293,517	\$0.85	\$10.50	\$7.35	\$3.15	\$14,646,291
50,000-75,000	37	2,212,504	\$3,059,738	\$1.38	\$11.00	\$7.70	\$3.30	\$21,335,016
25,000-75,000	46	1,685,241	\$3,033,531	\$1.80	\$8.70	\$6.09	\$2.61	\$11,629,598
10,000-25,000	33	609,093	\$2,028,291	\$3.33	\$7.70	\$5.39	\$2.31	\$2,675,719
0-10,000	18	88,326	\$78,965	\$0.89	\$6.50	\$4.55	\$1.95	\$490,845
Total	192	16,498,556	\$22,414,501	\$1.36	\$12.03	\$8.42	\$3.61	\$176,101,189

In summary, the 192 MS4 Phase I permittees analyzed are currently spending approximately \$22.4 million annually to install and operate full capture systems⁶⁵. To comply with Track 1 of the proposed Trash Amendments, an estimated additional cost of \$176 million or an additional \$10.67 (\$12.03 – \$1.36) per capita on the year that full compliance is achieved. The total capital costs are estimated at \$8.42 per capita or \$139 million. Once the full capture systems are installed (capital costs), the annual operations and maintenance costs are estimated at \$3.2 per capita or \$52.8 million. Assuming permittees install 10% of the structural controls each year, the incremental capital, operation and maintenance costs in Year 10 (highest cost year) would be \$65 million for all affected permittees (\$3.95 per capita).

⁶⁵ The NRDC data does not break down the costs into capital and operation and maintenance.

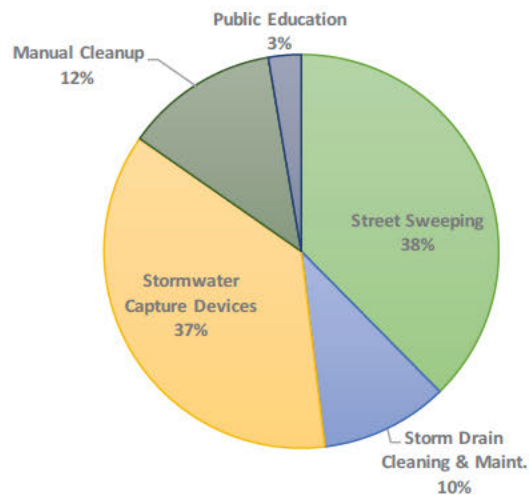
ii. Track 2: Combination of Full Capture Systems, Other Treatment Controls, Institutional Controls, Multi-Benefit Projects

A 2012 study⁶⁶ conducted by the California Coastal Commission and the Algalita Marine Research Institute and partially funded by the State Water Board concluded that:

“There is no one method for completely controlling trash in stormwater. Institutional controls may provide the best long-term solution, especially those focused on prevention. However, depending on the magnitude of the problem, institutional controls may be inadequate. Focusing on enforcement of litter laws is considered by many to provide the most “bang for the buck”. However, most urban municipalities will have to do more to physically capture and control trash in urban waterways or to prevent it from reaching the waterway.”

Previous studies have demonstrated that mixed institutional controls and full capture systems provide a high level of performance/compliance. For example, the City of Los Angeles has implemented a comprehensive trash prevention program involving both structural and institutional measures. The Los Angeles’ program has included the installation of full capture and partial capture systems in catch basins, as well as ongoing efforts to implement institutional measures such as public outreach, street sweeping and catch basin cleaning.

Figure 2. Percentage of Expenditures by Trash Control Category in the Los Angeles Region (Source: NRDC Study)



The final Trash Amendments specify that Track 2 must be implemented to achieve the equivalent level of performance to the exclusive use of full capture systems (Track 1) in the priority land uses.

On November 6, 2012, a study⁶⁷ prepared for the City of Los Angeles by Black & Veatch, assessed the effectiveness of institutional measures for trash TMDL compliance. The study conducted in Los Angeles show that institutional measures can be effective in medium and low trash-generating areas but may not achieve the same level of compliance in high trash-generating areas. The results show a 12.5% trash reduction in 2012 from the 2007 baseline in medium and low trash generating areas.

The question that remains is what ideal mixture of institutional controls, other treatment controls, multi-benefit projects and full capture systems permitted dischargers might choose to comply with the final Trash Amendments at a minimum cost.

⁶⁶ Gordon, Miriam, and Ruth Zamist. "Municipal Best Management Practices for Controlling Trash and Debris in Stormwater and Urban Runoff." n.d. California Coastal Commission; Algalita Marine Research Foundation. 31 Jul 2012 <http://plasticdebris.org/Trash_BMPs_for_Munis.pdf>.

⁶⁷ Black & Veatch. 2012. Quantification Study of Institutional Measures for Trash TMDL Compliance.

Based on the data provided in the NRDC Study, permittees in the Los Angeles Region are currently⁶⁸ spending approximately 37% of trash control expenditures in implementing full capture systems (Figure 2). This percentage varies significantly depending on the size of the permittee's jurisdiction, population density, and area of priority land uses. Larger sized permittees dedicate 17% of trash control expenditures to full capture systems, and smaller sized permittees dedicate 46% of trash control expenditures to full capture systems (Table 14 and Figure 3).

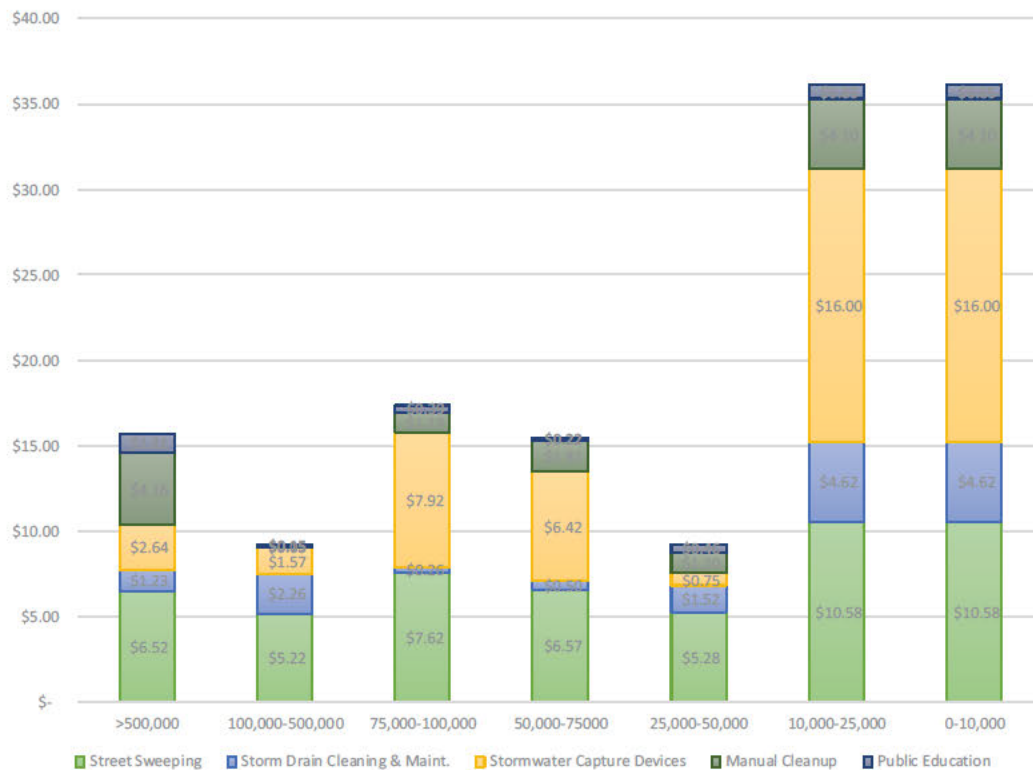
Table 14. Current Expenditures in Trash Control by Category in the Los Angeles Region

Los Angeles Region MS4 By Population Size	Street Sweeping	Storm Drain Cleaning & Maint.	Stormwater Capture Devices	Manual Cleanup	Public Education	Total Annual Average Cost Per Capita
>500,000	\$ 6.52	\$ 1.23	\$ 2.64	\$ 4.16	\$ 1.21	\$ 15.76
100,000-500,000	\$ 5.22	\$ 2.26	\$ 1.57	\$ 0.05	\$ 0.15	\$ 9.22
75,000-100,000	\$ 7.62	\$ 0.26	\$ 7.92	\$ 1.19	\$ 0.39	\$ 16.79
50,000-75,000	\$ 6.57	\$ 0.50	\$ 6.42	\$ 1.81	\$ 0.22	\$ 14.46
25,000-50,000	\$ 5.28	\$ 1.52	\$ 0.75	\$ 1.20	\$ 0.46	\$ 7.79
10,000-25,000	\$ 10.58	\$ 4.62	\$ 16.00	\$ 4.10	\$ 0.85	\$ 29.84
0-10,000						
Grand Total	\$ 6.72	\$ 1.87	\$ 6.54	\$ 2.25	\$ 0.48	\$ 15.04

Source: NRDC Study 2013

⁶⁸ Current expenditures in Los Angeles Region are not necessarily the total amount of expenditures needed to comply with the final Trash Amendments since the communities in Los Angeles Region were not scheduled to be in full compliance with their TMDLs as of the date that NRDC collected the data. This information is only illustrative to estimate the adequate distribution of full capture and institutional control expenditures.

Figure 3. Current Trash Controls Per Capita by Permittee Size in the Los Angeles Region



Source: NRDC Study 2013

The data shows that permittees in Los Angeles Region are already implementing full capture systems in combination with institutional controls.

In comparison, the data collected for MS4 Phase I permittees outside the Los Angeles Region have a substantially different cost structure of trash control related to the use of institutional controls, regardless of the size of the permittee’s jurisdiction.

Permittees outside the Los Angeles Region dedicate 13% of their trash-control resources to full capture systems. This percentage varies significantly depending on size (population density and land use area). For example, larger sized communities dedicate 11% to 14% of trash control resources to full capture systems, and smaller sized communities dedicate a larger percentage (up to 30%) to full capture systems (Figure 4 and Table 15).

Figure 4. Percentage of Expenditures by Trash Control Category Outside the Los Angeles Region (Source: NRDC Study 2013)

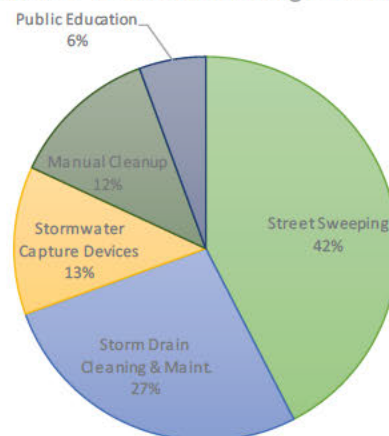


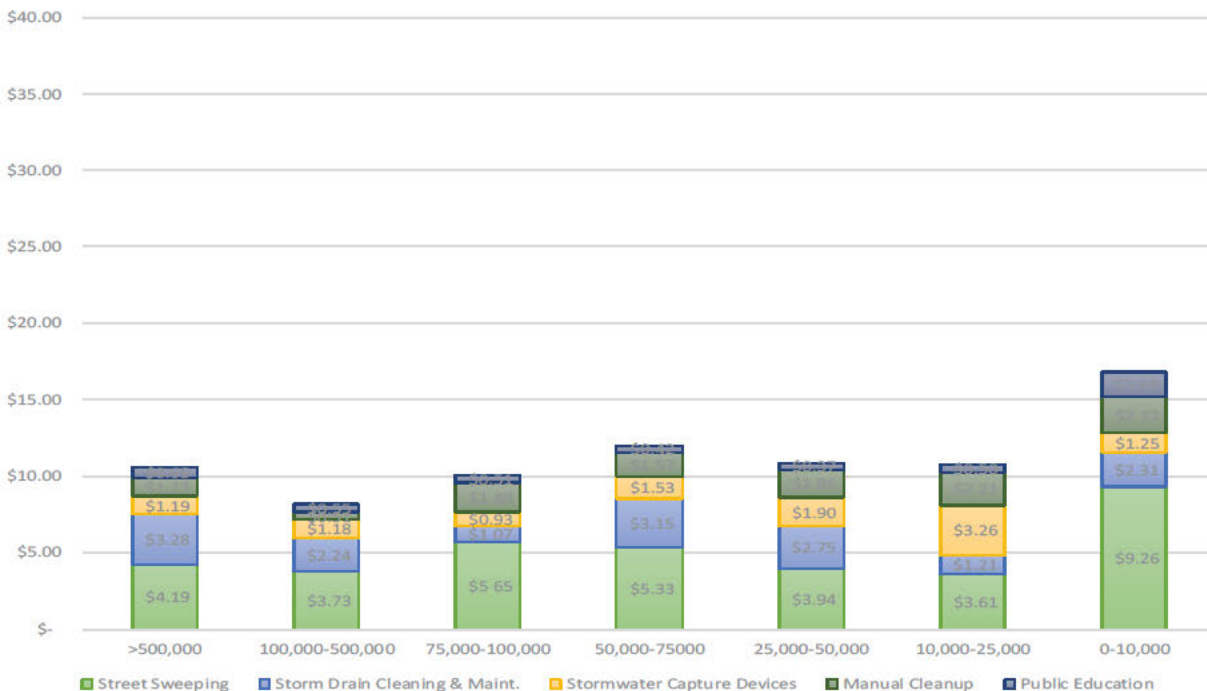
Table 15. Current Annual Per Capita Expenditures in Trash Control by Category Outside the Los Angeles Region

MS4 By Population Size	Street Sweeping	Storm Drain Cleaning & Maint.	Stormwater Capture Devices	Manual Cleanup	Public Education	Total Annual Cost Per Capita
>500,000	\$ 4.19	\$ 3.28	\$ 1.19	\$ 1.27	\$ 0.65	\$ 10.41
100,000-500,000	\$ 3.73	\$ 2.24	\$ 1.18	\$ 0.51	\$ 0.55	\$ 7.64
75,000-100,000	\$ 5.65	\$ 1.07	\$ 0.93	\$ 1.89	\$ 0.51	\$ 9.15
50,000-75,000	\$ 5.33	\$ 3.15	\$ 1.53	\$ 1.57	\$ 0.42	\$ 10.20
25,000-50,000	\$ 3.94	\$ 2.75	\$ 1.90	\$ 1.86	\$ 0.37	\$ 9.73
10,000-25,000	\$ 3.61	\$ 1.21	\$ 3.26	\$ 2.21	\$ 0.50	\$ 10.09
0-10,000	\$ 9.26	\$ 2.31	\$ 1.25	\$ 2.32	\$ 1.69	\$ 15.34
Grand Total	\$ 4.38	\$ 2.79	\$ 1.29	\$ 1.28	\$ 0.58	\$ 9.68

Source: NRDC Study 2013

This information is represented in Figure 5.

Figure 5. Current Trash Controls Per Capita by MS4 Phase I Permittee Size Outside the Los Angeles Region



Source: NRDC Study 2013

We determined the baseline costs for current use of institutional controls using cost factors obtained using data from the NRDC Study. The cost factors were applied to the population within each population size group. Table 16 summarizes the current estimated expenditures for MS4 Phase I permittees.

Table 16. Estimated Current Total Annual Expenditures in Trash Control by Category in MS4 Phase I Permittees Outside the Los Angeles Region

Baseline Expenditures. MS4 By Population Size	Street Sweeping	Storm Drain Cleaning & Maint.	Stormwater Capture Devices	Manual Cleanup	Public Education	Total Annual Cost
>500,000	\$ 12,239,133	\$ 9,577,468	\$ 3,468,147	\$ 3,703,492	\$ 1,895,704	\$ 30,369,032
100,000-500,000	\$ 27,841,905	\$ 16,706,970	\$ 8,801,453	\$ 3,775,087	\$ 4,132,958	\$ 57,066,650
75,000-100,000	\$ 8,572,112	\$ 1,629,968	\$ 1,412,616	\$ 2,870,335	\$ 770,787	\$ 13,890,738
50,000-75,000	\$ 11,788,359	\$ 6,971,166	\$ 3,388,229	\$ 3,473,392	\$ 928,365	\$ 22,558,015
25,000-50,000	\$ 6,648,246	\$ 4,634,900	\$ 3,197,960	\$ 3,135,473	\$ 629,481	\$ 16,405,397
10,000-25,000	\$ 2,198,389	\$ 736,123	\$ 1,987,132	\$ 1,346,130	\$ 305,923	\$ 6,143,977
0-10,000	\$ 817,704	\$ 203,876	\$ 110,750	\$ 205,061	\$ 148,889	\$ 1,355,031
Grand Total	\$ 72,188,075	\$ 46,050,511	\$ 21,225,758	\$ 21,193,701	\$ 9,542,549	\$ 159,741,928

No studies identified the mix of institutional control measures and full capture systems that would be used by any given community to comply with Track 2, as the most effective means of controlling trash are highly dependent on the particular site conditions, types of trash, and the available resources for maintenance and operation.

This economic analysis therefore considers several compliance options using the data from the NRDC Study. We have applied the current mixture of institutional controls and full capture systems from communities implementing trash and debris TMDLs in the Los Angeles Region, and compared this information with the information obtained from MS4 Phase I permittees located outside the Los Angeles Region. We then calculated the difference in the level of expenditures for each community group based on population size. The differences were used to estimate the total incremental cost for MS4 Phase I permittees located outside the Los Angeles Region (Table 17).

The data collected on institutional control expenditures show that the average expenditures by Los Angeles Water Board MS4 Phase I permittees are greater than non-Los Angeles Water Board MS4 Phase I permittees, not just for full capture systems but also for expenditures on several types of institutional controls (Table 17).

Table 17. Institutional Control Expenditures Per Capita in the Los Angeles Region and by Other Phase I MS4 Permittees

Average Trash Controls Cost	Los Angeles Region	Other Communities	Difference
Stormwater Capture Devices	\$ 6.54	\$ 1.29	\$ 5.25
Street Sweeping	\$ 6.72	\$ 4.38	\$ 2.34
Storm Drain Cleaning & Maint.	\$ 1.87	\$ 2.79	\$ (0.92)
Manual Cleanup	\$ 2.25	\$ 1.28	\$ 0.97
Public Education	\$ 0.48	\$ 0.58	\$ (0.10)
Total Current Annual (True) Average Cost Per Capita	\$ 15.04	\$ 9.68	\$ 5.36

The data in Table 17 suggests that for the more that is spent on full capture systems means that less needs to be spent on institutional controls, such as storm drain cleaning, maintenance and public education.

In some cases, the estimated per capita costs in categories such as full capture systems, manual cleanup and public education, for permittees outside of the Los Angeles Region is already greater than for permittees implementing trash and debris TMDLs. For those cases, the current level of expenditures was applied and no incremental costs would be necessary to comply with the final Trash Amendments.

Table 18 presents the estimated annual incremental cost if all MS4 Phase I permittees select Track 2. The total annual cost is estimated to be approximately \$67 million (\$4.09 per capita) in the year when full compliance is achieved. Therefore on average, the cost of compliance with Track 2 would be lower than complying with Track 1 (i.e., only using full capture systems).

Table 18. Estimated Incremental Costs of Compliance with Track 2 for MS4 Phase I Permittees Outside the Los Angeles Region

Estimated Increase in Total Trash								
Controls Cost by Population	100,000-	75,000-	50,000-	25,000-	10,000-			
Community Size Group	>500,000	500,000	100,000	75,000	50,000	25,000	0-10,000	Total
Stormwater Capture Devices	\$4,234,713	\$2,922,356	\$10,611,908	\$10,816,046	\$0	\$7,758,356	\$1,302,809	\$37,646,188
Street Sweeping	\$6,784,597	\$11,137,892	\$2,996,938	\$2,747,793	\$2,249,827	\$4,245,815	\$116,590	\$30,279,451
Storm Drain Cleaning & Maint.	(\$5,988,636)	\$169,341	(\$1,235,224)	(\$5,864,914)	(\$2,073,334)	\$2,077,887	\$204,033	(\$12,710,847)
Manual Cleanup	\$8,434,348	\$0	\$0	\$531,240	\$0	\$1,151,151	\$157,220	\$10,273,959
Public Education	\$1,634,774	\$0	\$0	\$0	\$145,730	\$211,806	\$0	\$1,992,310
Total Incremental Cost	\$15,099,795	\$14,229,588	\$12,373,622	\$8,230,165	\$322,223	\$15,445,015	\$1,780,652	\$67,481,061

Other Compliance Costs

In addition to compliance tracks, the final Trash Amendments includes monitoring, evaluation and reporting requirements. These would potentially increase the cost of compliance with the final Trash Amendments. This economic analysis does not include an estimate of those potential costs. These costs are expected to be negligible relative to capital and operation and maintenance costs.

c. Compliance Schedules

The final Trash Amendments propose a time schedule for permittees to comply ten years from the effective date of the first implementing permit.⁶⁹ One potential compliance schedule is 10% completion of controls per year. We have estimated the average annual cost to comply with Track 1 and Track 2 once the permittees have achieved full implementation. Capital costs were distributed evenly in order to achieve full compliance within ten years (10% each year).

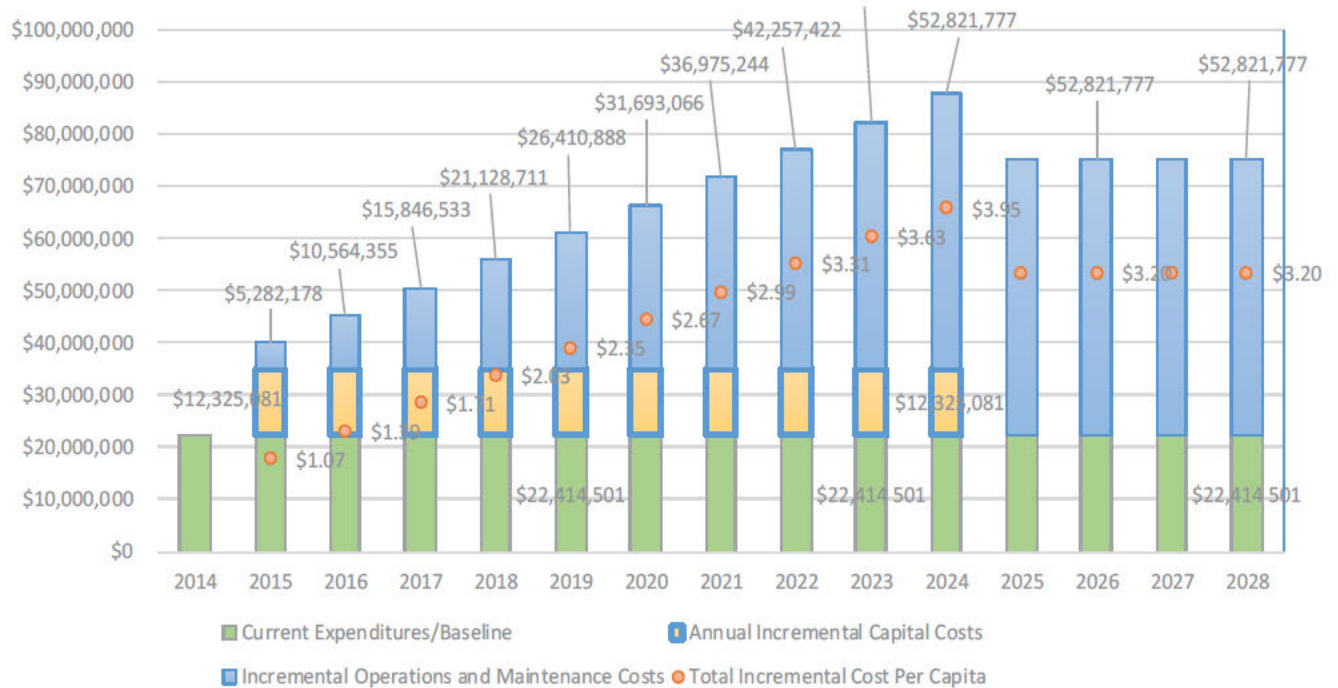
To estimate the annual incremental cost of compliance, the following cost factors and assumptions are used:

- Compliance starts in January 2015.
- The installation of a full capture system is \$800 per unit.

⁶⁹ See fn. 42, *ante*.

- The annual cost of operations and maintenance for a full capture system is \$342 per unit install.
- The total cost to install, operate and maintain a full capture system in Year 1 is \$1,142.
- Full capture systems were installed in 10% increments over ten years.
- Maintenance cost for each year includes the cost of operating and maintaining each full capture system. For example, the operations and maintenance cost in Year 2 is the sum of the 10% full capture systems installed in Year 1 plus the 10% installed in Year 2.

Figure 6. Compliance Schedule with Track 1 for MS4 Phase I Permittees Estimated Total Costs 2014-2024



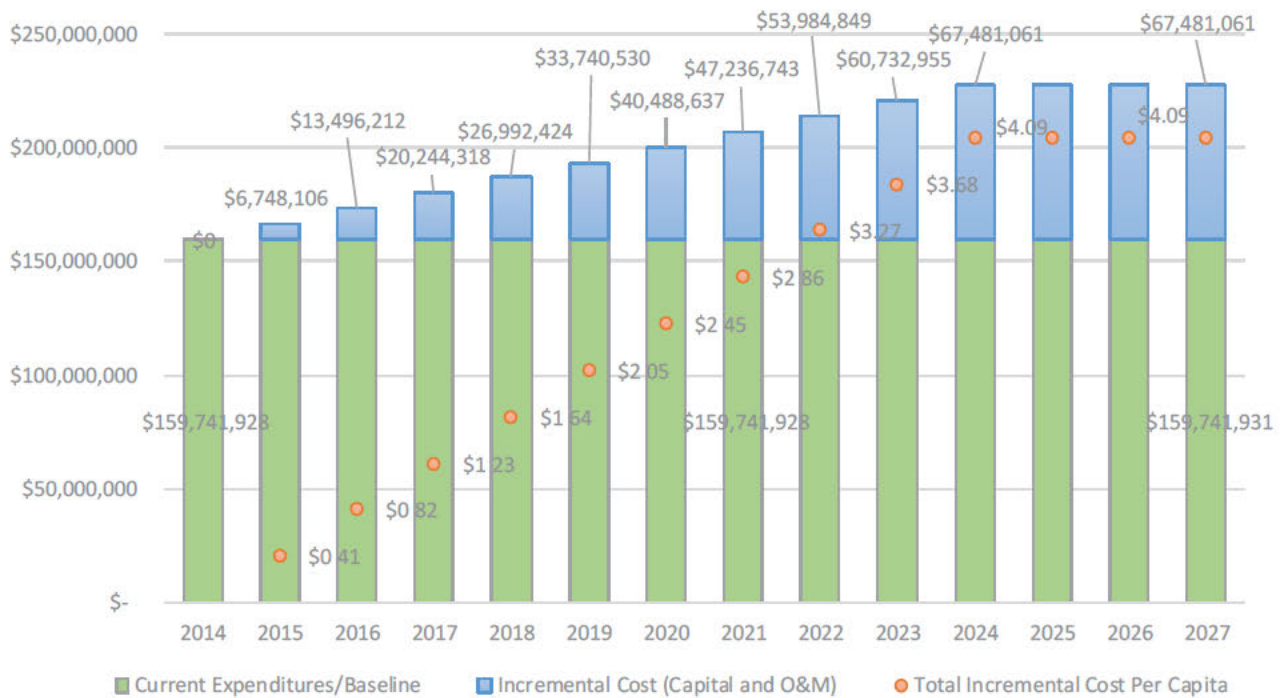
Assuming communities install 10% of the structural controls each year, the capital, operation and maintenance costs in Year 10 (highest cost year) would be \$65 million for all Phase 1 affected permittees (\$3.95 per capita). The total cost of installing (capital costs) full capture systems in MS4 Phase I permittees is estimated at \$8.42 per capita or approximately \$123 million. Spread out over ten years equally is approximately \$12.3 million per year. Operations and maintenance of the installed full capture systems increases based on the accumulated installed units (capital costs). As a result, operations and maintenance cost per capita fluctuates from \$0.32 in Year 1 to \$3.2 in Year 10.

Compliance Schedule with Track 2

The incremental cost in the year of full compliance with the final Trash Amendments is approximately \$67.5 million or \$4 per capita⁷⁰ (Figure 7).

⁷⁰ After Year 10 the incremental cost is assumed to remain constant at \$67.48 million per year.

Figure 7. Compliance Schedule with Track 2 for MS4 Phase I Permittees



d. Limitations and Uncertainties

Current cost of trash controls implemented through MS4 permits in California ranged from \$3 per person a year for municipalities with a population of 500,000 or more to up to \$60 per year for small municipalities. The selection of the method of compliance with the final Trash Amendments will highly depend on the site specific conditions of every permittee, such as:

- Compliance alternatives
- Costs of controls
- Types of trash
- Site characteristics
- Compliance schedules
- Current compliance rates (for establishing the baseline)
- Other economic factors, technology, inflation, risks, regulatory framework

5. MS4 PHASE II PERMITTEES: COST PER CAPITA METHOD

a. MS4 Phase II Statistics

Data for MS4 Phase II permittees was obtained using CIWQS and grouped by population size. Of the 156 MS4 Phase II listed permittees, eight were removed due to incomplete information necessary for the analysis⁷¹. 148 MS4 Phase II permittees were identified for the analysis (Table 19).

Table 19. MS4 Phase II Permittees by Regional Water Board

Number of MS4 Phase II Population Size	Regional Board											Grand Total	
	1	2	3	4	5F	5R	5S	6A	6B	7	8		9
>500,000													
100,000-500,000			1				1						2
75,000-100,000			2		2	1	2						7
50,000-75,000		4	4		1	1	6		3				19
25,000-50,000	2	4	11		5		9			3			34
10,000-25,000	6	2	12		5	1	14	1		2			43
0-10,000	4	15	8		3		11	1	1				43
Grand Total	12	25	38		16	3	43	2	4	5			148

There are no permittees listed in CIWQS under Phase II in the jurisdiction of the Los Angeles Water Board, Santa Ana Water Board, and San Diego Water Board⁷². Table 20 shows the population living in municipalities regulated under the MS4 Phase II permit.

⁷¹ Additionally, the City of Avalon and other non-traditional Phase II permittees in the Los Angeles Region are new enrollees to MS4 Phase II permit and lack data on CIWQS. Thus, the new enrollees were not included in the analysis.

⁷² There are ten MS4 Phase II permittees in Los Angeles Region, eleven MS4 Phase II permittees in the Santa Ana Region and nine MS4 Phase II permittees in the San Diego Region that are tracked in the Storm Water Multiple Application and Report Tracking System (SMARTS) database but were not included in the CIWQS database at the time of the economic analysis.

Table 20. Population for Municipalities Regulated Under MS4 Phase II Permits

Number of MS4 Phase I Municipalities by Population Size	Regional Water Board									Grand Total
	1	2	3	4	5	6	7	8	9	
>500,000										
100,000-500,000			144,000		112,581					256,581
75,000-100,000			190,053		410,070					600,123
50,000-75,000		254,276	219,526		492,190	194,000				1,159,992
25,000-75,000	66,832	145,456	361,578		558,983		126,005			1,258,854
10,000-25,000	96,229	22,785	201,976		304,542	13,000	35,334			673,866
0-10,000	31,371	100,176	49,676		95,346	11,600				288,169
Grand Total	194,432	522,693	1,166,809		1,973,712	218,600	161,339			4,237,585

In summary, 148 municipalities regulated under Phase II of the MS4 program with a total population of 4,237,585, representing 11.5% of California population (2010 Census) are considered in this analysis.

Using the information provided in the referenced studies, a baseline of current costs was created based on municipality type and size. The NRDC Study was relied upon for the data obtained from a direct survey of 221 California municipalities. The summary of the current average annual cost per capita by category of trash control is presented in Table 6. This methodology as previously described for MS4 Phase I permittees was replicated for the MS4 Phase II permittees.

b. Potential Compliance Options

1. Track 1: Full Capture Systems

An analysis of the increased annual average cost for the 148 MS4 Phase II permittees shows that the total potential incremental cost for all Phase II MS4s is \$33 million (Table 21).

Table 21. Incremental Cost of Compliance for MS4 Phase II Communities Using Full Capture Systems by Municipality Size

MS4 Phase II Municipality Size	MS4 Phase II	Total Population (A)	Current Cost (baseline)	Current Cost Per Capita (baseline B)	Estimated Annual Cost Per Capita (After Full Implementation in Year 10) (C+D)	Estimated Total Capital Costs Per Capita (C)	Estimated Annual O&M Per Capita (in Year 10) (D)	Total Estimated Incremental Cost Of Compliance (C+D-B) X A
>500,000								
100,000-500,000	2	256,581	\$321,137	\$1.25	\$12.82	\$8.96	\$3.84	\$2,967,648
75,000-100,000	7	600,123	\$533,630	\$0.89	\$10.50	\$7.35	\$3.15	\$5,766,952
50,000-75,000	19	1,159,992	\$1,462,858	\$1.26	\$11.03	\$7.70	\$3.30	\$11,327,048
25,000-75,000	34	1,258,854	\$2,084,477	\$1.66	\$8.70	\$6.09	\$2.61	\$8,868,698
10,000-25,000	43	673,866	\$2,156,399	\$3.20	\$7.72	\$5.39	\$2.31	\$3,047,851
0-10,000	43	288,169	\$300,253	\$1.04	\$6.45	\$4.55	\$1.95	\$1,558,787
Total	148	4,237,585	\$6,858,754	\$1.62	\$9.53	\$6.67	\$2.86	\$33,536,983

In summary, the 148 MS4 Phase II communities analyzed are currently spending \$6.8 million per year to install and operate full capture systems. To comply with Track 1 in one year is estimated to be an additional cost of \$33.5 million or an additional \$7.91 (difference between \$9.53 and \$1.62) per capita in the year that full compliance is achieved. The incremental total capital costs are estimated at \$5.54⁷³ per capita or \$23.4 million. Once full capture systems are installed (capital costs), the annual operation and maintenance costs are estimated at \$2.37⁷⁴ per capita or \$10 million. Assuming permittees install 10% of the structural controls each year, the capital, operation and maintenance costs in Year 10 (highest cost year) would be \$12 million (\$2.93 per capita) (Figure 9).

2. Track 2: Combination of Full Capture Systems, Other Treatment Controls, Institutional Controls, Multi-Benefit Projects

Track 2 of the final Trash Amendments focuses on permittees installing, operating, and maintaining any combination of full capture systems, other treatment controls, institutional controls, and/or multi-benefit projects. The combinations of trash controls must achieve the same performance results as Track 1.

MS4 Phase II permittees are already spending resources in full capture systems and institutional controls. Table 22 shows the average annual cost per capita for each type of trash control.

⁷³ Costs are estimated based on a full capture system at \$800 per unit (capital costs) and \$342 annual cost of operations and maintenance per unit. Therefore, capital costs are estimated to be 70% of the costs if all full capture systems are installed in one year and operations and maintenance cost are estimated to be 30% of the total costs. The capital costs incremental cost is calculated by multiplying \$7.91 (the difference between \$9.53 and \$1.62) by 70% (i.e., \$7.91 X 0.7 = \$5.54).

⁷⁴The operations and maintenance incremental cost is calculated by multiplying \$7.91 (the difference between \$9.53 and \$1.62) by 30% (i.e., \$7.91 X 0.3 = \$2.37).

Table 22. Current Average Annual Expenditures Per Capita by Trash Control Category by Population Size Group (MS4 Phase II Permittees)

MS4 PHASE II By Population Size	Street Sweeping	Storm Drain Cleaning & Maint.	Stormwater Capture Devices	Manual Cleanup	Public Education	Total Annual Cost Per Capita
>500,000						
100,000-500,000	\$ 4.08	\$ 2.12	\$ 1.25	\$ 0.56	\$ 0.58	\$ 8.59
75,000-100,000	\$ 6.98	\$ 1.34	\$ 0.86	\$ 2.13	\$ 0.52	\$ 11.84
50,000-75000	\$ 5.85	\$ 3.31	\$ 1.25	\$ 1.41	\$ 0.40	\$ 12.24
25,000-50,000	\$ 3.92	\$ 3.06	\$ 1.62	\$ 1.96	\$ 0.40	\$ 10.95
10,000-25,000	\$ 3.99	\$ 1.23	\$ 3.13	\$ 2.07	\$ 0.48	\$ 10.90
0-10,000	\$ 4.68	\$ 2.64	\$ 1.03	\$ 2.48	\$ 1.57	\$ 12.41
Grand Total	\$ 4.96	\$ 2.50	\$ 1.59	\$ 1.81	\$ 0.52	\$ 11.38

Source: NRDC Study 2013

The actual cost of trash controls by category is presented in Table 23 and Figure 8. The total estimated population regulated under a MS4 Phase II permit is 4,310,345.

Table 23. Current Expenditures in Annual Trash Control Category by Population Size Group (MS4 Phase II Permittees)

MS4 PHASE II By Population Size	Street Sweeping	Storm Drain Cleaning & Maint.	Stormwater Capture Devices	Manual Cleanup	Public Education	Total Annual Cost	Population
>500,000							
100,000-500,000	\$ 1,045,952	\$ 545,074	\$ 321,137	\$ 143,258	\$ 148,913	\$ 2,204,334	256,581
75,000-100,000	\$ 4,329,764	\$ 833,308	\$ 533,630	\$ 1,323,013	\$ 321,491	\$ 7,341,206	620,156
50,000-75000	\$ 6,835,786	\$ 3,870,160	\$ 1,462,858	\$ 1,650,517	\$ 468,274	\$ 14,287,595	1,167,639
25,000-50,000	\$ 5,043,383	\$ 3,930,905	\$ 2,084,477	\$ 2,515,101	\$ 508,387	\$ 14,082,253	1,286,248
10,000-25,000	\$ 2,750,042	\$ 846,592	\$ 2,156,399	\$ 1,427,361	\$ 329,857	\$ 7,510,251	689,112
0-10,000	\$ 1,359,397	\$ 768,567	\$ 300,253	\$ 722,072	\$ 457,452	\$ 3,607,742	290,609
Grand Total	\$ 21,364,325	\$ 10,794,607	\$ 6,858,754	\$ 7,781,321	\$ 2,234,375	\$ 49,033,382	4,310,345

Source: NRDC Study 2013

Figure 8. Current Annual Trash Control Per Capita for MS4 Phase II Communities

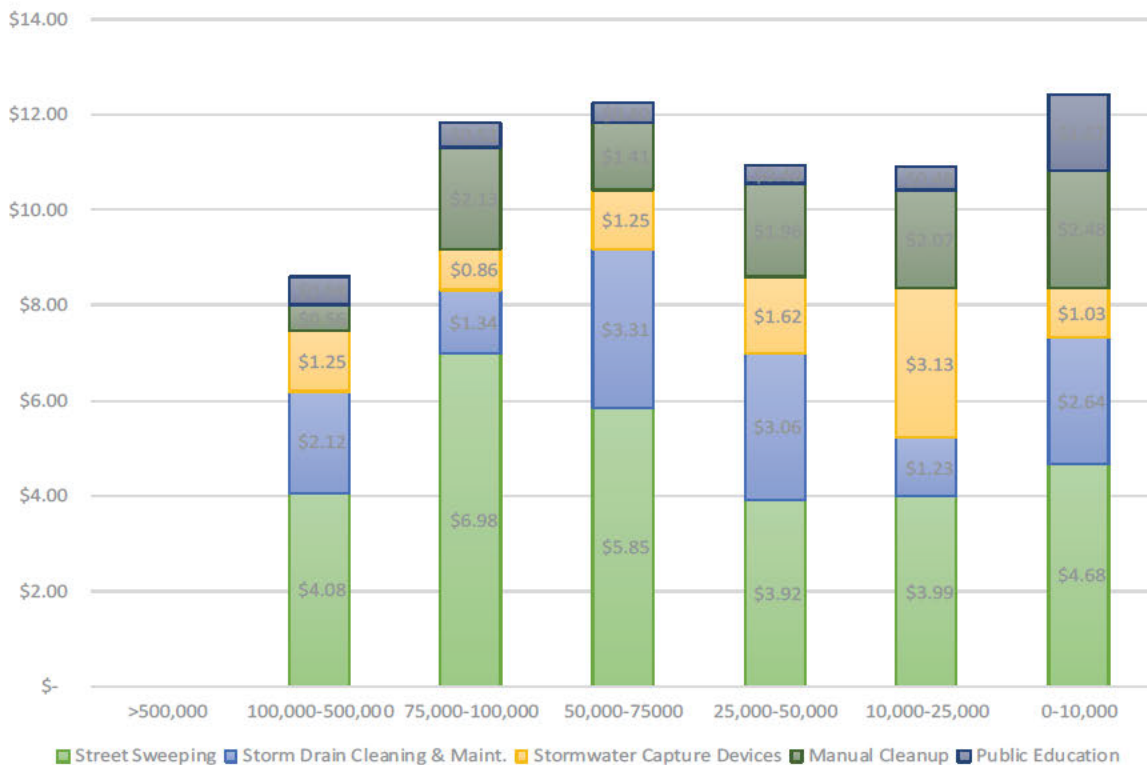


Table 24 highlights the main differences of annual trash control expenditures per capita between the permittees inside and outside the Los Angeles Region.

Table 24. Average Annual Trash Control Expenditures Per Capita in the Los Angeles Region and MS4 Phase II Communities

Average Trash Controls Cost	Los Angeles Region	Phase II Communities	Difference
Stormwater Capture Devices	\$ 6.54	\$ 1.59	\$ 4.95
Street Sweeping	\$ 6.72	\$ 4.96	\$ 1.76
Storm Drain Cleaning & Maint.	\$ 1.87	\$ 2.50	\$ (0.63)
Manual Cleanup	\$ 2.25	\$ 1.81	\$ 0.44
Public Education	\$ 0.48	\$ 0.52	\$ (0.04)
Total Current Annual (True) Average Cost Per Capita	\$ 15.04	\$ 11.38	\$ 3.66

Table 25 summarizes the estimated annual incremental cost of trash controls choosing a combination of institutional controls and full capture systems. MS4 Phase II permittees would

spend an additional \$32 million a year once full implementation is achieved⁷⁵, an additional \$7.77⁷⁶ per capita per year if compliance is completed in one year.

Table 25. Estimated Annual Incremental Costs of Compliance with Track 2 for MS4 Phase II Permittees Outside the Los Angeles Water Region

Estimated Increase in Total Trash Controls Cost by Population Community Size Group								
	100,000- >500,000	75,000- 500,000	50,000- 100,000	25,000- 75,000	10,000- 50,000	0-10,000	Total	
Stormwater Capture Devices	\$ 81,695	\$4,378,006	\$6,033,384	\$0	\$8,869,393	\$4,349,491	\$23,711,968	
Street Sweeping	\$293,400	\$395,824	\$835,602	\$1,748,006	\$4,540,763	\$1,715,246	\$9,528,842	
Storm Drain Cleaning & Maint.	\$34,799	(\$672,068)	(\$3,286,340)	(\$1,975,808)	\$2,337,105	\$574,046	(\$2,988,266)	
Manual Cleanup	\$0	\$0	\$462,910	\$0	\$1,397,998	\$469,425	\$2,330,333	
Public Education	\$0	\$0	\$0	\$83,287	\$255,888	\$0	\$339,175	
Total Incremental Cost	\$409,895	\$4,101,762	\$4,045,556	(\$144,515)	\$17,401,148	\$7,108,208	\$32,922,053	

c. Compliance Schedules

Compliance schedules for MS4 Phase II permittees is ten years of the effective date of the first implementing permit⁷⁷. The analysis uses the same methodology as previously described for MS4 Phase I permittees.

Compliance Schedule with Track 1

Total incremental cost in the year of full compliance with the final Trash Amendments is estimated to be \$12.3 million or \$2.93 per capita. After Year 10, the incremental cost of operating and maintaining the full capture systems the cost may be \$10 million per year⁷⁸ (\$2.37 per capita) (Figure 9).

⁷⁵ This estimated annual incremental cost is assuming that all necessary expenditures are conducted in one single year and the operations and maintenance associated with those specific expenditures. See compliance schedule for an analysis of incremental cost of compliance over a 10 year period.

⁷⁶ \$7.77 is the result of dividing the total annual cost presented in Table (\$32,922,053) by the population of the 148 communities selected (4,237,585) (i.e., \$32,922,053 / 4,237,585 = \$7.77).

⁷⁷ See fn. 42, *ante*.

⁷⁸ Operations and maintenance costs are estimated at \$342 per year for every full capture system installed. Therefore for every \$800 of full capture system installed, \$342 (or 42.75% of capital costs) would be spent annually in operations and maintenance. After 10 years of installation of full capture systems, MS4 Phase II communities would have spent \$23,463,510 on full capture systems. To maintain and operate \$23,463,510 full capture systems, the permittees would need to spend \$10 million annually (i.e., \$23,463,510 X 0.4275 = \$10,030,650).

Figure 9. Compliance Schedule with Track I for MS4 Phase II Permittees with Estimated Total Costs



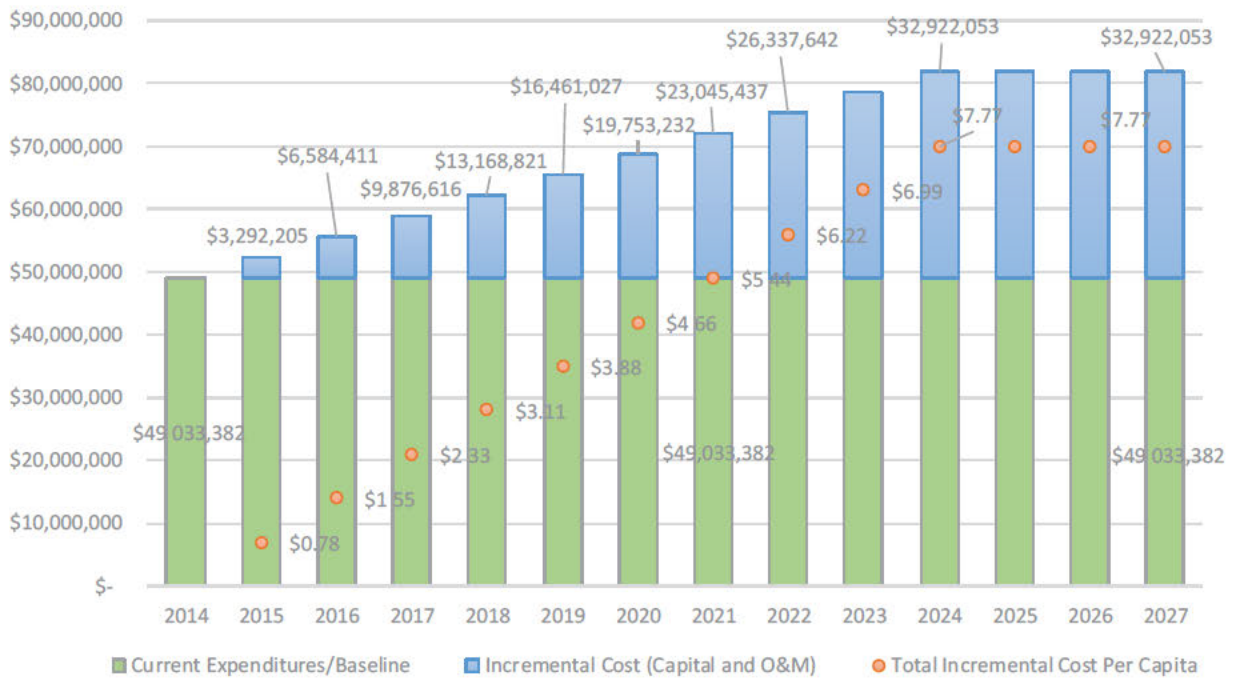
Assuming installation of 10% of the structural controls each year, the capital, operation and maintenance incremental costs in Year 10 (highest cost year) would be \$12.3 million for affected MS4 Phase II permittees (\$2.93 per capita). The total cost of installing (capital costs) full capture systems in MS4 Phase II permittees is estimated at \$5.54 per capita or approximately \$23.4 million. This total amount spread out in ten years equally is approximately \$2.3 million per year. Operations and maintenance of the installed full capture systems increases based on the accumulated installed units (capital costs). As a result, operations and maintenance cost per capita fluctuates from \$0.24 in Year 1 to \$2.37 in Year 10.

Compliance Schedule with Track 2

The incremental cost in the year of full compliance with the final Trash Amendments is \$32.9 million or \$7.77⁷⁹ per capita (Figure 10).

⁷⁹ \$7.77 is the result of dividing the total annual cost presented in Table (\$32,922,053) by the population of the 148 communities selected (4,237,585) (i.e., \$32,922,053 / 4,237,585 = \$7.77).

Figure 10. Compliance Schedule with Track 2 for MS4 Phase II Permittees



6. MS4 PHASE I AND PHASE II PERMITTEES: LAND COVERAGE METHOD

a. Costs Based on Land Coverage

Trash generation rates vary by land use. Sections 4 and 5 were used methodology to estimate compliance costs for Track 1 and Track 2. This section uses a second method of cost analysis to estimate the compliance cost of a full capture system based on land coverage. The number of storm drains within a linear road mile is based on land coverage. Since counties do not have a uniform classification of land cover codes or divisions, the data was collated from USGS Multi-Resolution Land Characteristics Consortium Land Cover Data 2006. The data can be accessed at: <http://www.mrlc.gov/nlcd2006.php>. The categories identified were the following:

- Land Use (LU) 22 or “Developed, Low Intensity”. This is defined as developed low intensity includes areas with a mixture of constructed materials and vegetation. Impervious surfaces account for 20-49 percent of total cover. These areas most commonly include single-family housing units.
- Land Use (LU) 23 or “Developed, Medium Intensity”. This is defined as developed medium intensity includes areas with a mixture of constructed materials and vegetation. Impervious surfaces account for 50-79 percent of the total cover. These areas most commonly include single-family housing units.
- Land Use (LU) 24 or “Developed, High Intensity”. This is defined as developed high intensity includes highly developed areas where people reside or work in high numbers. Examples include apartment complexes, row houses and commercial/industrial. Impervious surfaces account for 80-100 percent total cover.

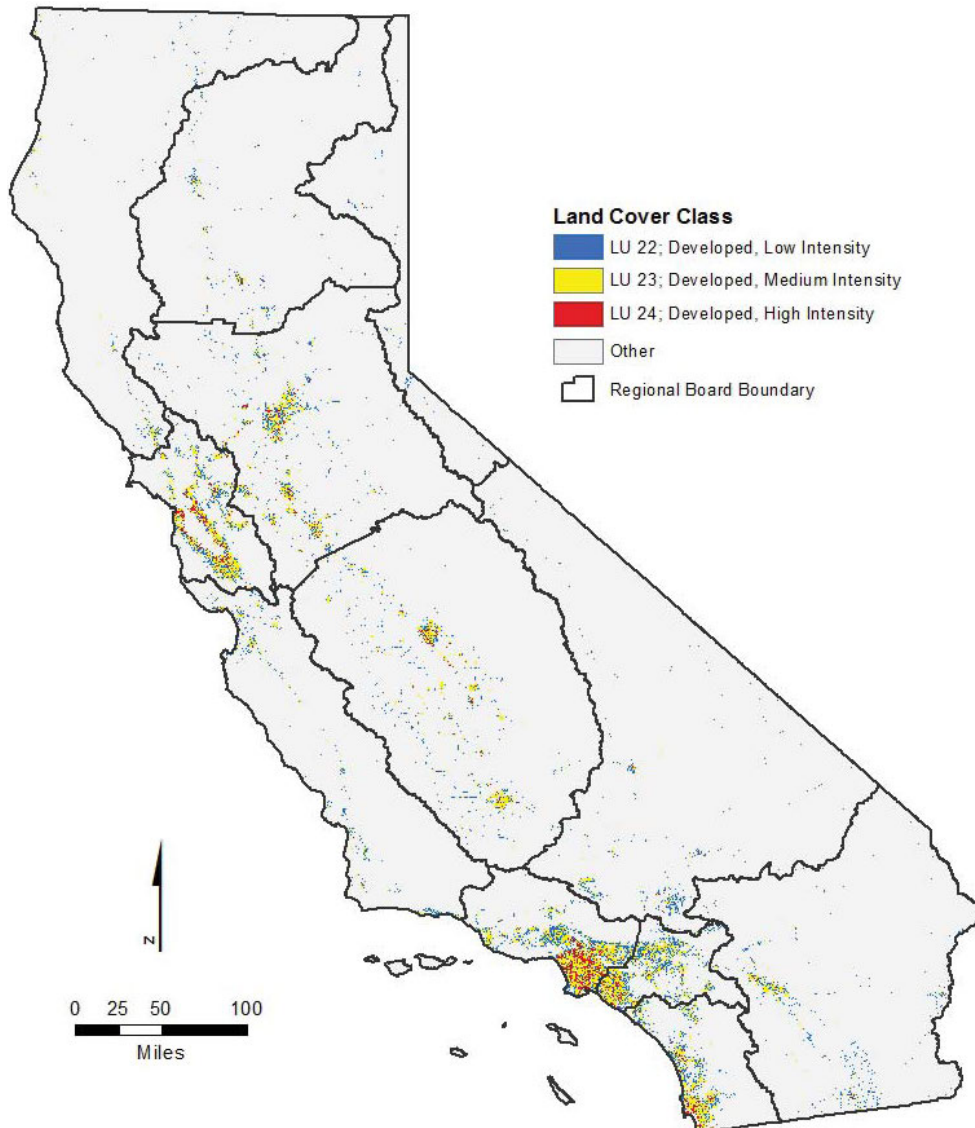
Land coverage was utilized to as a proxy to preliminarily identify priority land uses subject to the final Trash Amendments. The analysis assumes that priority land uses, as defined in the final Trash Amendments, correlate with land cover information for LU 24. Table 26 shows the land cover in acres by regional water board, and Figure 11 shows a map of developed areas by regional water board.

Table 26. Land Coverage by Regional Water Board.

Regional Water Board	Developed, High Intensity (acres) LU24	Developed, Medium Intensity (acres) LU23	Developed, Low Intensity (acres) LU22	Total (acres)
1	3,363.72	28,436.50	53,925.15	85,725.37
2	79,241.00	283,766.94	189,907.27	552,915.21
3	7,365.93	65,757.88	96,791.50	169,915.32
4	116,476.55	369,140.92	234,763.83	720,381.30
5	88,199.95	394,570.64	422,365.75	905,136.34
6	5,519.61	38,368.20	124,361.10	168,248.92
7	6,822.85	56,434.21	119,589.18	182,846.23
8	42,020.59	256,479.11	216,122.48	514,622.18
9	41,759.49	196,458.79	153,307.11	391,525.39
Total (acres)	390,769.69	1,689,413.19	1,611,133.37	3,691,316.26

Source: USGS Multi-Resolution Land Characteristics Consortium Land Cover Data 2006

Figure 11. Developed Land Cover Classes by Regional Water Board.



Compliance with Track 1 for MS4 permittees requires installing, operating and maintaining full capture systems for all storm drains that capture runoff from one or more of the priority land uses in their jurisdictions. Costs Considerations conducted for developing the TMDLs in the Los Angeles Region estimated that, in high intensity developed areas, an average of approximately one catch basin per acre is needed. Therefore, one full capture system per acre was used for the compliance cost estimates.

There are 390,769 acres classified as “Developed, High Intensity” in California. Los Angeles Water Board MS4 permittees are already implementing trash and debris TMDLs (116,476 acres) were subtracted from the total. The areas in City of San Francisco (10,830 acres of high density), and Sacramento (1,160 acres) served by combined sewer systems were subtracted from the total. Trash generated on areas served by combined sewer systems would be captured and removed at the regional wastewater treatment plant instead of being discharged through a conventional storm drain system. Therefore, the total high intensity land potential subject to the final Trash Amendments is 262,302.3 acres. The population within this high intensity land cover is 20.7 million.

The average cost of installing a catch basin insert was estimated to be \$800 and the annual operation and maintenance was \$324. We estimated one catch basin per acre and one full capture system is needed per catch basin. Similar to the compliance schedule discussion in Sections 5 and 6, full capture systems were assumed to be installed at a rate of about 10% per year, with full build out in Year 10.

As described in previous sections, MS4 Phase I and Phase II permittees are spending \$29 million a year or \$1.41 per resident per year in operating and maintaining full capture systems⁸⁰. Table 27 and Figure 12 shows the estimated total cost of compliance per year assuming a compliance period of ten years and that 10% of full capture systems are installed each year.

During the first ten years of the implementation of the final Trash Amendments, permittees may incur an incremental average cost of \$41 million a year (\$2 per capita) to install, operate and maintain full capture systems in high density areas. The total incremental annual cost of operating and maintain all full capture systems installed after Year 10 is \$60 million or an average cost per resident per year of \$2.91. Table 27 shows the total estimated costs, the incremental cost and the cost per capita for each year starting in 2015 and ending in 2026.

b. Limitations and Uncertainties

The estimates based on land coverage are based on the following assumptions:

1. Land Coverage is a surrogate for land use designation. Priority land uses are correlated to land coverage.

Using land coverage to estimate the total cost of compliance focuses on the actual priority land uses that would be impacted. This may reduce the error that the estimates using per capita would have on large communities with large populations and low developed density. At the same time, it may overestimate the costs by including all high intensity land uses that are not part of an MS4. The final Trash Amendments define priority land uses based on the different types of uses. By using land coverage instead of land use the analysis may be underestimating the area subject to compliance with the final Trash Amendments.

2. The average cost of a full capture system is \$800 and the annual operations and maintenance is \$342.

A broad range of compliance options are available to the permittees subject to the final Trash Amendments. The selection of the full capture system depends on many site specific factors and conditions. Capital cost per unit ranges from \$300 per catch basin inserts for installation (capital costs) and \$330 annual maintenance to \$80,000 per vortex separator system for installation (capital costs) and \$30,000 annual maintenance. Different methods may cover different areas, for example a drop inlet may only cover one acre, whereas a vortex separator system may cover many acres, therefore a normalized cost per acre was estimated at \$800 in capital cost and \$342 in annual operations and maintenance.

3. The analysis is highly sensitive to this assumption and more site specific estimates would be necessary to develop a more accurate estimate.

The number of full capture systems per acre in priority land uses is one full capture system per acre. There is no one size fits all assumption for storm drain inlet placing. High intensity blocks vary greatly in size depending on what city they are in and the local conditions (rainfall, slope, density, impervious surfaces, etc.). Rough estimates range from one catch

⁸⁰ See Table 13 and Table for a description of the baseline of current costs. (\$22.4 million for MS4 Phase I permittees and \$6.8 for MS4 Phase II permittees)

basin in a three-acre urban area in the City of Los Angeles⁸¹ (0.33 per acre) and up. For this analysis, one catch basin per acre was assumed. The analysis is highly sensitive to this assumption and more site specific estimates would be necessary to develop a more accurate estimate.

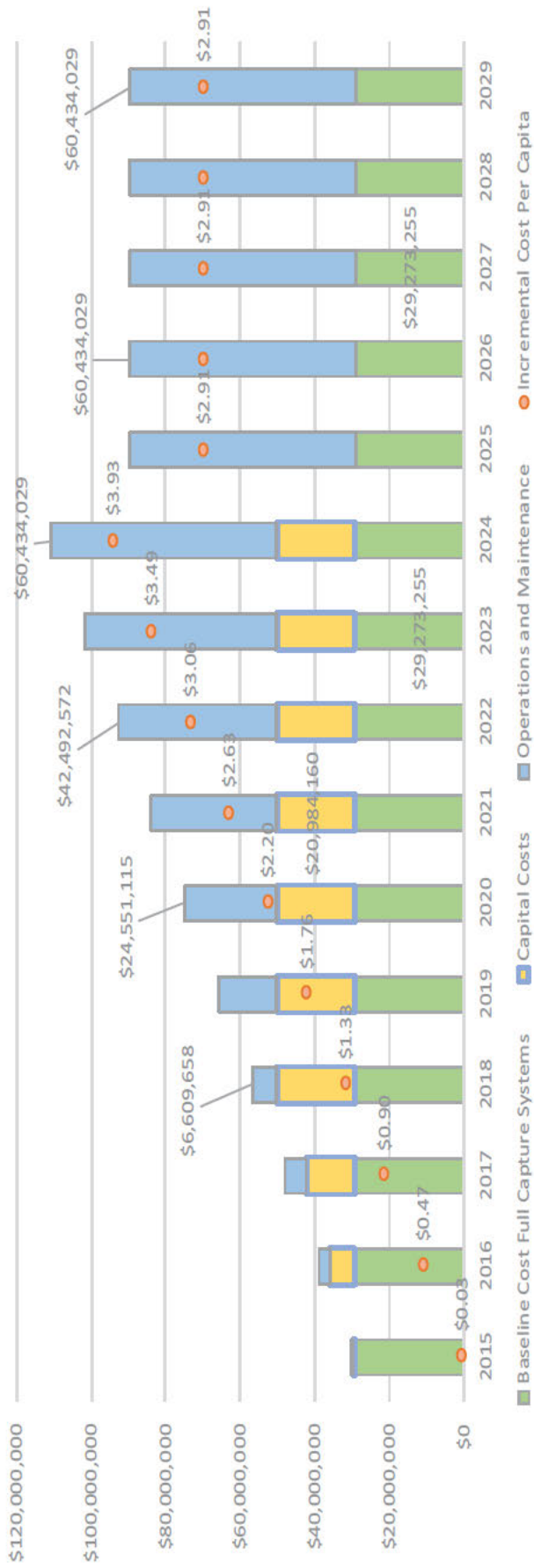
4. The land coverage analysis does not take into consideration institutional controls or other approved methods of compliance.
Compliance with the final Trash Amendments can be achieved with the installation of structural controls or a combination of structural controls and other methods including institutional controls. The land coverage analysis does not include an estimate of potential cost for a combination of institutional and structural controls per acre of priority land use. This approach would probably estimate the more reliable results. Further analysis would be necessary to estimate total costs of Track 2.

⁸¹ City of Los Angeles Stormwater Management Division. 2002. High Trash-Generation Areas and Control Measures. http://www.lastormwater.org/wp-content/files_mf/trash_gen_study.pdf

Table 27. Cost of Compliance Schedule Based on High Intensity Land Cover

Cost Categories	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026
Capital Costs	\$20,984,160	\$20,984,160	\$20,984,160	\$20,984,160	\$20,984,160	\$20,984,160	\$20,984,160	\$20,984,160	\$20,984,160	\$20,984,160	\$0	\$0
Operations and Maintenance	\$8,970,728	\$17,941,457	\$26,912,185	\$35,882,914	\$44,853,642	\$53,824,370	\$62,795,099	\$71,765,827	\$80,736,556	\$89,707,284	\$89,707,284	\$89,707,284
Total Cost	\$29,954,888	\$38,925,617	\$47,896,345	\$56,867,074	\$65,837,802	\$74,808,530	\$83,779,259	\$92,749,987	\$101,720,716	\$110,691,444	\$89,707,284	\$89,707,284
Cost Per Capita	\$1.44	\$1.88	\$2.31	\$2.74	\$3.18	\$3.61	\$4.04	\$4.47	\$4.91	\$5.34	\$4.33	\$4.33
Baseline Cost Full Capture Systems	\$29,273,255	\$29,273,255	\$29,273,255	\$29,273,255	\$29,273,255	\$29,273,255	\$29,273,255	\$29,273,255	\$29,273,255	\$29,273,255	\$29,273,255	\$29,273,255
Incremental Cost	\$681,633	\$9,652,361	\$18,623,090	\$27,593,818	\$36,564,547	\$45,535,275	\$54,506,003	\$63,476,732	\$72,447,460	\$81,418,189	\$60,434,029	\$60,434,029
Incremental Cost Per Capita	\$0.03	\$0.47	\$0.90	\$1.33	\$1.76	\$2.20	\$2.63	\$3.06	\$3.49	\$3.93	\$2.91	\$2.91

Figure 12 Compliance Schedule for Track 1 for MS4 Phase I and Phase II Permittees Based on High Intensity Land Coverage



7. POTENTIAL COSTS FOR INDUSTRIAL AND CONSTRUCTION PERMITTEES

There are 9,251 industrial facilities regulated under the Storm Water Industrial Program⁸². The estimated compliance costs (Track 1) with the final Trash Amendments for the industrial facilities are \$33.9⁸³ million or \$3,671⁸⁴ per facility.

The number of full capture systems required to comply with Track 1 is directly proportional to the number of catch basins and storm drains in each industrial site. Information regarding the number of storm drains in each industrial site is not available in the SMARTS database⁸⁵.

Given the small size of many industrial permittees, we assumed that smaller facilities would choose to comply with the final Trash Amendments implementing institutional controls rather than full capture systems. It is likely that only larger facilities would choose to install full capture systems. We identified two groups based on facility size. Out of the 9,251 industrial sites, 2,501 facilities with a size larger than 10 acres were assumed to comply by installing full capture systems and 6,750 facilities with a size of less than 10 acres, or without size information, would comply by implementing institutional controls such as training and manual cleanup.

In our calculations, the following assumptions⁸⁶ were made and used for the cost factors.

- Facilities larger than 10 acres would comply with Track 1.
- An average of 10 catch basins per facility for facilities greater than 10 acres.
- The cost of installation of each full capture system is estimated to be \$800 and the annual operation and maintenance to be \$342.
- Facilities smaller than 10 acres would implement institutional controls.
- Cost of institutional controls includes a \$500 initial training and an annual cost of \$300 in other measures.
- Industrial facilities are not implementing any trash control methods to comply with the final Trash Amendments, therefore all costs are incremental.

a. Track 1: Full Capture Systems

The estimated cost of compliance for industrial dischargers larger than 10 acres selecting Track 1 (2,501 facilities) would be approximately \$28.5 million in a single year⁸⁷ and \$8.5 million

⁸² CGP permittees are already required to comply with a prohibition to discharge debris and trash from construction sites. State Board Action 2009-0009-DWQ amended by 2010-0014-DWQ & 2012-0006-DWQ. Prohibition III. D. page 21. Available at:

http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo2009_0009_dwq.pdf. Debris is defined (footnote 4) as "Litter, rubble, discarded refuse, and remains of destroyed inorganic anthropogenic waste." Trash control costs are therefore not expected to increase for CGP permittees as a result of the final Trash Amendments.

⁸³ The total cost of \$33.9 million is the sum of the cost for large industrial facilities calculated in Table (i.e., \$28.5 million) and Table (i.e., \$5.4 million).

⁸⁴ This is the result of dividing the total cost of \$33.9 million by the 9,251 industrial facilities.

⁸⁵ SMARTS is the main database used to manage the Storm Water program. Available at: [Stormwater Multi-Application, Reporting, and Tracking System \(SMARTS\)](#)

⁸⁶ Assumptions are necessary because of the limitations in the data available regarding the activities conducted at the industrial facilities, the number of workers in each facility, etc.

⁸⁷ No compliance schedule is estimated in this section for IGP permittees. Therefore all expenditures are estimated as if they were incurred in a single year.

annually following initial implementation (Table 28). The average operation and maintenance annual cost per facility is estimated to be \$3,420 and the one time average installation cost of full capture systems per facility is estimated to be \$8,000.

Table 28. Estimated Cost of Compliance for Industrial Facilities Larger than 10 Acres

Size of Industrial Site	Number of Facilities	Number of Catch Basins @ 10 per Facility	Installation @ \$800	Operation @ \$342	Total Cost
>100 Acres	923	9,230	\$7,384,000	\$3,156,660	\$10,540,660
10-100 acres	1,578	15,780	\$12,624,000	\$5,396,760	\$18,020,760
Total	2,501	25,010	\$20,008,000	\$8,553,420	\$28,561,420

b. Track 2: Combination of Full Capture Systems, Other Treatment Controls, Institutional Controls, Multi-Benefit Projects

The estimated cost of compliance for industrial permittees smaller than 10 acres selecting Track 2 (6,750 facilities) would be approximately \$5.4 million in a single year and \$2 million annually following initial implementation (Table 29).

Table 29. Estimated Cost of Compliance for Industrial Facilities Smaller than 10 Acres

Size of Industrial Site	Number of Facilities	Training @ \$500	Operation @ \$300	Total Cost
<10 acres	3,571	\$1,785,500	\$1,071,300	\$2,856,800
No Size Data	3,179	\$1,589,500	\$953,700	\$2,543,200
Total	6,750	\$3,375,000	\$2,025,000	\$5,400,000

c. Compliance Schedule

Industrial permittees subject to the final Trash Amendments must demonstrate full compliance with the deadlines of the first implementing NPDES permit (whether such permits are modified, re-issued, or newly adopted). The deadlines cannot exceed the terms of the first implementing permit. With uncertain compliance timelines for these permittees, it is difficult to estimate and predict the schedule of the cost of complying with the final Trash Amendments, which is why this analysis assumes a permittees' full compliance being achieved in a single year, rather than amortized over several years.

8. POTENTIAL COSTS FOR CALTRANS

Caltrans' Division of Maintenance expenditures on "litter removal" are \$80 million⁸⁸ million per year⁸⁹. According to Caltrans, there are approximately 50,000 (approximately 15,000 centerline miles) in California⁹⁰. Therefore, the current cost of litter removal is, on average, \$1,600 per lane mile per year.

a. Compliance with the Final Trash Amendments

Caltrans may comply with the final Trash Amendments by installing, operating and maintaining any combination of full capture systems, other treatment controls, institutional controls and/or multi benefit projects for all storm drains that captures runoff from its significant trash generating areas.

Caltrans already implements a variety of institutional controls, including a statewide public outreach and education program (e.g., "Don't Trash California"). Caltrans also operates the Adopt-a-Highway program to clean up trash from its roadways. For this reason, and because of the many site-specific factors Caltrans will need to consider that are not available, we cannot identify with precision specific trash control that Caltrans may use. To determine the economic impact to Caltrans, we considered one possible approach that assumes no increase of institutional controls and some incremental level of structural controls to reduce trash loads to waters.

To estimate the location and relative extent of Caltrans' significant trash generating areas, we used a GIS analysis to determine the centerline miles of the state highway system. Areas already covered by existing trash and debris TMDLs and the areas of San Francisco and served by combined sewer systems⁹¹ were excluded. Next, we identified urban boundaries using city, town and census defined places from the U.S. Census Bureau TIGER/LineR Shapefiles⁹². Figure 13 provides a map of the resulting 5,990 urban centerline miles. We then assumed that 20% of the urban centerline miles would serve as a proxy for significant trash generating areas that that would require additional structural controls to comply with the final Trash Amendments. Using this method, 1,198 centerline miles were identified that may need to be addressed using structural control.

For unit costs, we assumed the same installation (\$800) and annual operation and maintenance (\$342) costs as those used in Section 7. We estimated that there are approximately 18 catch basins per mile in rural areas and 36 catch basins per mile in urban areas. Because significant trash generating areas are more likely to be in urban areas, we used the higher estimate to calculate the number of catch basins needing full capture devices. Under these assumptions, estimated incremental capital costs for Caltrans would be approximately \$35 million and incremental annual operation would be approximately \$15 million (Table 30).

⁸⁸ Litter removal costs are provided by Caltrans Maintenance Program. Available at: <http://www.dot.ca.gov/docs/LitterAbatementPlan.pdf>

⁸⁹ See fn. 32, *ante*.

⁹⁰ California State Transportation Agency. 2012. 2012 California Public Road Data, Table 1. Accessed May 2014. Available at: <http://www.dot.ca.gov/hq/tsip/hpms/datalibrary.php>

⁹¹ Areas with a combined sewer system are not explicitly carved out by the final Trash Amendments, but because all storm water in these areas is captured and treated, they are not considered significant trash generating areas and should not require additional trash controls. Therefore these areas were also excluded from Caltrans cost analysis.

⁹² U. S. Census Bureau. 2012. 2012 TIGER Shapefiles for census tracts and census designated places. Accessed January 2014. Available at: <http://www.census.gov/geo/maps-data/data/tiger-line.html>

Table 30. Incremental Capital Costs and Operation and Maintenance Estimates for Caltrans

Factor	Estimates
Centerline Miles of Roadway	15,147
Centerline miles in Urban areas.	5,990
Percent of subject miles requiring structural controls	20%
Affected Miles	1,198
Drop inlets per mile	36
Total number of drop inlets	46534
Total Capital Cost (@ \$800 per drop inlet)	\$34,502,400
Annual Operation & Maintenance Cost (@ \$342 per drop inlet per year)	\$14,749,776

b. Compliance Schedule

Compliance with the water quality objective and implementing the prohibition of discharge will be demonstrated by Caltrans according to a time schedule set forth in the final Trash Amendments. The compliance schedule will be contingent on the effective date of the first implementing permit. Caltrans must demonstrate full compliance within ten years of the effective date of the first implementing permitting permit⁹³. The State Water Board can set achievements of interim milestones for compliance within a specific permit. These interim milestones could be set as a percent reduction or percent installation per year or over several years. Assuming a 10% annual investment in structural controls, the annual capital cost would be approximately \$3.5 million.

Reaching full compliance with the prohibition of discharge will require extensive planning by Caltrans. To assist Caltrans with planning for full compliance, the State Water Board will issue a Water Code section 13267 or 13383 order within 18 months of the effective date of the final Trash Amendments requesting an implementation plan. Requesting an implementation plan from Caltrans permittees prior to the will optimize compliance planning and implementation.

c. Limitations and Uncertainties

Due to the differences in the type, size and distribution of facilities, the construction, operation and maintenance of trash control systems on highways and roads managed by Caltrans districts will be extremely site specific, and may differ significantly from costs for municipalities. The calculations are sensitive to the assumptions used to estimate significant trash generating areas and the percentage of those areas that would require additional structural controls. For example, we based cost calculations on the assumption that significant trash generating areas will largely correspond to urban areas. However, this assumption may underestimate costs that some significant trash generating areas will occur in non-urban areas, such as rest stops. GIS

⁹³ See fn. 42, *ante*.

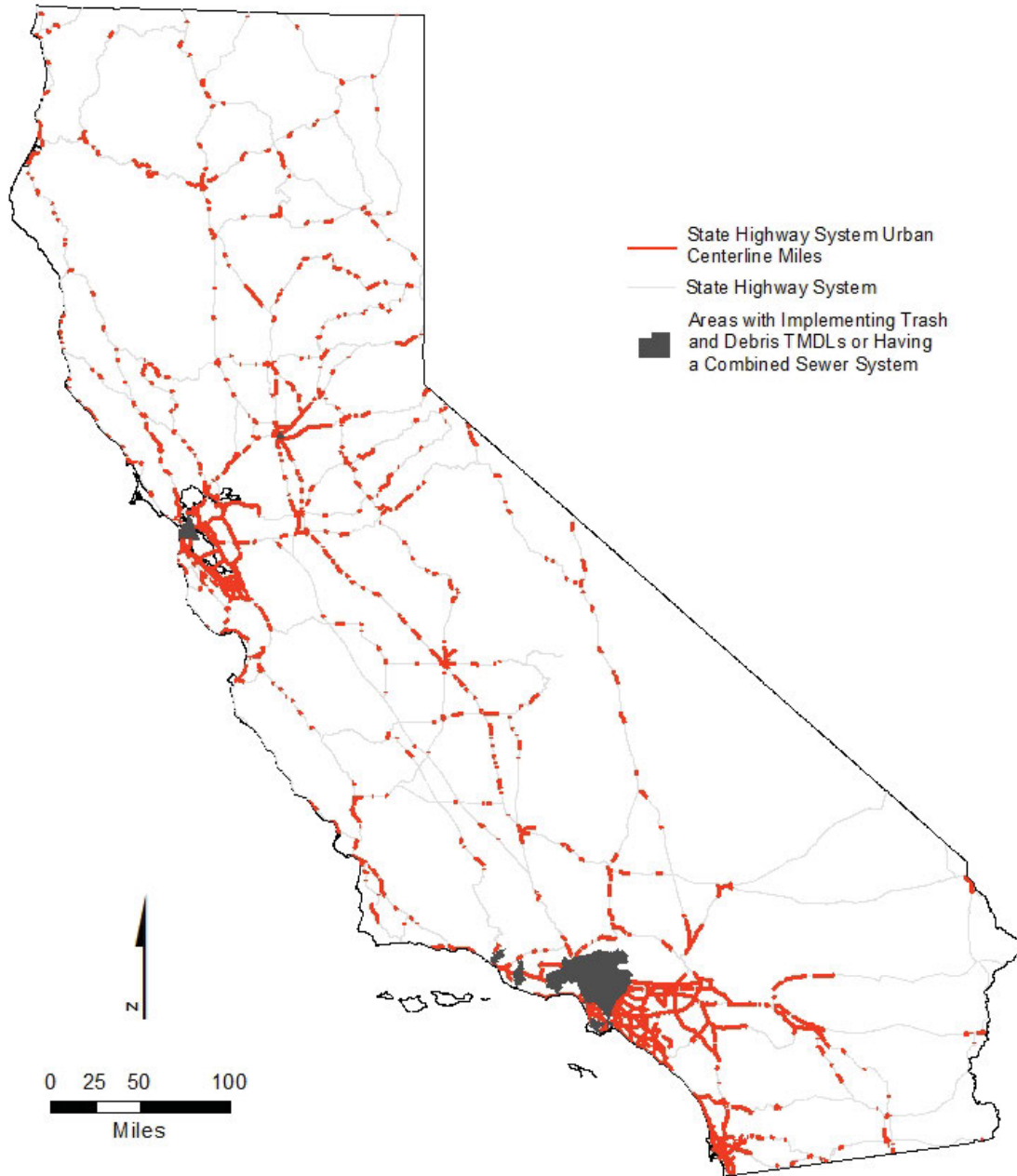
data from Caltrans indicates there are currently 88 rest stop areas in California, seven of which are already accounted for in the calculation of urban centerline miles. If these rest areas are determined to be significant trash generating areas, the capital costs are expected to increase by less than \$1 million using the methodology described above. In addition, Caltrans has suggested that 40% is a more reasonable estimate of the Percent of subject miles requiring structural controls⁹⁴. However Caltrans did not provide justification for this estimate. If the calculations in Table 30 were revised to use Caltrans assumptions, the total estimated capital cost would increase to approximately \$69 million.

Finally, we anticipate that Caltrans likely will choose Gross Solids Removal Devices in many locations instead of catch basin inserts. Gross Solids Removal Devices are generally more expensive to install and maintain, but also cover larger areas. Without additional information on the specific location and site conditions where additional trash controls will be needed, we cannot determine whether on balance Gross Solids Removal Devices will be more or less expensive than catch basin inserts⁹⁵.

⁹⁴ Source: McGowen, Scott., California Department of Transportation. Letter to Diana Messina, California State Water Resources Control Board. November 7, 2014.

⁹⁵ During the comment period and subsequent correspondence and conversations with Caltrans, Caltrans provided a cost estimate of \$176,000 per treated acre as the total installation cost for gross solid removal devices. However, this estimate was developed to address TMDL compliance for multiple pollutants (Source: McGowen, Scott., California Department of Transportation. Letter to Diana Messina, California State Water Resources Control Board. November 7, 2014). Caltrans may indeed choose to install Gross Solid Removal Devices to address multiple pollutants, but cheaper alternatives exist for trash and therefore the full costs associated with Gross Solids Removal Devices may not be reasonably attributed to these amendments. In fact, to the extent that Gross Solid Removal Devices are already required under the Caltrans MS4 permit, costs to implement the Trash Amendments could be substantially less than estimated above. Please see the responses to comments document for additional information.

Figure 13. State Highway System Centerlines in Urban Areas.



9. POTENTIAL COSTS FOR OTHER DISCHARGERS

The final Trash Amendments include a provision that allows the Water Boards to require dischargers that are not subject to Section 3⁹⁶ of the final Trash Amendments to implement trash controls in areas or facilities that may generate trash. Such areas or facilities may include (but are not limited to) high usage campgrounds, picnic areas, beach recreation areas, parks not subject to an MS4 permit, or marinas.

Because of the optional nature of this provision, no baseline figures are available with which to conduct an economic analysis. The absence of specific baseline figures, coupled with the variety of compliance options available, and the resulting wide range of costs related to this group of dischargers, no information is available to develop specific cost estimates for the incremental trash control costs associated with this category of dischargers at this point.

10. CONCLUSION

The presence of trash in surface waters, especially coastal and marine waters, is a serious issue in California. California communities are currently spending \$428 million annually to control trash from entering water of the states, which varies between the sizes of communities. With the final Trash Amendments, the State Water Board's objective is to provide statewide consistency for the Water Boards' regulatory approach to protect aquatic life and public health beneficial uses, and reduce environmental issues associated with trash in state waters, while focusing limited resources on high trash generating areas.

To achieve this objective, a central element of the final Trash Amendments is a land-use based compliance approach to focus trash control to areas with high trash generation rates. Within this land-use based approach, a dual alternative compliance Track approach is proposed for permitted storm water dischargers (i.e., MS4 Phase I, MS4 Phase II, Caltrans, IGP, and CGP) to implement the prohibition of discharge for trash.

Under the requirements of Water Code sections 13170 and 13241, subdivision (d) that require the State Water Board to consider economics when establishing water quality objectives. This economic analysis is not a cost-benefit analysis, but a consideration of potential costs of a suite of reasonably foreseeable measures to comply with the final Trash Amendments. This economic analysis utilized two basic methods to estimate the incremental cost of compliance for permitted storm water discharge: the first method was based on cost of compliance per capita, and the second method was based on land cover.

This economic analysis estimated the incremental annual cost to comply with the requirements of the final Trash Amendments ranged from \$4 to \$10.67 per year per capita for MS4 Phase I NPDES permittees and from \$7.77 to \$7.91 per year per capita for smaller communities regulated under MS4 Phase II permits. For IGP facilities, the estimated compliance cost is \$33.9 million or \$3,671 per facility. To comply with the final Trash Amendments, expenditures by Caltrans are estimated to increase by \$34.5 million in total capital costs and \$14.7 million per year for operation and maintenance of structural controls.

⁹⁶ As proposed to the Ocean Plan Ch. III(L)(2). As proposed to the ISWEBE Plan Ch. IV(A)(3).

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APPENDIX D: FINAL AMENDMENT TO WATER QUALITY CONTROL PLAN FOR OCEAN WATERS OF CALIFORNIA TO CONTROL TRASH

Text of the final amendment to control trash proposed to be amended into Chapter II – Water Quality Objectives of the Ocean Plan

C. Physical Characteristics

5. Trash* shall not be present in ocean waters, along shorelines or adjacent areas in amounts that adversely affect beneficial uses or cause nuisance.

Text of the final amendment to control trash proposed to be amended into Chapter III – Program of Implementation of the Ocean Plan

I. Prohibition of Discharge

6. Trash*

The discharge of Trash* to surface waters of the State or the deposition of Trash* where it may be discharged into surface waters of the State is prohibited. Compliance with this prohibition of discharge shall be achieved as follows:

- a. Dischargers with NPDES permits that contain specific requirements for the control of Trash* that are consistent with these Trash Provisions* shall be determined to be in compliance with this prohibition if the dischargers are in full compliance with such requirements.
- b. Dischargers with non-NPDES waste discharge requirements (WDRs) or waivers of WDRs that contain specific requirements for the control of Trash* shall be determined to be in compliance with this prohibition if the dischargers are in full compliance with such requirements.
- c. Dischargers with NPDES permits, WDRs, or waivers of WDRs that do not contain specific requirements for the control of Trash* are exempt from these Trash Provisions*.
- d. Dischargers without NPDES permits, WDRs, or waivers of WDRs must comply with this prohibition of discharge.
- e. Chapter III.I.6.b and Chapter III.L.3 notwithstanding, this prohibition of discharge applies to the discharge of preproduction plastic* by manufacturers of preproduction plastics*, transporters of preproduction

*Represents a defined term in the California Ocean Plan.

plastics* , and manufacturers that use preproduction plastics* in the manufacture of other products to surface waters of the State, or the deposition of preproduction plastic* where it may be discharged into surface waters of the State, unless the discharger is subject to a NPDES permit for discharges of storm water* associated with industrial activity.

L. Implementation Provisions for Trash*

1. **Applicability**

- a. These Trash Provisions* shall be implemented through a prohibition of discharge (Chapter III.I.6) and through NPDES permits issued pursuant to section 402(p) of the Federal Clean Water Act, waste discharge requirements (WDRs), or waivers of WDRs (as set forth in Chapter III.L.2 and Chapter III.L.3 below).
- b. These Trash Provisions* apply to all surface waters of the State, with the exception of those waters within the jurisdiction of the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) for which trash Total Maximum Daily Loads (TMDLs) are in effect prior to the effective date of these Trash Provisions*¹; provided, however, that:
- (1) Upon the effective date of these Trash Provisions*, the Los Angeles Water Board shall cease its full capture system* certification process and provide that any new full capture systems* shall be certified by the State Water Board in accordance with these Trash Provisions*.
- (2) Within one year of the effective date of these Trash Provisions*, the Los Angeles Water Board shall convene a public meeting to reconsider the scope of its trash TMDLs, with the exception of those for the Los Angeles River and Ballona Creek watersheds, to particularly consider an approach that would focus MS4* permittees' trash-control efforts on high-trash generation areas within their jurisdictions.

¹ In the Los Angeles Region, there are fifteen (15) trash TMDLs for the following watersheds and water bodies: Los Angeles River Watershed, Ballona Creek, Malibu Creek Watershed, Santa Monica Bay Nearshore and Offshore, San Gabriel River East Fork, Revolon Slough and Beardsley Wash, Ventura River Estuary, Machado Lake, Lake Elizabeth, Lake Hughes, Munz Lake, Peck Road Park Lake, Echo Park Lake, Lincoln Park Lake and Legg Lake. Three of these were established by the U.S. EPA: Peck Road Park Lake, Echo Park Lake and Lincoln Park Lake.

*Represents a defined term in the California Ocean Plan.

2. Dischargers Permitted Pursuant to Federal Clean Water Act Section 402(p)

Permitting authorities* shall include the following requirements in NPDES permits issued pursuant to Federal Clean Water Act section 402(p):

- a. MS4* permittees with regulatory authority over priority land uses* shall be required to comply with the prohibition of discharge in Chapter III.I.6.a herein by either of the following measures:
 - (1) Track 1: Install, operate, and maintain full capture systems* for all storm drains that captures runoff from the priority land uses* in their jurisdictions; or
 - (2) Track 2: Install, operate, and maintain any combination of full capture systems*, multi-benefit projects*, other treatment controls*, and/or institutional controls* within either the jurisdiction of the MS4* permittee or within the jurisdiction of the MS4* permittee and contiguous MS4* permittees. The MS4* permittee may determine the locations or land uses within its jurisdiction to implement any combination of controls. The MS4* permittee shall demonstrate that such combination achieves full capture system equivalency*. The MS4* permittee may determine which controls to implement to achieve compliance with full capture system equivalency*. It is, however, the State Water Board's expectation that the MS4* permittee will elect to install full capture systems* where such installation is not cost-prohibitive.

- b. The California Department of Transportation (Department) shall be required to comply with the prohibition of discharge in Chapter III.I.6.a herein in all significant trash generating areas* by installing, operating, and maintaining any combination of full capture systems*, multi-benefit projects*, other treatment controls*, and/or institutional controls* for all storm drains that captures runoff from significant trash generating areas*. The Department shall demonstrate that such combination achieves full capture system equivalency*. In furtherance of this provision, the Department and MS4* permittees that are subject to the provisions of Chapter III.L.2.a herein shall coordinate their efforts to install, operate, and maintain full capture systems*, multi-benefit projects*, other treatment controls*, and/or institutional controls* in significant trash generating areas* and/or priority land uses*.

- c. Dischargers that are subject to NPDES permits for discharges of storm water* associated with industrial activity (including construction activity) shall be required to comply with the prohibition of discharge in Chapter

*Represents a defined term in the California Ocean Plan.

III.I.6.a herein by eliminating Trash* from all storm water* and authorized non-storm water* discharges consistent with an outright prohibition of the discharge of Trash* contained within the applicable NPDES permit regulating the industrial or construction facility. If the discharger can satisfactorily demonstrate to the permitting authority* its inability to comply with the outright prohibition of the discharge of Trash* contained within the applicable NPDES permit, then the permitting authority* may require the discharger to either:

- (1) Install, operate, and maintain full capture systems* for all storm drains that captures runoff from the facility or site regulated by the NPDES permit; or,
- (2) Install, operate, and maintain any combination of full capture systems*, multi-benefit projects*, other treatment controls*, and/or institutional controls* for the facility or site regulated by the NPDES permit. The discharger shall demonstrate that such combination achieves full capture system equivalency*.

Termination of permit coverage for industrial and construction storm water* dischargers shall be conditioned upon the proper operation and maintenance of all controls (e.g., full capture systems*, multi-benefit projects*, other treatment controls*, and/or institutional controls*) used at their facility(ies).

- d. A permitting authority* may determine that specific land uses or locations (e.g., parks, stadia, schools, campuses, or roads leading to landfills) generate substantial amounts of Trash*. In the event that the permitting authority* makes that determination, the permitting authority* may require the MS4* to comply with Chapter III.L.2.a.1 or Chapter III.L.2.a.2, as determined by the permitting authority*, with respect to such land uses or locations.

3. Other Dischargers

A permitting authority* may require dischargers, described in Chapter III.I.6.c or Chapter III.I.6.d, that are not subject to Chapter III.L.2 herein, to implement any appropriate Trash* controls in areas or facilities that may generate Trash*. Such areas or facilities may include (but are not limited to) high usage campgrounds, picnic areas, beach recreation areas, parks not subject to an MS4* permit, or marinas.

*Represents a defined term in the California Ocean Plan.

4. Time Schedule

The permitting authority* shall modify, re-issue, or newly adopt NPDES permits issued pursuant to section 402(p) of the Federal Clean Water Act that are subject to the provisions of Chapter III.L.2 herein to include requirements consistent with these Trash Provisions*. The permitting authorities* shall abide by the following time schedules:

- a. NPDES Permits Regulating MS4* Permittees that have Regulatory Authority over Priority Land Uses*.²
 - (1) Within eighteen (18) months of the effective date of these Trash Provisions*, for each permittee, each permitting authority* shall either:
 - A. Modify, re-issue, or adopt the applicable MS4* permit to add requirements to implement these Trash Provisions*. The implementing permit shall require written notice from each MS4* permittee stating whether it has elected to comply under Chapter III.L.2.a.1 (Track 1) or Chapter III.L.2.a.2 (Track 2) and such notice shall be submitted to the permitting authority* no later than three (3) months from the effective date of the implementing permit, or for MS4s* designated after the effective date of these Trash Provisions*, three (3) months from the effective date of that designation. The implementing permit shall also require that within eighteen (18) months of the effective date of the implementing permit or new designation, MS4* permittees that have elected to comply with Track 2 shall submit an implementation plan to the permitting authority*. The implementation plan shall describe: (i) the combination of controls selected by the MS4* permittee and the rationale for

² The time schedule requirement in Chapter III.L.4.a.1 requiring MS4* permittees to elect Chapter III.L.2.a.1 (Track 1) or Chapter III.L.2.a.2 (Track 2) does not apply to MS4* permittees subject to the Municipal Regional Stormwater NPDES Permit (MRP) issued by the San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) or the East Contra Costa Municipal Storm Water Permit issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board) because those permits already require control requirements substantially equivalent to Track 2. The time schedule requirement in Chapter III.L.4.a.1 requiring MS4* permittees to submit an implementation plan does not apply to the above permittees if the pertinent permitting authority* determines that such permittee has already submitted an implementation plan prior to the effective date of the Trash Provisions* that is equivalent to the implementation plan required by Chapter III.L.4.a.1. In the aforementioned permits, the pertinent permitting authority* may establish an earlier full compliance deadline than that specified in Chapter III.L.4.a.3.

*Represents a defined term in the California Ocean Plan.

the selection, (ii) how the combination of controls is designed to achieve full capture system equivalency*, and (iii) how full capture system equivalency* will be demonstrated. The implementation plan is subject to approval by the permitting authority*.

B. Issue an order pursuant to Water Code section 13267 or 13383 requiring the MS4* permittee to submit, within three (3) months from receipt of the order, written notice to the permitting authority* stating whether such MS4* permittee will comply with the prohibition of discharge under Chapter III.L.2.a.1 (Track 1) or Chapter III.L.2.a.2 (Track 2). For MS4s* designated after the effective date of these Trash Provisions*, the order pursuant to Water Code section 13267 or 13383 shall be issued at the time of designation. Within eighteen (18) months of the receipt of the Water Code section 13267 or 13383 order, MS4* permittees that have elected to comply with Track 2 shall submit an implementation plan to the permitting authority* that describes: (i) the combination of controls selected by the MS4* permittee and the rationale for the selection, (ii) how the combination of controls is designed to achieve full capture system equivalency*, and (iii) how full capture system equivalency* will be demonstrated. The implementation plan is subject to approval by the permitting authority*.

(2) For MS4* permittees that elect to comply with Chapter III.L.2.a.1 (Track 1), the implementing permit shall state that full compliance shall occur within ten (10) years of the effective date of the first implementing permit except as specified in Chapter III.L.4.a.5. The permit shall also require these permittees to demonstrate achievement of interim milestones such as average load reductions of ten percent (10%) per year or other progress to full implementation. In no case may the final compliance date be later than fifteen (15) years from the effective date of these Trash Provisions*.

(3) For MS4* permittees that elect to comply with Chapter III.L.2.a.2 (Track 2), the implementing permit shall state that full compliance shall occur within ten (10) years of the effective date of the first implementing permit except as specified in Chapter III.L.4.a.5. The permit shall also require these permittees to demonstrate achievement of interim milestones such as average load reductions of ten percent (10%) per year or other progress to full implementation. In no case may the final compliance date be later

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than fifteen (15) years from the effective date of these Trash Provisions*.

- (4) The implementing permit shall state that for MS4* permittees designated after the effective date of the implementing permit, full compliance shall occur within ten (10) years of the effective date of the designation. The permit shall also require such designations to demonstrate achievement of interim milestones such as average load reductions of ten percent (10%) per year or other progress to full implementation.
- (5) Where a permitting authority* makes a determination pursuant to Chapter III.L.2.d that a specific land use generates a substantial amount of Trash*, that permitting authority* has discretion to determine the time schedule for full compliance. In no case may the final compliance date be later than ten (10) years from the determination.

b. NPDES Permits Regulating the Department.

- (1) Within eighteen (18) months of the effective date of these Trash Provisions*, the State Water Board shall issue an order pursuant to Water Code section 13267 or 13383 requiring the Department to submit an implementation plan to the Executive Director of the State Water Board that: (i) describes the specific locations of its significant trash generating areas*, (ii) the combination of controls selected by the Department and the rationale for the selections, and (iii) how it will demonstrate full capture system equivalency*.
- (2) The Department must demonstrate full compliance with Chapter III.L.2.b herein within ten (10) years of the effective date of the first implementing NPDES permit, along with achievements of interim milestones such as average load reductions of ten percent (10%) per year. In no case may the final compliance date be later than fifteen (15) years from the effective date of these Trash Provisions*.

c. NPDES Permits Regulating the Discharges of Storm Water* Associated with Industrial Activity (Including Construction Activity). Dischargers that are subject to the provisions of Chapter III.L.2.c herein must demonstrate full compliance in accordance with the deadlines contained in the first implementing NPDES permits. Such deadlines may not exceed the terms of the first implementing permits.

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5. Monitoring and Reporting

The permitting authority* must include monitoring and reporting requirements in its implementing permits. The following monitoring and reporting provisions are the minimum requirements that must be included within the implementing permits:

- a. MS4* permittees that elect to comply with Chapter III.L.2.a.1 (Track 1) shall provide a report to the applicable permitting authority* demonstrating installation, operation, maintenance, and the Geographic Information System- (GIS-) mapped location and drainage area served by its full capture systems* on an annual basis.
- b. MS4* permittees that elect to comply with Chapter III.L.2.b.2 (Track 2) shall develop and implement monitoring plans that demonstrate the effectiveness of the full capture systems*, multi-benefit projects*, other treatment controls*, and/or institutional controls* and compliance with full capture system equivalency*. Monitoring reports shall be provided to the applicable permitting authority* on an annual basis, and shall include GIS-mapped locations and drainage area served for each of the full capture systems*, multi-benefit projects*, other treatment controls*, and/or institutional controls* installed or utilized by the MS4* permittee. In developing the monitoring reports the MS4* permittee should consider the following questions:
 - (1) What type of and how many treatment controls*, institutional controls*, and/or multi-benefit projects* have been used and in what locations?
 - (2) How many full capture systems* have been installed (if any), in what locations have they been installed, and what is the individual and cumulative area served by them?
 - (3) What is the effectiveness of the total combination of treatment controls*, institutional controls*, and multi-benefit projects* employed by the MS4* permittee?
 - (4) Has the amount of Trash* discharged from the MS4* decreased from the previous year? If so, by how much? If not, explain why.
 - (5) Has the amount of Trash* in the MS4's* receiving water(s) decreased from the previous year? If so, by how much? If not, explain why.
- c. The Department, as subject to the provisions of Chapter III.L.2.b, shall develop and implement monitoring plans that demonstrate the

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effectiveness of the controls and compliance with full capture system equivalency*. Monitoring reports shall be provided to the State Water Board on an annual basis, and shall include GIS-mapped locations and drainage area served for each of the full capture systems*, multi-benefit projects*, other treatment controls*, and/or institutional controls* installed or utilized by the Department. In developing the monitoring report, the Department should consider the following questions:

- (1) What type of and how many treatment controls* institutional controls*, and/or multi-benefit projects* have been used and in what locations?
 - (2) How many full capture systems* have been installed (if any), in what locations have they been installed, and what is the individual and cumulative area served by them?
 - (3) What is the effectiveness of the total combination of treatment controls*, institutional controls*, and multi-benefit projects* employed by the Department?
 - (4) Has the amount of Trash* discharged from the Department's MS4* decreased from the previous year? If so, by how much? If not, explain why.
 - (5) Has the amount of Trash* in the receiving waters decreased from the previous year? If so, by how much? If not, explain why.
- d. Dischargers that are subject to the provisions of Chapter III.L.2.c herein shall be required to report the measures used to comply with Chapter III.L.2.c.

Text of the final amendment to control trash proposed to be amended into Appendix I of the Ocean Plan

APPENDIX I

DEFINITION OF TERMS

Full capture system is a treatment control*, or series of treatment controls*, including but not limited to, a multi-benefit project* or a low-impact development control* that traps all particles that are 5 mm or greater, and has a design treatment capacity that is either: a) of not less than the peak flow rate, Q, resulting from a one-year, one-hour, storm in the subdrainage area, or b) appropriately sized to, and designed to carry at least the same flows as, the corresponding storm drain.

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[Rational equation is used to compute the peak flow rate: $Q = C \cdot I \cdot A$, where Q = design flow rate (cubic feet per second, cfs); C = runoff coefficient (dimensionless); I = design rainfall intensity (inches per hour, as determined per the rainfall isohyetal map specific to each region, and A = subdrainage area (acres).]

Prior to installation, full capture systems* must be certified by the Executive Director, or designee, of the State Water Board. Uncertified full capture systems* will not satisfy the requirements of these Trash Provisions*. To request certification, a permittee shall submit a certification request letter that includes all relevant supporting documentation to the State Water Board's Executive Director. The Executive Director, or designee, shall issue a written determination approving or denying the certification of the proposed full capture system* or conditions of approval, including a schedule to review and reconsider the certification. Full capture systems* certified by the Los Angeles Regional Water Board prior to the effective date of these Trash Provisions* and full capture systems* listed in Appendix I of the Bay Area-wide Trash Capture Demonstration Project, Final Project Report (May 8, 2014) will satisfy the requirements of these Trash Provisions*, unless the Executive Director, or designee, of the State Water Board determines otherwise.

Full capture system equivalency is the Trash* load that would be reduced if full capture systems* were installed, operated, and maintained for all storm drains that capture runoff from the relevant areas of land (priority land uses*, significant trash generating areas*, facilities or sites regulated by NPDES permits for discharges of storm water* associated with industrial activity, or specific land uses or areas that generate substantial amounts of Trash*, as applicable). The full capture system equivalency* is a Trash* load reduction target that the permittee quantifies by using an approach, and technically acceptable and defensible assumptions and methods for applying the approach, subject to the approval of permitting authority*. Examples of such approaches include, but are not limited to, the following:

- (1) **Trash Capture Rate Approach.** Directly measure or otherwise determine the amount of Trash* captured by full capture systems* for representative samples of all similar types of land uses, facilities, or areas within the relevant areas of land over time to identify specific trash capture rates. Apply each specific Trash* capture rate across all similar types of land uses, facilities, or areas to determine full capture system equivalency*. Trash* capture rates may be determined either through a pilot study or literature review. Full capture systems* selected to evaluate Trash* capture rates may cover entire types of land uses, facilities, or areas, or a representative subset of types of land uses, facilities, or areas. With this approach, full capture system equivalency* is the sum of the products of each type of land use, facility, or area multiplied by Trash* capture rates for that type of land use, facility, or area.

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- (2) Reference Approach. Determine the amount of Trash* in a reference receiving water in a reference watershed where full capture systems* have been installed for all storm drains that capture runoff from all relevant areas of land. The reference watershed must be comprised of similar types and extent of sources of trash* and land uses (including priority land uses* and all other land uses), facilities, or areas as the permittee's watershed. With this approach, full capture system equivalency* would be demonstrated when the amount of Trash* in the receiving water is equivalent to the amount of Trash* in the reference receiving water.

Institutional controls are non-structural best management practices (i.e., no structures are involved) that may include, but not be limited to, street sweeping, sidewalk Trash* bins, collection of the Trash*, anti-litter educational and outreach programs, producer take-back for packaging, and ordinances.

Low-impact development controls are treatment controls* that employ natural and constructed features that reduce the rate of storm water* runoff, filter out pollutants, facilitate storm water* storage onsite, infiltrate storm water* into the ground to replenish groundwater supplies, or improve the quality of receiving groundwater and surface water. (See Water Code § 10564.)

Multi-benefit project is a treatment control* project designed to achieve any of the benefits set forth in section 10562, subdivision (d) of the Water Code. Examples include projects designed to: infiltrate, recharge or store storm water* for beneficial reuse; develop or enhance habitat and open space through storm water* and non-storm water management; and/or reduce storm water* and non-storm water runoff volume.

Municipal Separate Storm Sewer System (MS4) has the same meaning set forth in 40 Code of Federal Regulations section 122.26(b)(8).

Preproduction plastic has the same meaning set forth in section 13367(a) of the Water Code.

Priority land uses are those developed sites, facilities, or land uses (i.e., not simply zoned land uses) within the MS4* permittee's jurisdiction from which discharges of Trash* are regulated by this Ocean Plan as follows:

- (1) **High-density residential**: all land uses with at least ten (10) developed dwelling units/acre.
- (2) **Industrial**: land uses where the primary activities on the developed parcels involve product manufacture, storage, or distribution (e.g., manufacturing businesses, warehouses, equipment storage lots, junkyards, wholesale businesses, distribution centers, or building material sales yards).
- (3) **Commercial**: land uses where the primary activities on the developed parcels involve the sale or transfer of goods or services to consumers (e.g., business or professional buildings, shops, restaurants, theaters, vehicle repair shops, etc.)

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- (4) **Mixed urban:** land uses where high-density residential, industrial, and/or commercial land uses predominate collectively (i.e., are intermixed).
- (5) **Public transportation stations:** facilities or sites where public transit agencies' vehicles load or unload passengers or goods (e.g., bus stations and stops).

Equivalent alternate land uses: An MS4* permittee with regulatory authority over priority land uses* may issue a request to the applicable permitting authority* that the MS4* permittee be allowed to substitute one or more land uses identified above with alternates land use within the MS4* permittee's jurisdiction that generates rates of Trash* that are equivalent to or greater than the priority land use(s)* being substituted. The land use area requested to substitute for a priority land use* need not be an acre-for-acre substitution but may involve one or more priority land uses*, or a fraction of a priority land use*, or both, provided the total trash* generated in the equivalent alternative land use is equivalent to or greater than the total Trash* generated from the priority land use(s)* for which substitution is requested. Comparative Trash* generation rates shall be established through the reporting of quantification measures such as street sweeping and catch basin cleanup records; mapping; visual trash presence surveys, such as the "Keep America Beautiful Visible Litter Survey"; or other information as required by the permitting authority*.

Significant trash generating areas means all locations or facilities within the Department's jurisdiction where Trash* accumulates in substantial amounts, such as:

- (1) Highway on- and off-ramps in high density residential, commercial, and industrial land uses (as such land uses are defined under priority land uses* herein).
- (2) Rest areas and park-and-rides.
- (3) State highways in commercial and industrial land uses (as such land uses are defined under priority land uses* herein).
- (4) Mainline highway segments to be identified by the Department through pilot studies and/or surveys.

Storm water has the same meaning set forth in 40 Code of Federal Regulations section 122.26(b)(13) (Nov. 16, 1990).

Treatment controls are structural best management practices to either (a) remove pollutants and/or solids from storm water* runoff, wastewater, or effluent, or (b) capture, infiltrate or reuse storm water* runoff, wastewater, or effluent. Treatment controls include full capture systems* and low-impact development controls*.

Trash means all improperly discarded solid material from any production, manufacturing, or processing operation including, but not limited to, products, product packaging, or containers constructed of plastic, steel, aluminum, glass, paper, or other synthetic or natural materials.

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Trash Provisions are the water quality objective for Trash*, as well as the prohibition of discharge set forth in Chapter III.I and implementation requirements set forth in Chapter III.L herein.

*Represents a defined term in the California Ocean Plan.
Final Staff Report for Trash Amendments - April 7, 2015

APPENDIX E: FINAL PART 1 TRASH PROVISIONS OF THE WATER QUALITY CONTROL PLAN FOR INLAND SURFACE WATERS, ENCLOSED BAYS, AND ESTUARIES OF CALIFORNIA⁹⁷

Text of the final Part 1 Trash Provisions proposed to Chapter III – Water Quality Objectives of the ISWEBE Plan

A. Trash

TRASH shall not be present in inland surface waters, enclosed bays, estuaries, and along shorelines or adjacent areas in amounts that adversely affect beneficial uses or cause nuisance.

Draft text of the final Part 1 Trash Provisions proposed to Chapter IV – Implementation of Water Quality Objectives of the ISWEBE Plan

A. Trash

1. Applicability

- a. These TRASH PROVISIONS shall be implemented through a prohibition of discharge (Chapter IV.A.2) and through NPDES permits issued pursuant to section 402(p) of the Federal Clean Water Act, waste discharge requirements (WDRs), or waivers of WDRs (as set forth in Chapter IV.A.3 and Chapter IV.A.4 below).
- b. These TRASH PROVISIONS apply to all surface waters of the State, with the exception of those waters within the jurisdiction of the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) for which trash Total Maximum Daily Loads (TMDLs) are in effect prior to the effective date of these TRASH PROVISIONS¹; provided, however, that:
 - (1) Upon the effective date of these TRASH PROVISIONS, the Los Angeles Water Board shall cease its FULL CAPTURE SYSTEM certification process and provide that any new FULL CAPTURE SYSTEMS shall be certified by the State Water Board in accordance with these TRASH PROVISIONS.

⁹⁷ The State Water Board intends to amend the Water Quality Control Plan for Enclosed Bays and Estuaries of California to create the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan (ISWEBE Plan). The State Water Board intends that the Part 1 Trash Provisions will be incorporated into the ISWEBE Plan, once it is adopted.

¹ In the Los Angeles Region, there are fifteen (15) trash TMDLs for the following watersheds and water bodies: Los Angeles River Watershed, Ballona Creek, Malibu Creek Watershed, Santa Monica Bay Nearshore and Offshore, San Gabriel River East Fork, Revolon Slough and Beardsley Wash, Ventura River Estuary, Machado Lake, Lake Elizabeth, Lake Hughes, Munz Lake, Peck Road Park Lake, Echo Park Lake, Lincoln Park Lake and Legg Lake. Three of these were established by the USEPA: Peck Road Park Lake, Echo Park Lake and Lincoln Park Lake.

- (2) Within one year of the effective date of these TRASH PROVISIONS, the Los Angeles Water Board shall convene a public meeting to reconsider the scope of its trash TMDLs, with the exception of those for the Los Angeles River and Ballona Creek watersheds, to particularly consider an approach that would focus MS4 permittees' trash-control efforts on high-trash generation areas within their jurisdictions.

2. Prohibition of Discharge

The discharge of TRASH to surface waters of the State or the deposition of TRASH where it may be discharged into surface waters of the State is prohibited. Compliance with this prohibition of discharge shall be achieved as follows:

- a. Dischargers with NPDES permits that contain specific requirements for the control of TRASH that are consistent with these TRASH PROVISIONS shall be determined to be in compliance with this prohibition if the dischargers are in full compliance with such requirements.
- b. Dischargers with non-NPDES WDRs or waivers of WDRs that contain specific requirements for the control of TRASH shall be determined to be in compliance with this prohibition if the dischargers are in full compliance with such requirements.
- c. Dischargers with NPDES permits, WDRs, or waivers of WDRs that do not contain specific requirements for the control of TRASH are exempt from these TRASH PROVISIONS.
- d. Dischargers without NPDES permits, WDRs, or waivers of WDRs must comply with this prohibition of discharge.
- e. Chapter IV.A.2.b and Chapter IV.A.4 notwithstanding, this prohibition of discharge applies to the discharge of PREPRODUCTION PLASTIC by manufacturers of PREPRODUCTION PLASTICS, transporters of PREPRODUCTION PLASTICS, and manufacturers that use PREPRODUCTION PLASTICS in the manufacture of other products to surface waters of the State, or the deposition of PREPRODUCTION PLASTIC where it may be discharged into surface waters of the State, unless the discharger is subject to a NPDES permit for discharges of STORM WATER associated with industrial activity.

3. Dischargers Permitted Pursuant to Federal Clean Water Act Section 402(p)

PERMITTING AUTHORITIES shall include the following requirements in NPDES permits issued pursuant to Federal Clean Water Act section 402(p):

- a. MS4 permittees with regulatory authority over PRIORITY LAND USES shall be required to comply with the prohibition of discharge in Chapter IV.A.2.a herein by either of the following measures:
- (1) Track 1: Install, operate, and maintain FULL CAPTURE SYSTEMS for all storm drains that captures runoff from the PRIORITY LAND USES in their jurisdictions; or
 - (2) Track 2: Install, operate, and maintain any combination of FULL CAPTURE SYSTEMS, MULTI-BENEFIT PROJECTS, other TREATMENT CONTROLS, and/or INSTITUTIONAL CONTROLS within either the jurisdiction of the MS4 permittee or within the jurisdiction of the MS4 permittee and contiguous MS4 permittees. The MS4 permittee may determine the locations or land uses within its jurisdiction to implement any combination of controls. The MS4 permittee shall demonstrate that such combination achieves FULL CAPTURE SYSTEM EQUIVALENCY. The MS4 permittee may determine which controls to implement to achieve compliance with the FULL CAPTURE SYSTEM EQUIVALENCY. It is, however, the State Water Board's expectation that the MS4 permittee will elect to install FULL CAPTURE SYSTEMS where such installation is not cost-prohibitive.
- b. The California Department of Transportation (Department) shall be required to comply with the prohibition of discharge in Chapter IV.A.2.a herein in all SIGNIFICANT TRASH GENERATING AREAS by installing, operating, and maintaining any combination of FULL CAPTURE SYSTEMS, MULTI-BENEFIT PROJECTS, other TREATMENT CONTROLS, and/or INSTITUTIONAL CONTROLS for all storm drains that captures runoff from SIGNIFICANT TRASH GENERATING AREAS. The Department shall demonstrate that such combination achieves FULL CAPTURE SYSTEM EQUIVALENCY. In furtherance of this provision, the Department and MS4 permittees that are subject to the provisions of Chapter IV.A.3.a herein shall coordinate their efforts to install, operate, and maintain FULL CAPTURE SYSTEMS, MULTI-BENEFIT PROJECTS, other TREATMENT CONTROLS, and/or INSTITUTIONAL CONTROLS in SIGNIFICANT TRASH GENERATING AREAS and/or PRIORITY LAND USES.
- c. Dischargers that are subject to NPDES permits for discharges of STORM WATER associated with industrial activity (including construction activity) shall be required to comply with the prohibition of discharge in Chapter IV.A.2.a herein by eliminating TRASH from all STORM WATER and authorized non-STORM WATER discharges consistent with an outright prohibition of the discharge of TRASH contained within the applicable NPDES permit regulating the industrial or construction facility. If the

discharger can satisfactorily demonstrate to the PERMITTING AUTHORITY its inability to comply with the outright prohibition of the discharge of TRASH contained within the applicable NPDES permit, then the PERMITTING AUTHORITY may require the discharger to either:

- (1) Install, operate, and maintain FULL CAPTURE SYSTEMS for all storm drains that captures runoff from the facility or site regulated by the NPDES permit; or,
- (2) Install, operate, and maintain any combination of FULL CAPTURE SYSTEMS, MULTI-BENEFIT PROJECTS, other TREATMENT CONTROLS, and/or INSTITUTIONAL CONTROLS for the facility or site regulated by the NPDES permit. The discharger shall demonstrate that such combination achieves FULL CAPTURE SYSTEM EQUIVALENCY.

Termination of permit coverage for industrial and construction STORM WATER dischargers shall be conditioned upon the proper operation and maintenance of all controls (i.e., FULL CAPTURE SYSTEMS, other TREATMENT CONTROLS, INSTITUTIONAL CONTROLS, and/or MULTI-BENEFIT PROJECTS) used at their facility(ies).

- d. A PERMITTING AUTHORITY may determine that specific land uses or locations (e.g., parks, stadia, schools, campuses, or roads leading to landfills) generate substantial amounts of TRASH. In the event that the PERMITTING AUTHORITY makes that determination, the PERMITTING AUTHORITY may require the MS4 to comply with Chapter IV.A.3.a.1 or Chapter IV.A.3.a.2, as determined by the PERMITTING AUTHORITY, with respect to such land uses or locations.

4. Other Dischargers

A PERMITTING AUTHORITY may require dischargers, described in Chapter IV.A.2.c or Chapter IV.A.2.d, that are not subject to Chapter IV.A.3 herein, to implement any appropriate TRASH controls in areas or facilities that may generate TRASH. Such areas or facilities may include (but are not limited to) high usage campgrounds, picnic areas, beach recreation areas, parks not subject to an MS4 permit, or marinas.

5. Time Schedule

The PERMITTING AUTHORITY shall modify, re-issue, or newly adopt NPDES permits issued pursuant to section 402(p) of the Federal Clean Water Act that are subject to the provisions of Chapter IV.A.3 herein to include requirements consistent with these TRASH PROVISIONS. The PERMITTING AUTHORITIES shall abide by the following time schedules:

a. **NPDES Permits Regulating MS4 Permittees that have Regulatory Authority over Priority Land Uses.**²

(1) Within eighteen (18) months of the effective date of these TRASH PROVISIONS, for each permittee, each PERMITTING AUTHORITY shall either:

- A. Modify, re-issue, or adopt the applicable MS4 permit to add requirements to implement these TRASH PROVISIONS. The implementing permit shall require written notice from each MS4 permittee stating whether it has elected to comply under Chapter IV.A.3.a.1 (Track 1) or Chapter IV.A.3.a.2 (Track 2) and such notice shall be submitted to the PERMITTING AUTHORITY no later than three (3) months from the effective date of the implementing permit, or for MS4s designated after the effective date of these TRASH PROVISIONS, three (3) months from the effective date of that designation. The implementing permit shall also require that within eighteen (18) months of the effective date of the implementing permit or new designation, MS4 permittees that have elected to comply with Track 2 shall submit an implementation plan to the PERMITTING AUTHORITY. The implementation plan shall describe: (i) the combination of controls selected by the MS4 permittee and the rationale for the selection, (ii) how the combination of controls is designed to achieve FULL CAPTURE SYSTEM EQUIVALENCY, and (iii) how FULL CAPTURE SYSTEM EQUIVALENCY will be demonstrated. The implementation plan is subject to approval by the PERMITTING AUTHORITY.
- B. Issue an order pursuant to Water Code section 13267 or 13383 requiring the MS4 permittee to submit, within three (3) months from receipt of the order, written notice to the PERMITTING AUTHORITY stating whether such MS4 permittee will comply

² The time schedule requirement in Chapter IV.A.5.a.1 requiring MS4* permittees to elect Chapter IV.A.3.a.1 (Track 1) or Chapter IV.A.3.a.2 (Track 2) does not apply to MS4* permittees subject to the Municipal Regional Stormwater NPDES Permit (MRP) issued by the San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) or the East Contra Costa Municipal Storm Water Permit issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board) because those permits already require control requirements substantially equivalent to Track 2. The time schedule requirement in Chapter IV.A.5.a.1 requiring MS4 permittees to submit an implementation plan does not apply to the above permittees if the pertinent PERMITTING AUTHORITY determines that such permittee has already submitted an implementation plan prior to the effective date of the TRASH PROVISIONS that is equivalent to the implementation plan required by Chapter IV.A.5.a.1. In the aforementioned permits, the pertinent PERMITTING AUTHORITY may establish an earlier full compliance deadline than that specified in Chapter IV.A.5.a.3.

with the prohibition of discharge under Chapter IV.A.3.a.1 (Track 1) or Chapter IV.A.3.a.2 (Track 2). For MS4s designated after the effective date of these TRASH PROVISIONS, the order pursuant to Water Code section 13267 or 13383 shall be issued at the time of designation. Within eighteen (18) months of the receipt of the Water Code section 13267 or 13383 order, MS4 permittees that have elected to comply with Track 2 shall submit an implementation plan to the PERMITTING AUTHORITY that describes: (i) the combination of controls selected by the MS4 permittee and the rationale for the selection, (ii) how the combination of controls is designed to achieve FULL CAPTURE SYSTEM EQUIVALENCY, and (iii) how FULL CAPTURE SYSTEM EQUIVALENCY will be demonstrated. The implementation plan is subject to approval by the PERMITTING AUTHORITY.

- (2) For MS4 permittees that elect to comply with Chapter IV.A.3.a.1 (Track 1), the implementing permit shall state that full compliance shall occur within ten (10) years of the effective date of the first implementing permit except as specified in Chapter IV.A.5.a.5. The permit shall also require these permittees to demonstrate achievement of interim milestones such as average load reductions of ten percent (10%) per year or other progress to full implementation. In no case may the final compliance date be later than fifteen (15) years from the effective date of these TRASH PROVISIONS.
- (3) For MS4 permittees that elect to comply with Chapter IV.A.3.a.2 (Track 2), the implementing permit shall state that full compliance shall occur within ten (10) years of the effective date of the first implementing permit except as specified in Chapter IV.A.5.a.5. The permit shall also require these permittees to demonstrate achievement of interim milestones such as average load reductions of ten percent (10%) per year or other progress to full implementation. In no case may the final compliance date be later than fifteen (15) years from the effective date of these TRASH PROVISIONS.
- (4) The implementing permit shall state that for MS4 permittees designated after the effective date of the implementing permit, full compliance shall occur within ten (10) years of the effective date of the designation. The permit shall also require such designations to demonstrate achievement of interim milestones such as average load reductions of ten percent (10%) per year or other progress to full implementation.

- (5) Where a PERMITTING AUTHORITY makes a determination pursuant to Chapter IV.A.3.d that a specific land use generates a substantial amount of TRASH, that permitting authority has discretion to determine the time schedule for full compliance. In no case may the final compliance date be later than ten (10) years from the determination.

b. **NPDES Permits Regulating the Department.**

- (1) Within eighteen (18) months of the effective date of these TRASH PROVISIONS, the State Water Board shall issue an order pursuant to Water Code section 13267 or 13383 requiring the Department to submit an implementation plan to the Executive Director of the State Water Board that: (i) describes the specific locations of its SIGNIFICANT TRASH GENERATING AREAS, (ii) the combination of controls selected by the Department and the rationale for the selections, and (iii) how it will demonstrate FULL CAPTURE SYSTEM EQUIVALENCY.
- (2) The Department must demonstrate full compliance with Chapter IV.A.3.b herein within ten (10) years of the effective date of the first implementing NPDES permit, along with achievements of interim milestones such as average load reductions of ten percent (10%) per year. In no case may the final compliance date be later than fifteen (15) years from the effective date of these TRASH PROVISIONS.

c. **NPDES Permits Regulating the Discharges of Storm Water Associated with Industrial Activity (Including Construction Activity).**

Dischargers that are subject to the provisions of Chapter IV.A.3.c herein must demonstrate full compliance in accordance with the deadlines contained in the first implementing NPDES permits. Such deadlines may not exceed the terms of the first implementing permits.

6. **Monitoring and Reporting**

The PERMITTING AUTHORITY must include monitoring and reporting requirements in its implementing permits. The following monitoring and reporting provisions are the minimum requirements that must be included within the implementing permits:

- a. MS4 permittees that elect to comply with Chapter IV.A.3.a.1 (Track 1) shall provide a report to the applicable PERMITTING AUTHORITY demonstrating installation, operation, maintenance, and the Geographic Information System- (GIS-) mapped location and drainage area served by its full capture systems on an annual basis.

- b. MS4 permittees that elect to comply with Chapter IV.A.3.a.2 (Track 2) shall develop and implement monitoring plans that demonstrate the effectiveness of the FULL CAPTURE SYSTEMS, MULTI-BENEFIT PROJECTS, other TREATMENT CONTROLS, and/or INSTITUTIONAL CONTROLS and compliance with FULL CAPTURE SYSTEM EQUIVALENCY. Monitoring reports shall be provided to the applicable PERMITTING AUTHORITY on an annual basis, and shall include GIS-mapped locations and drainage area served for each of the FULL CAPTURE SYSTEMS, MULTI-BENEFIT PROJECTS, other TREATMENT CONTROLS, and/or INSTITUTIONAL CONTROLS installed or utilized by the MS4 permittee. In developing the monitoring reports the MS4* permittee should consider the following questions:
- (1) What type of and how many TREATMENT CONTROLS, INSTITUTIONAL CONTROLS, and/or MULTI-BENEFIT PROJECTS have been used and in what locations?
 - (2) How many FULL CAPTURE SYSTEMS have been installed (if any), in what locations have they been installed, and what is the individual and cumulative area served by them?
 - (3) What is the effectiveness of the total combination of TREATMENT CONTROLS, INSTITUTIONAL CONTROLS, and MULTI-BENEFIT PROJECTS employed by the MS4 permittee?
 - (4) Has the amount of TRASH discharged from the MS4 decreased from the previous year? If so, by how much? If not, explain why.
 - (5) Has the amount of TRASH in the MS4's receiving water(s) decreased from the previous year? If so, by how much? If not, explain why.
- c. The Department, as subject to the provisions of Chapter IV.A.3.b, shall develop and implement monitoring plans that demonstrate the effectiveness of the controls and compliance with FULL CAPTURE SYSTEM EQUIVALENCY. Monitoring reports shall be provided to the State Water Board on an annual basis, and shall include GIS-mapped locations and drainage area served for each of the FULL CAPTURE SYSTEMS, MULTI-BENEFIT PROJECTS, other TREATMENT CONTROLS, and/or INSTITUTIONAL CONTROLS installed or utilized by the Department. In developing the monitoring report, the Department should consider the following questions:
- (1) What type of and how many TREATMENT CONTROLS, INSTITUTIONAL CONTROLS, and/or MULTI-BENEFIT PROJECTS have been used and in what locations?

- (2) How many FULL CAPTURE SYSTEMS have been installed (if any), in what locations have they been installed, and what is the individual and cumulative area served by them?
 - (3) What is the effectiveness of the total combination of TREATMENT CONTROLS, INSTITUTIONAL CONTROLS, and MULTI-BENEFIT PROJECTS employed by the Department?
 - (4) Has the amount of TRASH discharged from the Department's MS4 decreased from the previous year? If so, by how much? If not, explain why.
 - (5) Has the amount of TRASH in the receiving waters decreased from the previous year? If so, by how much? If not, explain why.
- d. Dischargers that are subject to the provisions of Chapter IV.A.3.c herein shall be required to report the measures used to comply with Chapter IV.A.3.c.

Text of the final Part 1 Trash Provisions proposed to Appendix A: Glossary of the ISWEBE Plan

FULL CAPTURE SYSTEM: A TREATMENT CONTROL, or series of TREATMENT CONTROLS, including but not limited to, a MULTI-BENEFIT PROJECT or a LOWIMPACT DEVELOPMENT CONTROL that traps all particles that are 5 mm or greater, and has a design treatment capacity that is either: a) of not less than the peak flow rate, Q, resulting from a one-year, one-hour, storm in the subdrainage area, or b) appropriately sized to, and designed to carry at least the same flows as, the corresponding storm drain.

[Rational equation is used to compute the peak flow rate: $Q = C \cdot I \cdot A$, where Q = design flow rate (cubic feet per second, cfs); C = runoff coefficient (dimensionless); I = design rainfall intensity (inches per hour, as determined per the rainfall isohyetal map specific to each region, and A = subdrainage area (acres).]

Prior to installation, FULL CAPTURE SYSTEMS must be certified by the Executive Director, or designee, of the State Water Board. Uncertified FULL CAPTURE SYSTEMS will not satisfy the requirements of these TRASH PROVISIONS. To request certification, a permittee shall submit a certification request letter that includes all relevant supporting documentation to the State Water Board's Executive Director. The Executive Director, or designee, shall issue a written determination approving or denying the certification of the proposed FULL CAPTURE SYSTEM or conditions of approval, including a schedule to review and reconsider the certification. FULL CAPTURE SYSTEMS certified by the Los Angeles Regional Water Board prior to the effective date of these TRASH PROVISIONS and FULL CAPTURE SYSTEMS listed in Appendix I of the Bay Area-wide Trash Capture Demonstration Project, Final Project Report (May 8, 2014) will satisfy the requirements of these TRASH PROVISIONS,

unless the Executive Director, or designee, of the State Water Board determines otherwise.

FULL CAPTURE SYSTEM EQUIVALENCY: The TRASH load that would be reduced if FULL CAPTURE SYSTEMS were installed, operated, and maintained for all storm drains that capture runoff from the relevant areas of land (PRIORITY LAND USES, SIGNIFICANT TRASH GENERATING AREAS, facilities or sites regulated by NPDES permits for discharges of STORM WATER associated with industrial activity, or specific land uses or areas that generate substantial amounts of TRASH, as applicable). The FULL CAPTURE SYSTEM EQUIVALENCY is a TRASH load reduction target that the permittee quantifies by using an approach, and technically acceptable and defensible assumptions and methods for applying the approach, subject to the approval of PERMITTING AUTHORITY. Examples of such approaches include, but are not limited to, the following:

- (1) Trash Capture Rate Approach. Directly measure or otherwise determine the amount of TRASH captured by FULL CAPTURE SYSTEMS for representative samples of all similar types of land uses, facilities, or areas within the relevant areas of land over time to identify specific TRASH capture rates. Apply each specific TRASH capture rate across all similar types of land uses, facilities, or areas to determine FULL CAPTURE SYSTEM EQUIVALENCY. TRASH capture rates may be determined either through a pilot study or literature review. FULL CAPTURE SYSTEMS selected to evaluate TRASH capture rates may cover entire types of land uses, facilities, or areas, or a representative subset of types of land uses, facilities, or areas. With this approach, FULL CAPTURE SYSTEM EQUIVALENCY is the sum of the products of each type of land use, facility, or area multiplied by TRASH capture rates for that type of land use, facility, or area.
- (2) Reference Approach. Determine the amount of TRASH in a reference receiving water in a reference watershed where FULL CAPTURE SYSTEMS have been installed for all storm drains that capture runoff from all relevant areas of land. The reference watershed must be comprised of similar types and extent of sources of TRASH and land uses (including PRIORITY LAND USES and all other land uses), facilities, or areas as the permittee's watershed. With this approach, FULL CAPTURE SYSTEM EQUIVALENCY would be demonstrated when the amount of TRASH in the receiving water is equivalent to the amount of TRASH in the reference receiving water.

INSTITUTIONAL CONTROLS: Non-structural best management practices (i.e., no structures are involved) that may include, but not be limited to, street sweeping, sidewalk TRASH bins, collection of the TRASH, anti-litter educational and outreach programs, producer take-back for packaging, and ordinances.

LOW-IMPACT DEVELOPMENT CONTROLS: TREATMENT CONTROLS that employ natural and constructed features that reduce the rate of STORM WATER runoff, filter out pollutants, facilitate STORM WATER storage onsite, infiltrate STORM WATER into

the ground to replenish groundwater supplies, or improve the quality of receiving groundwater and surface water. (See Water Code § 10564.)

MULTI-BENEFIT PROJECT: A TREATMENT CONTROL project designed to achieve any of the benefits set forth in section 10562, subdivision (d) of the Water Code. Examples include projects designed to: infiltrate, recharge or store STORM WATER for beneficial reuse; develop or enhance habitat and open space through STORM WATER and non-STORM WATER management; and/or reduce STORM WATER and non-STORM WATER runoff volume.

MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4): Same meaning set forth in 40 Code of Federal Regulations section 122.26(b)(8).

PREPRODUCTION PLASTIC: Same meaning set forth in section 13367(a) of the Water Code.

PRIORITY LAND USES: Those developed sites, facilities, or land uses (i.e., not simply zoned land uses) within the MS4 permittee's jurisdiction from which discharges of TRASH are regulated by these TRASH PROVISIONS as follows:

- (1) High-density residential: all land uses with at least ten (10) developed dwelling units/acre.
- (2) Industrial: land uses where the primary activities on the developed parcels involve product manufacture, storage, or distribution (e.g., manufacturing businesses, warehouses, equipment storage lots, junkyards, wholesale businesses, distribution centers, or building material sales yards).
- (3) Commercial: land uses where the primary activities on the developed parcels involve the sale or transfer of goods or services to consumers (e.g., business or professional buildings, shops, restaurants, theaters, vehicle repair shops, etc.)
- (4) Mixed urban: land uses where high-density residential, industrial, and/or commercial land uses predominate collectively (i.e., are intermixed).
- (5) Public transportation stations: facilities or sites where public transit agencies' vehicles load or unload passengers or goods (e.g., bus stations and stops).

Equivalent alternate land uses: An MS4 permittee with regulatory authority over PRIORITY LAND USES may issue a request to the applicable PERMITTING AUTHORITY that the MS4 permittee be allowed to substitute one or more land uses identified above with alternate land uses within the MS4 permittee's jurisdiction that generates rates of TRASH that is equivalent to or greater than the PRIORITY LAND USE(S) being substituted. The land use area requested to substitute for a PRIORITY LAND USE need not be an acre-for-acre substitution but may involve one or more PRIORITY LAND USES, or a fraction of a PRIORITY LAND USE, or both, provided the total TRASH generated in the equivalent alternative land use is equivalent to or greater than the total TRASH generated from the PRIORITY LAND USE(S) for which substitution is requested. Comparative TRASH generation rates shall be established through the reporting of quantification measures such as street sweeping and catch basin cleanup records; mapping; visual trash presence surveys, such as the "Keep America

Beautiful Visible Litter Survey”; or other information as required by the PERMITTING AUTHORITY.

PERMITTING AUTHORITY: The State Water Board or Regional Water Board, whichever issues the permit.

SIGNIFICANT TRASH GENERATING AREAS: All locations or facilities within the Department’s jurisdiction where TRASH accumulates in substantial amounts, such as:

- (1) Highway on- and off-ramps in high density residential, commercial, and industrial land uses (as such land uses are defined under PRIORITY LAND USES herein).
- (2) Rest areas and park-and-rides.
- (3) State highways in commercial and industrial land uses (as such land uses are defined under PRIORITY LAND USES herein).
- (4) Mainline highway segments to be identified by the Department through pilot studies and/or surveys.

STORM WATER: Same meaning set forth in 40 Code of Federal Regulations section 122.26(b)(13) (Nov. 16, 1990).

TREATMENT CONTROLS: Structural best management practices to either (a) remove pollutants and/or solids from STORM WATER runoff, wastewater, or effluent, or (b) capture, infiltrate or reuse STORM WATER runoff, wastewater, or effluent. TREATMENT CONTROLS include FULL CAPTURE SYSTEMS and LOW-IMPACT DEVELOPMENT CONTROLS.

TRASH: All improperly discarded solid material from any production, manufacturing, or processing operation including, but not limited to, products, product packaging, or containers constructed of plastic, steel, aluminum, glass, paper, or other synthetic or natural materials.

TRASH PROVISIONS: The water quality objective for TRASH, as well as the prohibition of discharge and implementation requirements set forth in Chapter IV.A herein.

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

ORDER NO. R9-2017-0077

**AN ORDER DIRECTING THE OWNERS AND OPERATORS OF
PHASE I MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)
DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION**

**TO SUBMIT REPORTS PERTAINING TO THE CONTROL OF TRASH
IN DISCHARGES FROM PHASE I MS4s
TO OCEAN WATERS, INLAND SURFACE WATERS,
ENCLOSED BAYS, AND ESTUARIES
IN THE SAN DIEGO REGION**

The California Regional Water Quality Control Board, San Diego Region (hereinafter San Diego Water Board) finds:

- 1. Trash Amendments.** On April 7, 2015, the State Water Board adopted Resolution No. 2015-0019, amending the Water Quality Control Plan for Ocean Waters of California (Ocean Plan) and the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan) to address the impacts of trash to the surface waters of California (referred to hereafter as the Trash Amendments). The effective date of the Trash Amendments is December 2, 2015.
- 2. Regional MS4 Permit.** Throughout the State, trash is typically generated on land and transported to surface water, predominantly through storm water discharges from MS4s. These storm water discharges occur in part from Phase I MS4s in the San Diego Region regulated through a regional general permit adopted by the San Diego Water Board (Regional MS4 Permit) pursuant to section 402(p) of the Clean Water Act. The term Regional MS4 Permit refers to the San Diego Water Board's Order No. R9-2013-0001, as amended by Order Nos. R9-2015-0001 and R9-2015-0100, NPDES No. CAS0109266, *National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region*.
- 3. Trash Amendments Implementation.** The Trash Amendments establish a statewide narrative water quality objective and implementation requirements to control trash, including a prohibition against the discharge of trash to ocean waters, inland surface waters, enclosed bays, and estuaries in California. For Phase I MS4 permittees with regulatory authority over priority land uses, the Trash Amendments require the San Diego Water Board to take certain steps towards implementation of the narrative water quality objective and prohibition by June 2, 2017 through requirements incorporated into the Regional MS4 Permit or through a monitoring and reporting order issued pursuant to Water Code section 13267 or 13383. The San Diego Water Board will not be amending the Regional MS4 Permit within the time frame specified by the Trash Amendments; therefore, the initial steps in planning for the implementation of the Trash Amendments are being required through this Order in accordance with Water Code

section 13383. The San Diego Water Board intends to incorporate the requirements of the Trash Amendments into the Regional MS4 Permit during its next reissuance in Fiscal Year 2018-19.

4. Persons Responsible for the Discharges of Trash. The owners and operators of Phase I MS4s are responsible for discharges of waste, including trash, from land uses and locations within their jurisdictions through their MS4s to ocean waters, inland surface waters, enclosed bays, and estuaries in the San Diego Region. In the San Diego Region, owners and operators of Phase I MS4s subject to the requirements of this Order (herein referred to as MS4 permittees) include the following entities:

- County of Orange
 - City of Aliso Viejo
 - City of Dana Point
 - City of Laguna Beach
 - City of Laguna Hills
 - City of Laguna Niguel
 - City of Laguna Woods
 - City of Lake Forest
 - City of Mission Viejo
 - City of Rancho Santa Margarita
 - City of San Clemente
 - City of San Juan Capistrano
 - Orange County Flood Control District
-
- County of Riverside
 - City of Murrieta
 - City of Temecula
 - City of Wildomar
 - Riverside County Flood Control and Water Conservation District¹
-
- County of San Diego
 - City of Carlsbad
 - City of Chula Vista
 - City of Coronado
 - City of Del Mar
 - City of El Cajon
 - City of Encinitas
 - City of Escondido
 - City of Imperial Beach
 - City of La Mesa
 - City of Lemon Grove
 - City of National City
 - City of Oceanside
 - City of Poway
 - City of San Diego
 - City of San Marcos
 - City of Santee
 - City of Solana Beach
 - City of Vista
 - San Diego County Regional Airport Authority
 - San Diego Unified Port District

5. Water Quality Objectives. The Trash Amendments established the following statewide narrative water quality objectives for trash in ocean waters, inland surface waters, enclosed bays, and estuaries in California.

¹ Riverside County Flood Control and Water Conservation District (District) lacks regulatory authority over Priority Land Uses. As noted in Finding 9.d of this Order, the Trash Amendments (Appendix D of the Ocean Plan Chapter III.L.2.d and Appendix E of the ISWEBE Plan Chapter IV.A.3.d) provide the San Diego Water Board with the authority to investigate whether specific land uses or locations within the District's jurisdiction generate substantial amounts of trash and determine that compliance with Track 1 or Track 2 trash control measures for those land uses or locations is necessary.

- a. The Trash Amendments established the following narrative water quality objective for trash in Chapter II.C.5 of Appendix D of the Ocean Plan:

“Trash shall not be present in ocean waters, along shorelines or adjacent areas in amounts that adversely affect beneficial uses or cause nuisance.”

- b. The Trash Amendments established the following narrative water quality objective or trash in Chapter III.A of Appendix E of the ISWEBE Plan:

“Trash shall not be present in inland surface waters, enclosed bays, estuaries, and along shorelines or adjacent areas in amounts that adversely affect beneficial uses or cause nuisance.”

Meeting these narrative water quality objectives for trash will be protective and supportive of numerous beneficial uses for the ocean waters, inland surface waters, enclosed bays, and estuaries in the San Diego Region, including but not limited to, wildlife habitat (WILD), marine habitat (MAR), preservation of rare and endangered species (RARE), fish migration (MIGR), navigation (NAV), and water contact and non-contact recreation (REC1 and REC2).

- 6. Trash Discharge Prohibition.** The Trash Amendments established the following discharge prohibition in Chapter III.I.6 of Appendix D of the Ocean Plan and Chapter IV.A.2 of Appendix E of the ISWEBE Plan:

“The discharge of trash to surface waters of the State or the deposition of trash where it may be discharged into surface waters of the State is prohibited.”

- 7. Regional MS4 Permit Implementation of the Trash Amendments.** The Trash Amendments require the incorporation of the trash narrative water quality objectives and discharge prohibition into the Regional MS4 Permit. The Regional MS4 Permit then will require the MS4 permittees to comply with the trash narrative water quality objectives and discharge prohibition through the implementation of one of two measures to be selected by the MS4 permittees.

To comply with the trash narrative water quality objectives and discharge prohibition, the MS4 permittees are required to implement either of the following measures:

Track 1: Install, operate, and maintain full capture systems for all storm drains that capture runoff from the priority land uses in their jurisdictions; or

Track 2: Install, operate, and maintain any combination of full capture systems, multi-benefit projects, other treatment controls, and/or institutional controls within either the jurisdiction of the MS4 permittee or within the jurisdiction of the MS4 permittee and contiguous MS4 permittees. The MS4 permittee may determine the locations or land uses within its jurisdiction to implement any combination of controls. The MS4 permittee shall demonstrate that such combination achieves full capture system equivalency. The MS4 permittee may determine which controls to implement to achieve compliance with full capture system equivalency. It is,

however, the State Water Board's expectation that the MS4 permittee will elect to install full capture systems where such installation is not cost-prohibitive.

The Trash Amendments require that within three (3) months of the effective date of this Order, each MS4 permittee is required to provide written notice to the San Diego Water Board stating whether the MS4 permittee elects to comply with the trash discharge prohibition by implementing Track 1 or Track 2. MS4 permittees that elect to implement Track 2 are also required to submit an implementation plan to the San Diego Water Board within eighteen (18) months of receipt of this Order. The implementation plan is required to describe: (i) the combination of controls selected by the MS4 permittee and the rationale for the selection, (ii) how the combination of controls is designed to achieve full capture system equivalency, and (iii) how full capture equivalency will be demonstrated. The implementation plan is subject to approval by the San Diego Water Board. Track 2 implementation plans will be deemed accepted by the San Diego Water Board ninety (90) days after submission unless otherwise directed in writing by the San Diego Water Board Executive Officer. MS4 permittees may elect to change Tracks through their adaptive management process during the compliance time schedule described in Finding 10, provided they submit supporting justification to the San Diego Water Board.

8. Full Capture System Equivalency. The Trash Amendments define full capture system equivalency as follows:

“Full capture system equivalency is the trash load that would be reduced if full capture systems were installed, operated, and maintained for all storm drains that capture runoff from the relevant areas of land (priority land uses, significant trash generating areas, facilities or sites regulated by NPDES permits for discharges of storm water associated with industrial activity, or specific land uses or areas that generate substantial amounts of trash, as applicable). The full capture system equivalency is a trash load reduction target that the permittee quantifies by using an approach, and technically acceptable and defensible assumptions and methods for applying the approach, subject to the approval of permitting authority. Examples of such approaches include, but are not limited to, the following:

(1) Trash Capture Rate Approach. Directly measure or otherwise determine the amount of trash captured by full capture systems for representative samples of all similar types of land uses, facilities, or areas within the relevant areas of land over time to identify specific trash capture rates. Apply each specific trash capture rate across all similar types of land uses, facilities, or areas to determine full capture system equivalency. Trash capture rates may be determined either through a pilot study or literature review. Full capture systems selected to evaluate trash capture rates may cover entire types of land uses, facilities, or areas, or a representative subset of types of land uses, facilities, or areas. With this approach, full capture system equivalency is the sum of the products of each type of land use, facility, or area multiplied by trash capture rates for that type of land use, facility, or area.

(2) Reference Approach. Determine the amount of trash in a reference receiving water in a reference watershed where full capture systems have been installed for all storm drains that capture runoff from all relevant areas of land. The reference watershed must be comprised of similar types and extent of sources of trash and land uses (including priority land uses and all other land uses), facilities, or areas as the permittee's watershed. With this approach, full capture system equivalency would be demonstrated when the amount of trash in the receiving water is equivalent to the amount of trash in the reference receiving water."

9. Land Uses and Locations Requiring Trash Controls. The Trash Amendments define land uses and locations that are to be controlled for trash discharges by MS4 permittees:

- a. Priority Land Uses:** Those developed sites, facilities, or land uses (i.e. not simply zoned land uses) within a MS4 permittee's jurisdiction from which discharges of trash are regulated by the Ocean Plan or ISWEBE Plan as follows:
- High-density residential: all land uses with at least ten (10) developed dwelling units/acre.
 - Industrial: land uses where the primary activities on the developed parcels involve product manufacture, storage, or distribution (e.g., manufacturing businesses, warehouses, equipment storage lots, junkyards, wholesale businesses, distribution centers, or building material sales yards).
 - Commercial: land uses where the primary activities on the developed parcels involve the sale or transfer of goods or services to consumers (e.g., business or professional buildings, shops, restaurants, theaters, vehicle repair shops, etc.).
 - Mixed urban: land uses where high-density residential, industrial, and/or commercial land uses predominate collectively (i.e., are intermixed).
 - Public transportation stations: facilities or sites where public transit agencies' vehicles load or unload passengers or goods (e.g., bus stations and stops).
- b. Equivalent Alternative Land Uses:** An MS4 permittee with regulatory authority over priority land uses may issue a request to the San Diego Water Board that the MS4 permittee be allowed to substitute one or more land uses identified above with an alternate land use within the MS4 permittee's jurisdiction that generates rates of trash that is equivalent to or greater than the priority land use(s) being substituted. The land use area requested to substitute for a priority land use need not be an acre-for-acre substitution but may involve one or more priority land uses, or a fraction of a priority land use, or both, provided the total trash generated in the equivalent alternative land use is equivalent to or greater than the total trash generated from the priority land use(s) for which substitution is requested. Comparative trash generation rates shall be established through the reporting of quantification measures such as street sweeping and catch basin cleanup records;

mapping; visual trash presence surveys, such as the “Keeping America Beautiful Visible Litter Survey”; or other information as required by the San Diego Water Board.

- c. *Coordination with California Department of Transportation (Caltrans).* The Trash Amendments (Appendix D of the Ocean Plan Chapter III.L.2.b and Appendix E of the ISWEBE Plan Chapter IV.A.3.b) require that Caltrans and MS4 permittees coordinate their efforts to install, operate, and maintain full capture systems, multi-benefit projects, other treatment controls, and/or institutional controls in significant trash generating areas and/or priority land uses.
- d. *Specific Land Uses or Locations Determined by the San Diego Water Board:* The Trash Amendments (Appendix D of the Ocean Plan Chapter III.L.2.d and Appendix E of the ISWEBE Plan Chapter IV.A.3.d) provide the San Diego Water Board with the authority to determine that specific land uses or locations (e.g., parks, stadia, schools, campuses, or roads leading to landfills) generate substantial amounts of trash. In the event the San Diego Water Board makes that determination, the Board may require the MS4 permittees to comply with the requirements of the Trash Amendments with respect to such land uses or locations.

10. Compliance Time Schedule. The Trash Amendments require the implementing permit (i.e. the Regional MS4 Permit) to state that full compliance with the trash discharge prohibition shall occur within ten (10) years of the effective date of the first implementing permit. In addition, the Regional MS4 Permit must require the MS4 permittees to demonstrate achievements of interim milestones such as average load reductions of ten percent (10%) per year or other progress to full implementation. In no case may the final compliance date, which will be included in the Regional MS4 Permit, be later than fifteen (15) years from the effective date of the Trash Amendments (i.e. December 2, 2030).

11. Monitoring and Reporting. The Trash Amendments require the implementing Regional MS4 Permit to include monitoring and reporting requirements to ensure adequate trash control. The MS4 permittees will be required to provide reports to the San Diego Water Board on an annual basis to describe progress toward achieving full compliance with the trash discharge prohibition. The monitoring and reporting requirements are dependent on the measures elected to be implemented by a MS4 permittee².

12. Water Quality Improvement Plans and Jurisdictional Runoff Management Plans. The Regional MS4 Permit requires the MS4 permittees to develop and implement Water Quality Improvement Plans for ten (10) Watershed Management Areas, designated in the Regional MS4 Permit as shown in Table 1 below:

² The minimum monitoring and reporting requirements that will be considered for inclusion in the Regional MS4 Permit reissuance are described in the Trash Amendments at Appendix D: Chapter III, section L.5 of the Ocean Plan and Appendix E: Chapter IV, section A.6 of the ISWEBE Plan.

Table 1. San Diego Region Watershed Management Areas

Hydrologic Unit(s)	Watershed Management Area	Major Surface Water Bodies	Responsible MS4 permittees
San Juan (901.00)	South Orange County	<ul style="list-style-type: none"> - Aliso Creek - San Juan Creek - San Mateo Creek - Pacific Ocean - Heisler Park ASBS 	<ul style="list-style-type: none"> - City of Aliso Viejo - City of Dana Point - City of Laguna Beach - City of Laguna Hills¹ - City of Laguna Niguel - City of Laguna Woods¹ - City of Lake Forest² - City of Mission Viejo - City of Rancho Santa Margarita - City of San Clemente - City of San Juan Capistrano - County of Orange - Orange County Flood Control District
Santa Margarita (902.00)	Santa Margarita River	<ul style="list-style-type: none"> - Murrieta Creek - Temecula Creek - Santa Margarita River - Santa Margarita Lagoon - Pacific Ocean 	<ul style="list-style-type: none"> - City of Menifee³ - City of Murrieta⁴ - City of Temecula - City of Wildomar⁴ - County of Riverside - County of San Diego - Riverside County Flood Control and Water Conservation District
San Luis Rey (903.00)	San Luis Rey River	<ul style="list-style-type: none"> - San Luis Rey River - San Luis Rey Estuary - Pacific Ocean 	<ul style="list-style-type: none"> - City of Oceanside - City of Vista - County of San Diego
Carlsbad (904.00)	Carlsbad	<ul style="list-style-type: none"> - Loma Alta Slough - Buena Vista Lagoon - Agua Hedionda Lagoon - Baticuitos Lagoon - San Elijo Lagoon - Pacific Ocean 	<ul style="list-style-type: none"> - City of Carlsbad - City of Encinitas - City of Escondido - City of Oceanside - City of San Marcos - City of Solana Beach - City of Vista - County of San Diego
San Dieguito (905.00)	San Dieguito River	<ul style="list-style-type: none"> - San Dieguito River - San Dieguito Lagoon - Pacific Ocean 	<ul style="list-style-type: none"> - City of Del Mar - City of Escondido - City of Poway - City of San Diego - City of Solana Beach - County of San Diego
Penasquitos (906.00)	Penasquitos	<ul style="list-style-type: none"> - Los Penasquitos Lagoon - Pacific Ocean 	<ul style="list-style-type: none"> - City of Del Mar - City of Poway - City of San Diego - County of San Diego
	Mission Bay	<ul style="list-style-type: none"> - Mission Bay - Pacific Ocean - San Diego Marine Life Refuge ASBS 	<ul style="list-style-type: none"> - City of San Diego
San Diego (907.00)	San Diego River	<ul style="list-style-type: none"> - San Diego River - Pacific Ocean 	<ul style="list-style-type: none"> - City of El Cajon - City of La Mesa - City of San Diego - City of Santee - County of San Diego

Table 1. San Diego Region Watershed Management Areas

Hydrologic Unit(s)	Watershed Management Area	Major Surface Water Bodies	Responsible MS4 permittees
Pueblo San Diego (908.00) Sweetwater (909.00) Otay (910.00)	San Diego Bay	- Sweetwater River - Otay River - San Diego Bay - Pacific Ocean	- City of Chula Vista - City of Coronado - City of Imperial Beach - City of La Mesa - City of Lemon Grove - City of National City - City of San Diego - County of San Diego - San Diego County Regional Airport Authority - San Diego Unified Port District
Tijuana (911.00)	Tijuana River	- Tijuana River - Tijuana Estuary - Pacific Ocean	- City of Imperial Beach - City of San Diego - County of San Diego

Notes:

1. By agreement dated February 10, 2015, pursuant to Water Code section 13228, the Phase I MS4 discharges within the jurisdiction of the City of Laguna Hills and the City of Laguna Woods located in the Santa Ana Region are regulated by San Diego Water Board Order No. R9-2013-0001 as amended by Order No. R9-2015-0001, upon the later effective date of Order No. R9-2015-0001 or Santa Ana Water Board Tentative Order No. R8-2015-0001. The City of Laguna Hills and Laguna Woods must also comply with the requirements of the San Diego Creek/Newport Bay TMDL in section XVIII of Santa Ana Water Board Order No. R8-2015-0001.
2. By agreement dated February 10, 2015, pursuant to Water Code section 13228, Phase I MS4 discharges within the City of Lake Forest located within the San Diego Water Board Region are regulated by the Santa Ana Water Board Order No. R8-2015-0001 (NPDES No. CAS618030) upon the later effective date of this Order or Santa Ana Water Board Tentative Order No. R8-2015-0001. In accordance with the terms of the agreement between the San Diego Water Board and the Santa Ana Water Board, the City of Lake Forest must implement the requirements of the Bacteria TMDL in Attachment E of this Order, participate in preparation and implementation of the Water Quality Improvement Plan for the Aliso Creek Watershed Management Area as described in Provision B of this Order and continue implementation of its over-irrigation discharge prohibition in its City Ordinance, Title 15, Chapter 15, section 14.030, List (b).
3. By agreement dated October 26, 2015, pursuant to Water Code section 13228, Phase I MS4 discharges within the City of Menifee located within the San Diego Water Board Region are regulated by the Santa Ana Water Board Order No. R8-2010-0033 as it may be amended or reissued (NPDES No. CAS618033) upon the later effective date of this Order. In accordance with the terms of the agreement between the San Diego Water Board and the Santa Ana Water Board, the City of Menifee must participate in preparation and implementation of the Water Quality Improvement Plan for the Santa Margarita River Watershed Management Area as described in Provision B of this Order.
4. By agreement dated October 26, 2015, pursuant to Water Code section 13228, the Phase I MS4 discharges within the jurisdiction of the City of Murrieta and the City of Wildomar located in the Santa Ana Region are regulated by San Diego Water Board Order No. R9-2013-0001 as amended by Orders No. R9-2015-0001 and R9-2015-0100. The City of Murrieta and City of Wildomar must also comply with the requirements of the Lake Elsinore/Canyon Lake Nutrient TMDLs in section VI.D.2 of Santa Ana Water Board Order No. R8-2010-0033, or corresponding section as it may be amended or reissued.

The Water Quality Improvement Plans include the following: (a) identification of priority water quality conditions that need to be addressed to improve the water quality in each Watershed Management Area; (2) numeric goals for the highest priority water quality conditions to be achieved that will demonstrate discharges from the MS4s are not causing or contributing to exceedances of applicable water quality objectives, or water quality objectives are being attained in receiving waters; (3) a description of the water quality improvement strategies that will be and may be implemented to achieve the numeric goals; and (4) schedules for implementing the water quality improvement strategies and achieving the numeric goals.

The Regional MS4 Permit also requires incorporation of implementation plans for applicable Total Maximum Daily Loads (TMDLs) and Areas of Special Biological Significance (ASBS), which include interim and final water quality-based effluent limitations, compliance strategies, and compliance schedules, into the Water Quality Improvement Plans.

In addition to Water Quality Improvement Plan development, each MS4 permittee is also required to develop and implement a jurisdictional runoff management plan (JRMP) that describes how specific strategies in the Water Quality Improvement Plans will be implemented by each MS4 permittee. While the JRMPs are not explicitly part of the Water Quality Improvement Plan, reporting relating to JRMP programs is accomplished through the Water Quality Improvement Plan annual reporting process.

The implementation measures, interim milestones, and compliance schedules for Track 1 or Track 2 of the Trash Amendments shall also be incorporated into either the Water Quality Improvement Plans, the JRMPs, or a combination of the two, to be implemented by the MS4 permittees as part of the adaptive management process.

Compliance with the Trash Amendments is based on implementation of specific measures to control trash within a MS4 permittee's jurisdiction; however, inclusion of trash control strategies may be beneficial on a watershed scale. Through the issuance of this Order pursuant to Water Code section 13383, the San Diego Water Board intends the MS4 permittees to incorporate the requirements of the Trash Amendments into either the Water Quality Improvement Plans, the JRMPs, or a combination of the two, after reissuance of the Regional MS4 Permit. Reporting on implementation measures to comply with the Trash Amendments will be required through jurisdictional runoff management program annual report forms, which are submitted as part of the Water Quality Improvement Plan Annual Reports.

13. Basis for Requiring Submittals from MS4 Permittees. This Order is issued under federal authority. The water quality objectives established by the Trash Amendments described in Finding 5 serves as a water quality standard federally mandated under Clean Water Act section 303(c) and the federal regulations (33 U.S.C. § 1312, 40 C.F.R. § 131). This water quality standard was specifically approved by the United States Environmental Protection Agency (USEPA) following adoption by the State Water Board and approval by the Office of Administrative Law. This Order requests information necessary for MS4 permittees to plan for implementation of actions to achieve the water quality standard for trash. Further, the water quality standard expected to be achieved pursuant to the Trash Amendments may allow each water body impaired by trash and already on the Clean Water Act section 303(d) list to be removed from the list, or each water body subsequently determined to be impaired by trash to not be placed on the list, obviating the need for the development of a total maximum daily load (TMDL) for trash for each of those water bodies (33 U.S.C. § 1313(d); 40 C.F.R. § 130.7). In those cases, the specific actions that will be proposed by the MS4 permittees in response to this Order substitute for some or all the actions that would otherwise be required consistent with any waste load allocations in a trash TMDL (40 C.F.R. § 122.44, subd. (d)(1)(vii)(B)). Accordingly, this Order is issued pursuant to federal law. Consistent with the Trash Amendments, this Order nevertheless allows MS4 permittees flexibility in the specific actions they propose to meet the federal requirements.

14. California Environmental Quality Act. Issuance of this Order is not subject to CEQA in accordance with section 15061(b)(3) of Chapter 3, Title 14 of the CCR because it can be seen with certainty that there is no possibility that the required activities in question may have a significant effect on the environment.

IT IS HEREBY ORDERED, pursuant to California Water Code section 13383, that the MS4 permittees must comply with the following directives:

A. REQUIRED SUBMITTALS³

- 1. Written Notices.** Each MS4 permittee identified in Finding 4 must submit to the San Diego Water Board, **no later than three (3) months from the date of this Order (September 5, 2017)**, a written notice stating whether the MS4 permittee will implement Track 1 or Track 2 to comply with the trash discharge prohibition in the Ocean Plan and ISWEBE Plan.

- 2. Track 1 Jurisdictional Maps and Time Schedule.** Each MS4 permittee identified in Finding 4 electing to comply with Track 1 must submit the following information **no later than eighteen (18) months from the date of this Order (December 3, 2018)**:
 - a. A jurisdictional map identifying Priority Land Uses, the corresponding storm drain network including all storm drain inlets and drainage, proposed full capture system installation locations and associated drainage areas; *and*
 - b. A time schedule to achieve full compliance with the trash discharge prohibition, including interim milestones (such as average load reductions of ten percent per year or other progress) to full implementation. The final compliance date must not be later than fifteen (15) years from the effective date of the Trash Amendments (i.e. December 2, 2030).

- 3. Track 2 Implementation Plans.** Each MS4 permittee identified in Finding 4 electing to comply with Track 2 must submit, **no later than eighteen (18) months from the date of this Order (December 3, 2018)**, an implementation plan that describes:
 - a. The combination of controls⁴ selected by the MS4 permittee and the rationale for each selection;
 - b. How the combination of controls is designed to achieve full capture system equivalency;
 - c. How full capture system equivalency will be demonstrated;
 - d. How the implemented controls identified in the trash implementation plans will be monitored and assessed in jurisdictional runoff management program or Water Quality Improvement Plan Annual Reports;
 - e. Proposals by MS4 permittees, if any, to substitute Priority Land Uses described in Finding 9 above with other locations or land uses, provided that the total trash

³ Directives A.1, A.2, A.3, and A.5 do not apply to the Riverside County Flood Control and Water Conservation District because it does not have land use authority over Priority Land Uses.

⁴ Controls include full capture systems, multi-benefit projects, other treatment controls, and/or institutional controls, as defined in Appendix D of the Ocean Plan and Appendix E of the ISWEBE Plan.

generated in other locations or land uses is equivalent to, or greater than, the total trash generated in the Priority Land Use being substituted; *and*

- f. A time schedule to achieve full compliance with the trash discharge prohibition, including interim milestones (such as average load reductions of ten percent per year or other progress) to full implementation. The proposed final compliance date must not be later than fifteen (15) years from the effective date of the Trash Amendments (i.e. December 2, 2030).

4. Identification of Substantial Trash Generating Land Uses or Locations Within Riverside County Flood Control and Water Conservation District's

Jurisdiction. The Riverside County Flood Control and Water Conservation District (District) must submit, **no later than eighteen (18) months from the date of this Order (December 3, 2018)**, a report identifying land uses or locations within its jurisdiction including but not limited to, facilities, drainage structures, and easements that generate a substantial amount of trash.

- 5. Coordination with Caltrans.** Each MS4 permittee identified in Finding 4 must submit, **no later than eighteen (18) months from the date of this Order (December 3, 2018)**, a description of how MS4 permittees will coordinate their efforts to install, operate, and maintain full capture systems, multi-benefit projects, and other controls with Caltrans in significant trash generating areas and/or priority land uses, as applicable.

B. PROVISIONS

- 1. Signatory Requirements.** All documents submitted to the San Diego Water Board must be signed and certified.

a. All reports required by this Order must be signed as follows:

- (1) For a corporation, by a principal executive officer of at least the level of vice-president;
- (2) For a partnership or sole proprietorship, by a general partner or the proprietor, respectively;
- (3) For a municipality, state, federal or other public agency, by either a principal executive or ranking elected official.
- (4) By a duly authorized representative of the person designated above (B.1.a.(1), B.1.a.(ii), or B.1.a.(iii)). A person is a duly authorized representative only if:

- (a) The authorization is made in writing by a person described in paragraph B.6.a above;

(b) The authorization specifies either an individual or position having responsibility for the overall operation of the regulated facility or activity; and

(c) The written authorization is submitted to the San Diego Water Board.

b. Any person signing a document required by this Order must make the following certification:

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

2. Submittal of Documents. All documents submitted to the San Diego Water Board in compliance with this Order must be submitted in electronic format (compact disk (CD-ROM or CD) in a Portable Document Format (PDF), unless otherwise directed. All electronic format documents required under this Order must be submitted to:

Executive Officer
California Regional Water Quality Control Board
San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108
Attn: Laurie Walsh, PE, Storm Water Management Unit

3. Changes to Order. This Order may be amended, rescinded, or updated by the Executive Officer. The MS4 permittees may propose changes or alternatives to the requirements in this Order if a valid rationale for the changes is shown. The filing of a request by a MS4 permittees for amending, rescinding, or updating this Order, or notification of planned changes or anticipated noncompliance does not stay any condition of this Order.

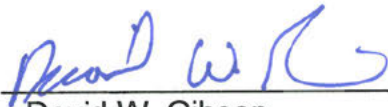
C. NOTIFICATIONS

1. Enforcement Discretion. The San Diego Water Board reserves its right to take any enforcement action authorized by law for violations of the terms and conditions of this Order.

2. Requesting Administrative Review by the State Water Board. Any aggrieved person may petition the State Water Board regarding this Order in accordance with Water Code section 13320 and the California Code of Regulations title 23 sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m.,

30 days following the date of this Order. Copies of the laws and regulations applicable to filing petitions may be found on the State Water Board website at http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

For instructions on how to file a petition for review, see the State Water Board website at:
http://www.waterboards.ca.gov/public_notices/petitions/water_quality/wqpetition_instr.shtml

Ordered By: 

David W. Gibson
EXECUTIVE OFFICER
June 2, 2017

**Comparison Between the Requirements of
Tentative Order 2001-01, the Federal NPDES
Storm Water Regulations, the Existing San Diego
Municipal Storm Water Permit (Order 90-42),
and Previous Drafts of the San Diego Municipal
Storm Water Permit**

A table comparing the Tentative Order's requirements with the requirements of other pertinent documents.

PERMITS COMPARISON (DRAFT)

Comparison Between the Requirements of Tentative Order No. 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order No. 90-42), and Previous Drafts of the San Diego Municipal Storm Water Permit

Conclusions

1. **Urban runoff causes or contributes to the impairment of every known impaired water body in the San Diego Region (i.e., every 303(d) listed water body in the Region is impaired, at least in part, because of urban runoff).**
2. **During the past 10 years (the period during which the Copermittees have been subject to Order No 90-42), water quality in the Region has continued to decline. The decline is the result of the increasing urban runoff pollution associated with the growth of the Region (i.e., increasing urban development and human population).**
3. **The continued degradation of the Region's receiving waters is evidence that current efforts to control urban runoff are not working (i.e., current Copermittee Urban Runoff Management Programs under Order No. 90-42 are either inadequate or ineffective). In other words, we are losing the battle against urban runoff pollution.**
4. **More must be done to reduce urban runoff pollutants if the beneficial uses (e.g., fishing, swimming, aquatic habitat, etc.) of the Region's receiving waters are to be protected.**
5. **Tentative Order No. 2001-01 (the proposed renewal of Order No 90-42) is the answer. If properly implemented, Tentative Order 2001-01 will significantly "slow the current rate" of water quality degradation in San Diego. Furthermore, the Tentative Order has the potential to "improve" the quality of San Diego receiving waters over the long term (i.e., 10-20 years).**
6. **Tentative Order No. 2001-01 is the product of an evolving development process that has included the release of two previous drafts and spanned more than six years. The Tentative Order incorporates the SDRWQCB's responses to over 200 pages of public comments on the 1995 and 1998 drafts of the permit.**
7. **Because Order No. 90-42, the interim drafts, and Tentative Order No. 2001-01 are all based on the same 1990 federal regulations, the underlying objectives and essential requirements of these documents are all "fundamentally the same". In other words, Tentative Order No. 2001-01 is not a "new" permit. It has the same underlying objectives and requirements as Order No. 90-42, the "early" first round permit to which the Copermittees have been subject for the past ten years.**

8. Although fundamentally very similar, Tentative Order 2001-01 will require Copermittees to do more and to expend a greater level of effort than is currently required under Order No. 90-42.
9. Relative to Order No. 90-42, the requirements of Tentative Order No. 2001-01 are significantly expanded in that they are more numerous, more specific/detailed, and more stringent than the requirements in Order No. 90-42. The SDRWQB believes that the expanded requirements are justified and necessary in light of the declining quality of the Region's receiving waters.
10. Approximately 80% of the requirements contained in Tentative Order No 2001-01 are also contained in the second draft of the permit released October 1998. This means approximately 80% of the permit requirements have been known to the Copermittees (and available for their review and implementation) for at least two years.
11. The remaining 20% of the requirements in the Tentative Order are "new", meaning that they have been added within the past two years. If 80% of the permit has been known for at least two years, then theoretically, the Copermittees have had the recent 51 day review period (ending Nov 30, 2000) to assimilate the new remaining 20% of the permit¹.
12. Greater than 40% of the requirements contained in Tentative Order No 2001-01 are also contained in the Copermittee's current first round permit, Order No. 90-42. This means that at least 40% of the Tentative Order's requirements have been known to the Copermittees for the past ten years. Accordingly, a Copermittee that is currently in compliance with Order No. 90-42 will have at least 40% of the Tentative Order's requirements already met and fully implemented during the past ten years.
13. Of the 80% of the Tentative Order's requirements that have been known to the Copermittees for at least two years, half (or 50% of 80%) have been known to the Copermittees for no less than 10 years and half have been known for no less than two years.
14. Approximately 60% of the requirements in Tentative Order 2001-01 are based solely on the 1990 federal NPDES Storm Water Regulations. The remaining 40% of the requirements in the Tentative Order "exceed the federal regulations". Requirements that "exceed the federal regulations" are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.
15. The 40% of the requirements in Tentative Order 2001-01 which "exceed the federal regulations" are based almost exclusively on (1) guidance documents

¹ Current law requires a 45 day comment period.

developed by USEPA²; and (2) SWRCB's orders describing statewide precedent setting decisions on MS4s permits³.

16. The SDRWQCB is authorized to include requirements in the Tentative Order which "exceed the federal regulations" under both section 402(p)(3)(iii) of the Clean Water Act, as well as section 13377 of the California Water Code. In the course of carrying out its mission, the SDRWQCB is authorized to require any more stringent controls it deems necessary to protect the beneficial uses of receiving waters, address specific local problems (e.g., beach closures), implement water quality control plans, or prevent nuisance.
17. Taken as a whole, the requirements contained in Tentative Order 2001-01 represent the SDRWQCB's interpretation/definition of MEP for the San Diego Region. MEP, or the maximum extent practicable, is the technology-based standard established by Congress for municipal dischargers of urban runoff (i.e., MS4 dischargers).
18. The inclusion in a renewal MS4 permit (e.g., Order No. 2001-01) of requirements that are more stringent than those in an initial MS4 permit is supported by USEPA⁴ and the SWRCB⁵. Over time it is expected that subsequent MS4 permits will require an increasing level of effort on the part of the municipalities that is commensurate with the need to protect beneficial uses. This is particularly appropriate where the initial permit was an "early" permit.
19. SDRWQCB has Ample Legal Authority to Adopt Tentative Order No. 2001-01. Each of the requirements contained in Tentative Order is solidly grounded in the Clean Water Act, the California Water Code, the federal storm water regulations, USEPA guidance documents on MS4 permits, and SWRCB Orders relating to MS4 permits.

Comparison Table

The attached table, showing the development process of Tentative Order No. 2001-01, is provided to call attention to the similarities and differences between the requirements of

² Environmental Protection Agency. 1992. Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

³ In Orders WQ 98-01 and 99-05, the SWRCB prescribed specific precedent setting Receiving Water Limitations language to be included in all future MS4 permits. On October 5, 2000 the SWRCB made its final decision to uphold the LARWQCB's adoption of Standard Urban Storm Water Mitigation Plans (SUSMPs) requirements for new development in MS4 permits.

⁴ U.S. Environmental Protection Agency. 1996. Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits. 61 FR 43761.

⁵ On October 5, 2000 the SWRCB made its final decision to uphold the LARWQCB's adoption of Standard Urban Storm Water Mitigation Plans (SUSMPs) for new development in MS4 permits.

Tentative Order No. 2001-01 and the current San Diego Municipal Storm Water Permit (Order No. 90-42). Additionally the table compares both the existing and proposed permits, as well as the two previous drafts, to the 1990 federal NPDES Storm Water Regulations for Phase I (federal regulations)⁶.

The orders, regulations, and drafts are presented in the table chronologically so that the evolution of the Tentative Order's requirements is evident over time. The differences and similarities between the various documents can be observed in the table by noting the number of "X's" in each column. An "X" indicates that a given requirement is included in the document; while a "-" means that the requirement is missing.

Order No. 90-42 was the first document included in the table to be issued (in July of 1990), and has the least number of requirements. As the table indicates, Order 90-42 was an "early" permit, in that it was released prior to the November 1990 promulgation of the Federal NPDES storm water regulations. Although Order No. 90-42 contained the "essentials" of the 1990 regulations, the requirements were written in very broad generic and often vague terms. Broad generic terms were incorporated into the permit for the purpose of providing the maximum amount of flexibility to the Copermittees in implementing the new requirements (flexibility was, in fact, the stated reason for issuing the permit in advance of the final regulations).

When the federal regulations were issued by the United States Environmental Protection Agency (USEPA) in November of 1990, they were significantly more detailed and contained more requirements than Order No. 90-42. **The federal regulations, which implement and clarify the federal statute, specify the minimum fundamental or essential requirements that must be contained in all municipal storm water permits.** For this reason, the existing, proposed, and previous drafts of San Diego Municipal Storm Water permit are based on, and grounded in, the federal regulations. It is to the federal regulations that each of the documents in the table should be ultimately compared. To enhance understanding and clarify the federal regulations, USEPA's intent in drafting the regulations was expanded upon in the "Preamble" to the federal regulations and in several guidance documents (which provide further detail and insight on USEPA intent). These supporting documents have also been relied upon in developing the requirements of the Tentative Order and its previous drafts.

Five Fundamental Requirements of an MS4 Permit

When distilled down to its essence, the federal regulations direct that municipalities implement an Urban Runoff Management Program that, at a minimum, includes the five following fundamental requirements:

⁶ The 1990 final phase I NPDES federal storm water regulations, codified at 40CFR 122.26, implement and interpret section 402(p) of the Clean Water Act. Section 402(p) is the section of the Clean Water Act that requires municipalities to obtain an NPDES permit for their discharges of storm water. The 1987 amendments to the Clean Water Act added section 402(p). The Clean Water Act is the 1976 federal statute which requires NPDES permits to regulate point source discharges of pollutants to waters of the United States.

1. Prohibit non-storm water discharges into MS4s.
2. Implement best management practices (BMPs) to reduce pollutant discharges into MS4s to the maximum extent practicable (MEP).
3. Ensure that discharges from the MS4 do not cause or contribute to an exceedance of water quality objectives in receiving waters.
4. Identify (actively find) and eliminate sources of illicit discharges.
5. Enforce local ordinances and permits.

Need for Increased Permit "Specificity"

The table below demonstrates the increase in permit specificity over time. There are several important reasons for the increase in the specificity of the permit language, which are discussed below.

1. Copermittees Requested Increased Specificity; Tentative Order 2001-01 provides Increased Specificity

Copermittees have repeatedly requested that the SDRWQCB define the minimum levels of actions/efforts required on their parts to keep them in minimum compliance with Order No. 90-42. As previously explained, the early permit was purposely written in broad terms to provide maximum flexibility the Copermittees. For example, Order No. 90-42 directs the Copermittees to develop and implement a comprehensive Urban Runoff Management Program, but unlike the Tentative Order, provides very little direction or detail on what that program must contain, and even less direction on minimum levels of effort required for compliance. As a result, many Copermittees frequently ask the SDRWQCB to provide direction and specificity on these topics. Tentative Order No. 2001-01 directly responds to this request by specifying minimum required program components, as well as the minimum elements of each component. These types of definitions require specific language, rather than broad directives, since they convey all of the activities expected of the Copermittees. In this way, the Tentative Order defines the minimum level of effort needed for compliance. A permit which describes each of the activities to be conducted will be greater in length and detail than a permit that does not. Although responsive to the Copermittees' request, much of the specifics provided in the Tentative Order had already been provided to the Copermittees over ten years ago in the form of the federal regulations.

2. Copermittees Requested that MEP be Defined; Tentative Order 2001-01 Defines MEP

Maximum Extent Practicable or MEP is the technology-based standard established by Congress in the Clean Water Act (section 402(p)(3)(B)(iii)) that municipal dischargers of storm water must meet. Technology-based standards establish the level of pollutant

reductions that dischargers must achieve, typically by treatment or by a combination of treatment and source control BMPs. In this case, municipal dischargers are required to reduce the discharge of pollutants into and from their MS4s to the MEP. The MEP standard therefore provides specificity about the minimum amount of effort needed for permit compliance. MEP considers economics and is generally, but not necessarily, less stringent than BAT⁷. A definition of MEP is not provided either in the statute or in the regulations. Instead, the definition of MEP is dynamic and is intended to be defined over time by the following process: municipalities propose their definition of MEP by way of their Urban Runoff Management Programs. The total collective and individual activities conducted pursuant to their Urban Runoff Management Programs become their "proposal" for MEP, as it applies both to their overall management program and level of effort, as well as to any specific activity (e.g., what is MEP for street sweeping, or MEP for sanitary sewer maintenance?).

In a memorandum dated February 11, 1993 entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel for the SWRCB writes "...to achieve the MEP standard, municipalities must employ whatever best management practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost prohibitive". She goes on to state, in part, "...The final determination regarding whether a municipality has reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger."

Tentative Order No. 2001-01 defines MEP in the San Diego Region. The overall program scope and level of effort specified in the Tentative Order's Urban Runoff Management Programs is the SDRWQCB's interpretation of MEP. By defining the minimum standard, the SDRWQCB has eliminated much of the guesswork and uncertainty previously associated with permit compliance.

3. Copermittees Provided Substantial Comments on Previous Drafts; Tentative Order No. 2001-01 Responds to All Comments Received

Tentative Order No. 2001-01 is detailed in its requirements in part due to the extended reissuance process it has undergone. Drafts of the San Diego Municipal Storm Water Permit have been released for public comment twice before (in 1995 and 1998). During the course of development, the SDRWQCB has asked for and received a significant number of comments on previous drafts (informally during individual discussions and collective meetings, as well as formally in more than 200 pages of written comments). Each comment has been carefully reviewed and considered. The language in Tentative Order No. 2001-01 incorporates the SDRWQCB's responses to all comments received prior to its release on October 11, 2000.

Over the years and in a variety of forums, both the Copermittees and the public have generally sought more clarification and detailed explanations of permit requirements.

⁷ BAT, or best available technology, is the technology-based standard established by Congress for industrial dischargers of storm water.

Many of the comments received on earlier drafts have contained specific requests for the SDRWQCB to provide additional clarification or specificity on a variety of permit requirements.

In response to these comments, the level of detail of the Tentative Order has increased over time. This evolution can be seen in the attached table by the increasing number of requirements in each subsequent issuance of the Tentative Order (note totals at end of table). Tentative Order 2001-01 provides the additional clarification and increased specificity requested, while seeking to address the entire scope and variety of issues raised during the lengthy public participation process. One consequence of an extended development process and repeated requests for greater specificity, is that overall volume of the permit has also increased proportionately over the years. It may be interesting to note that many of the "very recently received" comments on Tentative Order 2001-01 continue to request additional clarification on specific requirements.

4. Greater Specificity Will Facilitate Assessment Of Copermittee Compliance

Assessing Copermittee compliance with Order No. 40-42 has been challenging and resource intensive. There are many reasons for this including the following:

- Storm water permits are based on BMPs and lack numeric effluent limits
- MEP, the technology based standard for MS4 permits, had not been defined
- Order No. 90-42 was an "early" permit with broad vague language
- Order No. 90-42 lacked other "measurable" performance standards
- Storm water management is a developing field (most other discharges regulated by the SDRWQCB are well defined)

With respect to assessing permit compliance, a storm water permit's lack of numeric effluent limitations is a distinct disadvantage. This is because compliance (or noncompliance) with numeric effluent limitations is one of the most important tools used by the regional boards in their overall assessment of a discharger's compliance. The comparison of routine effluent monitoring data to the numeric effluent limitations specified in the permit provides an accurate and effective measure of permit compliance.

In contrast, assessing compliance with Order No. 90-42, a BMP-based "early" storm water permit, has proven complex and subjective. When effluent limits are absent, the inclusion of greater specificity is made all the more necessary. Reliance on BMPs, as opposed to numeric effluent limits, demands specification of those programs and activities that are relied upon to reduce pollution. To assess compliance with the early permit, the SDRWQCB has utilized a variety of other tools, with varying degrees of effectiveness (See "Status of Copermittee Compliance", Attachment 16).

Tentative Order 2001-01 now contains detailed narrative descriptions of its requirements that represent the SDRWQCB's definition of MEP. Such detailed requirements remove ambiguity by clearing spelling out the SDRWQCB's minimum expectations. In summary,

the increased specificity of the Tentative Order will greatly enhance a Copermitttee's, the SDRWQCB's, or other interested party's ability to assess permit compliance.

Need For Increased Permit "Stringency" - - Exceeding the Federal Regulations

There has also been an increase in number of and stringency of permit requirements over time. As can be seen in the table below, Order No. 2001-01 requires considerably more of Copermitttees than does Order No. 90-42. Furthermore, in some respects, the requirements of Tentative Order No. 2001-01 exceed the minimum requirements as specified in the federal regulations. The need for increased stringency and to exceed the federal regulations is discussed below.

1. Continuing Water Quality Degradation Requires Increased Stringency

The increasing impairment of our Region's waters due to urban runoff (as discussed on page 5 of the Fact Sheet/Technical Report, provided as Attachment 7 of Agenda Item 5) demands increased stringency in municipal storm water permits. The population and urban development of our Region has expanded dramatically since Order No. 90-42 was issued ten years ago, and the resulting water quality problems have mirrored this expansion. The closure or posting of local beaches has become all too familiar. Urban runoff now directly causes or contributes to all of the known receiving water quality impairments in the San Diego Region. The importance of water quality to our region's tourism industry and way of life has caused an increase in public outcry against urban runoff contamination and beach closures. Urban runoff issues are now a common site on our Region's newspaper headlines and governing body agendas. Legislation at the state level regarding water quality (such as AB 411) is being generated within our Region due in large part to the Region's pronounced urban runoff water quality issues.

The continued degradation of the Region's receiving water is evidence that the current collective efforts of the Copermitttees to control urban runoff are either ineffective or inadequate. More must be done to reduce urban runoff pollution if the beneficial uses of the Region's receiving waters are to be protected. The more stringent requirements of the Tentative Order are needed to address these problems and the increased attention and expectations that accompany them.

2. Tentative Order Reflects a Decade of Evolving Technology

Versions of the San Diego Municipal Storm Water Permit have also become increasingly stringent due to the advancing progress in urban runoff management and technology which has occurred over time. Tentative Order No. 2001-01, and its requirements, reflect a 10 year evolution in the field of urban runoff management. Information on the impacts of urban runoff, as well as how to minimize these impacts, have greatly expanded since the existing Municipal Storm Water Permit for San Diego was first issued in 1990. In 1990, very few reference materials were available to Copermitttees. Today there is a large and growing body of excellent resources available.

The Tentative Order takes advantage of this increased knowledge and the passage of time, by including additional requirements which have been proven effective or which are necessary to protect receiving waters from increasing urban runoff pollution. The result of the technology evolution is a longer and more detailed, but also more effective, permit.

3. Increased Stringency is Supported by USEPA and SWRCB

The increased specificity included in the Tentative Order is in large part derived from USEPA's guidance as provided in its *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems*⁸ and its *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*.⁹ Where the Tentative Order is more stringent than the federal regulations, the stringency is frequently based on the recommendations of the Guidance Manual. USEPA's guidance and the 1999 Phase II Storm Water regulations indicate that MS4 permits are to increase in stringency when reissued, especially where beneficial uses of receiving waters are not being protected.

The Interim Permitting Approach also supports increased specificity in storm water permits, recommending that municipal storm water permits use "best management practices (BMPs) in first-round storm water permits, and **expanded or better-tailored BMPs in subsequent permits**, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate" (emphasis added). It is important to note that the SWRCB cited USEPA's Interim Permitting Approach as support for its recent tentative decision which upheld the increased specificity of numeric sizing criteria requirements for post-construction BMPs as appropriate requirements in municipal storm water permits. This SWRCB decision supporting Standard Urban Storm Water Mitigation Plans (SUSMPs) demonstrates the SWRCB's general recognition of the need for increased requirements in municipal storm water permits.

The SWRCB's decision to require MS4 discharges to meet water quality standards also supports increased specificity in municipal storm water permits. In Orders WQ 98-01 and 99-05, the SWRCB prescribed specific precedent setting Receiving Water Limitations language to be included in all future MS4 permits. This language specifically requires that MS4 dischargers meet water quality standards and allows for the use of narrative BMPs (increasing in stringency and implemented in an iterative process) as the mechanism by which water quality standards can be met. The idea of an iterative process

⁸ U.S. Environmental Protection Agency. 1992. *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems*. EPA 833-B-92-002.

⁹ U.S. Environmental Protection Agency. 1996. *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*. 61 FR 43761.

of increasingly stringent BMP implementation is consistent with the concept of increasingly stringent MS4 permits. For example, increasingly stringent BMP implementation is required for discharges to impaired water bodies; likewise, increasingly stringent MS4 permits are required for regions with numerous water bodies impaired by urban runoff.

The SWRCB clearly expresses its intent that MS4 permits should increase in stringency in a manner similar to increasingly stringent BMP implementation when it states in a recent memorandum "[...] because most MS4 discharges enter impaired water bodies, there is a real need for permits to include stringent requirements to protect those water bodies. As total maximum daily loads (TMDLs) are developed, it is likely that MS4s will have to participate in pollutant load reductions, and the MS4 permits are the most effective vehicles for those reductions."

In summary, Tentative Order No. 2001-01 is consistent with USEPA and SWRCB support for increasing stringency in MS4 permits as necessary to protect the beneficial uses of the Region's receiving waters from further impairment.

Tentative Order 2001-01 Is Fundamentally The Same As Order No. 90-42

The "early" permit and each of the drafts of the renewal permit as well as the federal regulations (from which the essential requirements are derived) all have the same basic objective, namely, to reduce pollutants in urban runoff discharges to receiving waters. As shown in the table below, each of the documents also contain each of the fundamental underlying requirements specified in the federal regulations.

From a broad brush perspective, (even though differing substantially in level of detail and number of pages), each version of the Order is fundamentally the same. Tentative Order No. 2001-01 is not a "new" permit. It has the same underlying objective and contains the same essential ingredients as Order No. 90-42, the "early" permit to which the Copermittees have been subject for the past ten years.

The comparisons table clearly shows that the number, specificity, and stringency of permit requirements has increased over time throughout the permit development process. Perhaps more importantly however, the table also demonstrates that the most fundamental requirements, as specified in the federal regulations, have remained the same through time and that each are contained in Order No. 90-42, in the Tentative Order, and in both of the previous drafts.

Furthermore because the language contained in Order No. 90-42 and the federal regulations is quite broad, the basic requirements typically encompass or embody the more enhanced requirements of Tentative Order No. 2001-01 and previous drafts. For example, with regards to requirements for enforcement by the Copermittees, Order No. 90-42 simply states "Pursue enforcement actions as necessary to ensure compliance [...]." Though this statement is relatively broad, it embodies the more specific requirements of Tentative Order No. 2001-01, such as the Tentative Order's requirements

to "enforce ordinances and permits as necessary [at construction, industrial, and commercial sites] to maintain compliance with the Order." In a reciprocal manner, most of the requirements of Tentative Order No. 2001-01 are embodied in Order No. 90-42 and the federal NPDES storm water regulations. Footnotes to the table are occasionally provided to exhibit these types of circumstances.

The similarity of the various order, drafts, and regulations included in the table can also be observed when the number of requirements in each document are tallied. For example, roughly 80% of the Tentative Order's requirements were also present in the 1998 draft of the San Diego Municipal Storm Water Permit. Even the requirements of Order No. 90-42 encompass roughly 40% of the requirements of Tentative Order No. 2001-01. This exhibits the similarity in the requirements of the various documents covered in the table, and also demonstrates that the majority of the requirements of Tentative Order No. 2001-01 have been presented for public review prior to the public release of the Tentative Order.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Prohibition of Various Types of Discharges (Section A., page 8 of Tentative Order No. 2001-01)	Prohibit discharges into and from municipal separate storm sewer systems (MS4s) causing pollution, contamination, or nuisance	X	X	X	X	X
	Prohibit discharges from MS4s causing exceedances of water quality objectives	X	X	X	X	X
	Prohibit discharges into and from MS4s containing pollutants which have not been reduced to maximum extent practicable (MEP)	X	X	X	X	X
	Prohibit post-development runoff from new development which is greater in peak rate or velocity than pre-development runoff from the same site					
Prohibitions of Non-Storm Water Discharges (Section B., page 9 of Tentative Order No. 2001-01)	Prohibit discharges of post-development runoff into a Clean Water Act section 303(d) water body containing any pollutant (for which the water body is already impaired) in levels exceeding predevelopment levels (for those same pollutants)					X
	Prohibit discharges from MS4s as required by Basin Plan Prohibitions	X	N/A	X	X	X
	Prohibit non-storm water discharges, except de minimis discharges	X	X	X	X	X
	Prohibit de minimis discharges if source of pollutants or require BMPs for the discharges	X	X	X	X	X
	For de minimis discharges not prohibited, submit information on discharge not prohibited and what BMPs will be required					
	Require BMPs for non-emergency fire fighting flows which are significant sources of pollutants			X	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Prohibit non-prohibited non-storm water discharges with pollutants which can't be reduced to MEP	X	X	X	X	X
Receiving Water Limitations (Section C., page 10 of Tentative Order No. 2001-01)	Prohibit discharges causing violation of water quality standards If exceedance of water quality standards occurs, implement control measures stop exceedance If exceedance of water quality standards occurs, notify SDRWQCB of exceedance and submit report to SDRWQCB of measures to be taken.	X	X	X	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	If exceedance of water quality standards occurs, revise urban runoff management program and monitoring program, and implement the programs				X	X
Legal Authority (Section D, page 10 of Tentative Order No. 2001-01)	Establish, maintain, and enforce legal authority to control pollutant discharges into and from MS4	X ¹⁰	X ¹¹	X	X	X
	Establish legal authority which authorizes Copermittee to control pollutant discharges from industrial and construction activities into MS4	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to prohibit all illicit discharges	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to prohibit and eliminate illicit connections	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to control discharge of spills, dumping, or disposal of materials other than storm water into MS4	X	X	X	X	X

¹⁰ Much of the language in Order No. 90-42 regarding the Copermittees' attainment of legal authority is very broad. It states "Enact legislation and ordinances as necessary to ensure compliance with the stormwater management program and the implementation plans." SDRWQCB interprets this language as requiring the establishment of legal authority to control all pollutant discharges into and from the MS4. Therefore, all requirements regarding the attainment of legal authority for the purpose of controlling pollutant discharges into and from the MS4 are "checked" in the Order No. 90-42 column.

¹¹ The Federal NPDES regulations require Copermittees to operate pursuant to legal authority which enables them to "[R]equire compliance with conditions in ordinances, permits, contracts, and orders" (40 CFR 122.26(d)(2)(i)(E)). Therefore, the Federal NPDES regulations require the Copermittees to have legal authority to comply with requirements in orders from the SDRWQCB. Accordingly, legal authority requirements necessary to ensure compliance with SDRWQCB orders are "checked" in the Federal NPDES Regulations column.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Establish legal authority which authorizes Copermittee to require compliance with Copermittee ordinances, permits, contracts, or orders	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to utilize enforcement mechanisms	X	X	X ¹²	X	X
	Establish legal authority which authorizes Copermittee to control pollutants from one portion of shared MS4 to another through interagency agreements	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to carry out inspections, surveillance, and monitoring necessary to determine compliance	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to require the use of BMPs	X	X	X	X	X
	Provide certified statement that Copermittee has adequate legal authority			X	X	X
	Provide certified statement that identifies responsibilities of each municipal department which conducts urban runoff activities			X		X
	Provide certified statement citing urban runoff related ordinances and how they are enforceable			X		X
	Provide certified statement describing how ordinances are implemented and appealed			X		X

¹² The 1995 Draft requires legal authority to be obtained which authorizes the Copermittee to "require compliance" is analogous to "require compliance" is analogous to "enforce." Therefore, the requirement to "establish legal authority which authorizes Copermittee to utilize enforcement mechanisms" is "checked" in the 1995 Draft column.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Provide certified statement describing issuance of administrative orders and injunctions or use of court system for enforcement actions.	-	-	-	-	X
Technology Based Standards (Section E., page 12 of Tentative Order No. 2001-01)	BMPs shall be implemented to reduce pollutants discharges into and from the MS4 to the MEP	X	X	X	X	X
	Pollutant discharges into and from the MS4 from industrial activity owned by the Copermitee shall be reduced to BAT/BCT	-	X	X	X	X
	Pollutant discharges into and from the MS4 from construction activity owned by the Copermitee shall be reduced to BAT/BCT	-	X	X	X	X
Urban Runoff Management Plan (Section F., page 13 of Tentative Order No. 2001-01)	Implement urban runoff management plan to reduce discharge of pollutants into and from MS4	X	X	X	X	X
	Reduce pollutant discharges from new development and redevelopment to the MEP	X	X	X	X	X
Land-Use Planning for New Development and Significant Redevelopment (Section F.1., page 13 of Tentative Order No. 2001-01)	Utilize urban planning to minimize discharge of pollutants in urban runoff	X	X	X	X	X
	Minimize short and long-term impacts on receiving water quality from new development and redevelopment	-	-	-	-	X
	Incorporate water quality and watershed principles into General Plan	-	-	-	-	X
	Modify development project approval processes	-	-	X	X	X
	Include conditions of approval in local permits for new development	-	-	X	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Land-Use Planning for New Development and Significant Redevelopment (SUSMPs) (Section F.1.b(2); page 15 of Tentative Order No. 2001-01)	Revise environmental review processes and CEQA initial study checklists	-	-	-	X	X
	Conduct education efforts focused on new development and redevelopment	-	-	-	-	X
	Educate municipal staff on requirements for new development and redevelopment	-	-	X	X	X
	Educate project applicants, contractors, developers, property owners, etc. on requirements for new development and redevelopment	-	-	X	X	X
	Develop Standard Urban Storm Water Mitigation Plans to reduce pollutants and runoff flows from priority development project categories	-	-	-	X	X
	Implement post-construction BMPs for new development and redevelopment	-	-	X	X	X
	Require structural post-construction BMPs to meet design criteria and performance standards	-	-	X	X	X
	Require structural post-construction BMPs for priority development project categories to meet numeric sizing criteria	-	-	-	-	X
	Develop procedure for pollutants of concern to be identified for new development projects	-	-	-	-	X
	Develop a process by which SUSMPs will be implemented	-	-	-	-	X
Develop a program to manage waivers from SUSMPs	-	-	-	-	X	
Require protection of groundwater resources when BMPs with the primary function of infiltration are used	-	-	-	-	X	

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Construction (Section F.2., page 21 of Tentative Order No. 2001-01)	Reduce pollutant discharges from construction sites	X	X	X	X	X
	Require implementation of pollution prevention methods at construction sites	-	X ¹³	X	X	X
	Update grading ordinances	-	-	-	X	X
	Modify construction and grading approval processes	-	-	-	X	X
	Include conditions of approval in local grading and construction permits to ensure pollutant discharges are reduced to MEP	-	-	X	X	X
	Inventory all construction sites	X ¹⁴	X	-	X	X
	Prioritize construction sites for construction oversight activities	-	X ¹⁵	-	X	X
	Require implementation of designated minimum BMPs at each construction site	X	X	X	X	X

¹³ The Preamble to the Federal NPDES regulations states "[I]n implementing these regulations, EPA and the States will strive to achieve environmental results in a cost effective manner by placing high priority on pollution prevention activities [...]. For this reason, SDRWQCB interprets Federal NPDES regulation requirements for implementation of control measures to include requirements for implementation of pollution prevention control measures. Accordingly, all requirements regarding pollution prevention are "checked" in the Federal NPDES Regulations column.

¹⁴ The language in Order No. 90-42 regarding requirements for pollutant source inventories is very broad. It states "The permittees shall inventory [...] major sources of pollutants such as industrial and military and other federal facilities, airports, highways, shopping centers, and large parking areas." Staff interprets this language to apply to all land-use areas within each Copermittee's jurisdiction, including construction, municipal, industrial, commercial, and residential areas. Therefore, all requirements regarding pollutant source inventories are "checked" in the Order No. 90-42 column.

¹⁵ The Federal NPDES regulation requirements for prioritization are broad. They state "Proposed management programs shall describe priorities for implementing controls." SDRWQCB interprets this language to apply to all land-use areas within each Copermittee's jurisdiction, including construction, municipal, industrial, commercial, and residential areas. Therefore, all requirements regarding prioritization are "checked" in the Federal NPDES Regulation column.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Require implementation of additional BMPs at construction sites tributary to Clean Water Act section 303(d) water bodies	X	X	X	X	X
	Inspect construction sites for compliance with ordinances and permits	-	X	X	X	X
	Establish inspection frequencies for construction sites based on their prioritization	-	X	X	X	X
	Inspect high priority construction sites weekly (or monthly if SWPPP has been reviewed and is found to have been implemented)	-	-	-	-	X
	Inspect medium and low priority construction sites twice during the wet season	-	-	-	-	X
	Inspect construction sites as needed during the dry season	-	-	-	-	X
	Enforce ordinances and permits at all construction sites	X ¹⁶	X	X	X	X
	Provide notification to SDRWQCB of non-compliant sites	X ¹⁷	X	X	X	X
	Conduct education efforts focused on construction	-	X	X	X	X
	Educate municipal staff on requirements for construction	-	-	X	X	X
	Educate project applicants, contractors, developers, property owners, etc. on requirements for construction	-	X	X	X	X

¹⁶ The language in Order No. 90-42 regarding enforcement is very broad. It states "[P]ursue enforcement actions as necessary to ensure compliance with the stormwater management programs and the implementation plans." SDRWQCB interprets this language to apply to all areas within each Copernittee's jurisdiction, including construction, municipal, industrial, commercial, and residential areas. Therefore, all requirements regarding enforcement are "checked" for Order No. 90-42.

¹⁷ Order No. 90-42 requires reporting of all instances of non-compliance.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Municipal (Section F.3.a., page 24 of Tentative Order No. 2001-01)	Reduce pollutant discharges from municipal areas and activities	X	X	X	X	X
	Reduce impacts on receiving waters from operating and maintaining public streets, roads, and highways	-	X	X	X	X
	Assure that flood management projects assess water quality impacts	-	X	X	X	X
	Implement control measures for discharges of pollutants from municipal waste storage facilities	-	X	X	X	X
	Require implementation of pollution prevention methods for municipal areas and activities	-	X	X	X	X
	Inventory all municipal areas and activities which generate pollutants	X	-	-	-	X
	Prioritize municipal areas and activities for oversight	-	X	-	-	X
	Require implementation of designated minimum BMPs for each municipal area or activity	-	X	X	X	X
	Require implementation of additional BMPs for municipal areas and activities tributary to Clean Water Act section 303(d) water bodies	-	X	X	X	X
	Implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges to or from the MS4	-	X ¹⁸	X	X	X

¹⁸ The language in Order No. 90-42 regarding maintenance of the MS4 is broad. It states "Permittees shall, at all times, properly maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by a permittee to achieve compliance with the conditions of this Order." Staff interprets this language to apply to consistent periodic maintenance of the entire MS4. Therefore, all requirements regarding maintenance of the MS4 are "checked" for Order No. 90-42.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Implement a schedule of maintenance for the MS4	X	X	X	X	X
	Inspect and remove waste accumulated in the MS4	X	-	X	X	X
	Perform additional MS4 cleaning as necessary.	-	-	X	X	X
	Keep records of cleanings and quantity of material removed	-	-	-	X	X
	Dispose of MS4 waste properly	-	-	-	X	X
	Eliminate waste discharges during maintenance and cleaning	-	-	-	X	X
	Implement BMPs to reduce contribution of pollutants associated with the application, storage, and disposal of pesticides, herbicides, and fertilizers	-	X	X	X	X
	Inspect high priority municipal areas and activities annually	-	-	-	-	X
	Enforce storm water ordinance for all municipal areas and activities	X	X	X	X	X
	Reduce pollutants in runoff from industrial sites	X	X	X	X	X
	Require implementation of pollution prevention methods at industrial sites	-	X	X	X	X
	Inventory all industrial sites	X	X	X	X	X
	Prioritize industrial sites for oversight	-	X	X	X	X
	Require implementation of designated minimum BMPs for each industrial site	X	X	X	X	X
	Require implementation of additional BMPs for industrial sites tributary to Clean Water Act section 303(d) water bodies	-	X	X	X	X
	Require monitoring program for runoff from high priority industrial sites	-	X	-	X	X

Industrial
(Section F.3.b., page 27 of Tentative Order No. 2001-01)

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Commercial (Section F.3.c., page 30 of Tentative Order No. 2001-01)	Inspect industrial sites for compliance with ordinances and permits		X	X	X	X
	Establish inspection frequencies for industrial sites based on their prioritization		X	X	X	X
	Inspect high priority industrial sites annually (or biannually if SWPPP has been reviewed and is found to have been implemented)					
	Enforce ordinances at all industrial sites	X	X	X	X	X
	Provide notification to SDRWQCB of non-compliant sites	X	X	X	X	X
	Reduce pollutants in runoff from commercial sites		X	X	X	X
	Require implementation of pollution prevention methods at commercial sites			X	X	X
	Inventory all high priority commercial sites	X		X	X	X
	Require implementation of designated minimum BMPs for each commercial site	X		X	X	X
	Require implementation of additional BMPs for commercial sites tributary to Clean Water Act section 303(d) water bodies	X		X	X	X
Residential (Section F.3.d., page 31 of Tentative Order No. 2001-01)	Inspect high priority commercial sites as needed			X		X
	Enforce ordinances at all commercial sites	X	X	X	X	X
	Reduce pollutants in runoff from residential areas and activities	X	X	X	X	X
	Require implementation of pollution prevention methods for residential areas and activities		X	X	X	X
	Inventory all high priority residential areas and activities	X			X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Require implementation of designated minimum BMPs for high priority residential areas and activities	X	X	X	X	X
	Require implementation of additional BMPs for residential areas and activities tributary to Clean Water Act section 303(d) water bodies	X	X	X	X	X
	Enforce ordinances for all residential areas and activities	X	X	X	X	X
	Implement an education program to increase knowledge of MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions		X	X	X	X
	Implement education program to measurably change behavior of target communities				X	X
	Educate municipal departments and personnel		X	X	X	X
	Educate construction site owners and developers		X	X	X	X
	Educate industrial owners and operators			X	X	X
	Educate commercial owners and operators			X	X	X
	Educate residential community, general public, school children			X	X	X
	Educate quasi-governmental agencies					X
	Seek and eliminate illicit discharges and connections	X	X	X	X	X
	Conduct dry weather field screening of MS4 outfalls to detect illicit discharges and connections	X	X	X	X	
	Conduct dry weather analytical monitoring of MS4 outfalls					X
Illicit Discharge Detection and Elimination (Section F.5., page 34 of Tentative Order No. 2001-01)						

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Follow-up on potential illicit discharges or connections based on dry weather analytical monitoring		X	X	X	X
	Establish criteria to identify where follow-up investigations appropriate			X	X	X
	Eliminate detected illicit discharges and connections	X	X	X	X	X
	Enforce ordinances, orders, and other legal authority to prevent and eliminate illicit discharges and connections	X	X	X	X	X
	Prevent and respond to sewage spills (including from private laterals) and other spills	X	X	X	X	X
	Develop and implement a mechanism to be notified of all sewage spills from private laterals					
	Facilitate public reporting of illicit discharges and connections through operation of a public hotline.		X	X	X	X
	Facilitate proper management and disposal of used oil, toxic materials, and other household hazardous wastes		X	X	X	X
	Implement controls and measures to limit infiltration of seepage from sanitary sewers to MS4s.		X	X	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Public Participation (Section F.6., page 35 of Tentative Order No. 2001-01)	Incorporate public participation into urban runoff management plan	-	X	-	X	X
Assessment of Urban Runoff Management Program (Section F.7., page 36 of Tentative Order No. 2001-01)	Develop and implement long-term strategy for assessing effectiveness of the urban runoff management program Assess status of compliance	X	X	X	X	X
Fiscal Analysis (Section F.8., page 36 of Tentative Order No. 2001-01)	Develop a strategy to conduct a fiscal analysis of the urban runoff management program Conduct fiscal analysis annually	-	-	-	-	X
Watersheds (Section J., page 41 of Tentative Order No. 2001-01)	Develop and implement a watershed urban runoff management program Collaborate with other Copermitees in watershed and identify and mitigate highest priority water quality issues in the watershed Create a map of each watershed Assess water quality of all receiving waters in each watershed Identify and prioritize water quality problems in each watershed caused by MS4 discharges	X	X ¹⁹	X	X	X
		-	-	-	X	X
		-	X ²⁰	-	X	X
		-	-	-	X	X

¹⁹ The Federal NPDES regulations state "Proposed programs may impose controls on a [...] watershed basis [...]" (40 CFR 122.26(d)(2)(iv)).

²⁰ The Federal NPDES regulations require an assessment of the quality of receiving waters (40 CFR 122.26(d)(1)(iv)(C)). If the urban runoff management program were to be conducted on a watershed basis, the water quality assessment would also be conducted on a watershed basis.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Reporting (Sections H, I, L, and M, pages 36 - 44 of Tentative Order No. 2001-01)	Develop a time schedule of short and long-term recommended watershed activities	-	-	-	X	X
	Identify Cooperitees and corresponding responsibilities for each watershed	-	-	-	X	X
	Develop a mechanism for public participation in watershed process	-	-	-	X	X
	Implement a watershed based education program	-	-	-	-	X
	Develop a mechanism to facilitate watershed-based land use planning between Cooperitees	-	-	-	-	X
	Develop an implementation schedule for collaborative watershed-based land use planning	-	-	-	-	X
	Assess long-term effectiveness of watershed urban runoff management program	-	X ²¹	-	X	X
	Submit description of urban runoff management program	X	X	X	X	X
	Document all urban runoff activities and submit annually	X	X	X	X	X
	Submit description of watershed urban runoff management program	-	X ²²	-	X	X
	Document all watershed urban runoff activities and submit annually	-	-	-	X	X
	Submit report on dry weather monitoring results	X	X	X	X	X
	Submit monitoring report annually	X	X	X	X	X
	21 If an urban runoff management program is conducted on a watershed basis, the Federal NPDES regulations would require an assessment of the effectiveness of the watershed urban runoff management program.					
22 If an urban runoff management program is conducted on a watershed basis, a description of the watershed urban runoff management program would be required.						

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Copermittee Collaboration (Section N., page 44 of Tentative Order No. 2001-01)	All reports shall be signed and certified	X	X	X	X	X
	Collaborate with other Copermittees to address common issues, promote consistency, and coordinate activities		X	X	X	X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement between the Copermittees.	X	X	X	X	X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which provides a management structure for designation of joint responsibilities	X		X	X	X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which designates fiscal responsibilities of Copermittees	X			X	
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which provides a management structure for decision-making				X	X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which provides a management structure for watershed activities					X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which provides a management structure for information management				X	X
	Jointly develop a standardized format for reports				X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Principal Permittee (Section O., page 45 of Tentative Order No. 2001-01)	Serve as a liaison between Copermitees and SDRWQCB	X	-	-	X	X
	Designate Principal Permittee	X	-	-	X	X
	Ensure coordination of permit activities among Copermitees	X	-	-	X	X
Non-Compliance (Section R.1., page 49 of Tentative Order No. 2001-01)	Integrate individual Copermitee documents	X	-	-	X	X
	Report all instances of non-compliance	X	X	X	X	X
Monitoring (Attachment B of Tentative Order No. 2001-01)	Develop a monitoring program	X	X	X	X	X
	Develop storm water monitoring program	X	X	X	X	X
	Develop urban runoff monitoring program	X	-	-	-	X
	Develop receiving water monitoring program	X	-	X	X	X
	Develop a report that summarizes previous monitoring results	X	-	-	-	X
	Develop a report that recommends future monitoring activities	-	-	-	-	X
	Estimate annual pollutant load of cumulative discharges	-	X	X	X	X
	Conduct urban stream bioassessment monitoring	-	-	-	-	X
	Conduct long-term mass loading monitoring	X	-	X	X	X
	Conduct coastal storm drain monitoring	-	-	-	-	X
Conduct ambient bay, lagoon, and coastal receiving water monitoring	Conduct ambient bay, lagoon, and coastal receiving water monitoring	-	-	X	X	X
	Conduct toxic hot spot monitoring	-	-	X	X	X
	Conduct dry weather field screening	X	X	X	X	X
	Conduct dry weather analytical monitoring	-	-	-	-	X
	Develop map of MS4	X	X	X	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Total Number of Requirements (estimate)	187	77	108	121	150	185
Total Number of Pages	-	33 (+ 3)		39 (+31)	26 (+17)	50 (+30)

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CONSTITUTION OF THE STATE OF CALIFORNIA

ARTICLE XIII B GOVERNMENT SPENDING LIMITATION

Section 6

SEC. 6. (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:

(1) Legislative mandates requested by the local agency affected.

(2) Legislation defining a new crime or changing an existing definition of a crime.

(3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

(4) Legislative mandates contained in statutes within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I.

(b) (1) Except as provided in paragraph (2), for the 2005–06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.

(2) Payable claims for costs incurred prior to the 2004–05 fiscal year that have not been paid prior to the 2005–06 fiscal year may be paid over a term of years, as prescribed by law.

(3) Ad valorem property tax revenues shall not be used to reimburse a local government for the costs of a new program or higher level of service.

(4) This subdivision applies to a mandate only as it affects a city, county, city and county, or special district.

(5) This subdivision shall not apply to a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government employee organization, that arises from, affects, or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section.

(c) A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.

(Sec. 6 amended June 3, 2014, by Prop. 42. Res.Ch. 123, 2013.)

West's Annotated California Codes
Constitution of the State of California 1879 (Refs & Annos)
Article XIIIIC. [Voter Approval for Local Tax Levies] (Refs & Annos)

West's Ann.Cal.Const. Art. 13C, § 1

§ 1. Definitions

Effective: November 3, 2010
[Currentness](#)

SECTION 1. Definitions. As used in this article:

- (a) "General tax" means any tax imposed for general governmental purposes.
- (b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.
- (c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.
- (d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.
- (e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:
- (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
 - (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
 - (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

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

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

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

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

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

Credits

(Added by [Initiative Measure \(Prop. 218, § 3, approved Nov. 5, 1996\)](#). Amended by [Initiative Measure \(Prop. 26, § 3, approved Nov. 2, 2010, eff. Nov. 3, 2010\)](#).)

West's Ann. Cal. Const. Art. 13C, § 1, CA CONST Art. 13C, § 1
Current with urgency legislation through Ch. 10 of 2018 Reg.Sess

West's Annotated California Codes

Constitution of the State of California 1879 (Refs & Annos)

Article XIIIIC. [Voter Approval for Local Tax Levies] (Refs & Annos)

West's Ann.Cal.Const. Art. 13C, § 2

§ 2. General and special taxes; local government powers; powers of special purpose districts or agencies

Currentness

Sec. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

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

Credits

(Added by Initiative Measure (Prop. 218, § 3, approved Nov. 5, 1996).)

West's Ann. Cal. Const. Art. 13C, § 2, CA CONST Art. 13C, § 2

Current with urgency legislation through Ch. 10 of 2018 Reg.Sess

West's Annotated California Codes

Constitution of the State of California 1879 (Refs & Annos)

Article XIII C. [Voter Approval for Local Tax Levies] (Refs & Annos)

West's Ann. Cal. Const. Art. 13C, § 3

§ 3. Power of initiatives

Currentness

Sec. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, [Sections 8 and 9 of Article II](#), the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

Credits

(Added by [Initiative Measure \(Prop. 218, § 3, approved Nov. 5, 1996\)](#).)

West's Ann. Cal. Const. Art. 13C, § 3, CA CONST Art. 13C, § 3

Current with urgency legislation through Ch. 10 of 2018 Reg. Sess

West's Annotated California Codes

Constitution of the State of California 1879 (Refs & Annos)

Article XIIIID. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann.Cal.Const. Art. 13D, § 1

§ 1. Application of article

Currentness

Sec. 1. Application. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIII C shall be construed to:

- (a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.
- (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.
- (c) Affect existing laws relating to the imposition of timber yield taxes.

Credits

(Added by Initiative Measure (Prop. 218, § 4, approved Nov. 5, 1996).)

West's Ann. Cal. Const. Art. 13D, § 1, CA CONST Art. 13D, § 1

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West's Annotated California Codes

Constitution of the State of California 1879 (Refs & Annos)

Article XIII D. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann. Cal. Const. Art. 13D, § 2

§ 2. Definitions

Currentness

Sec. 2. Definitions. As used in this article:

- (a) "Agency" means any local government as defined in [subdivision \(b\) of Section 1 of Article XIII C](#).
- (b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."
- (c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.
- (d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.
- (e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.
- (f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.
- (g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.
- (h) "Property-related service" means a public service having a direct relationship to property ownership.
- (i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

Credits

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

West's Ann. Cal. Const. Art. 13D, § 2, CA CONST Art. 13D, § 2
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West's Annotated California Codes

Constitution of the State of California 1879 (Refs & Annos)

Article XIII D. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann. Cal. Const. Art. 13D, § 3

§ 3. Limitations on property taxes, assessments, fees and charges; electric and gas service fees

[Currentness](#)

Sec. 3. Property Taxes, Assessments, Fees and Charges Limited. (a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

(2) Any special tax receiving a two-thirds vote pursuant to [Section 4 of Article XIII A](#).

(3) Assessments as provided by this article.

(4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

Credits

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

West's Ann. Cal. Const. Art. 13D, § 3, CA CONST Art. 13D, § 3

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West's Annotated California Codes

Constitution of the State of California 1879 (Refs & Annos)

Article XIIIID. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann.Cal.Const. Art. 13D, § 4

§ 4. Proposed assessments; procedures and requirements

Currentness

Sec. 4. Procedures and Requirements for All Assessments. (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

Credits

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

West's Ann. Cal. Const. Art. 13D, § 4, CA CONST Art. 13D, § 4

Current with urgency legislation through Ch. 10 of 2018 Reg.Sess

West's Annotated California Codes

Constitution of the State of California 1879 (Refs & Annos)

Article XIIIID. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann.Cal.Const. Art. 13D, § 5

§ 5. Effective date of article; assessments exempted from procedures and requirements of Section 4

Currentness

Sec. 5. Effective Date. Pursuant to [subdivision \(a\) of Section 10 of Article II](#), the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in [Section 4](#):

(a) Any 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. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in [Section 4](#).

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in [Section 4](#).

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in [Section 4](#).

Credits

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

West's Ann. Cal. Const. Art. 13D, § 5, CA CONST Art. 13D, § 5
Current with urgency legislation through Ch. 10 of 2018 Reg.Sess

West's Annotated California Codes

Constitution of the State of California 1879 (Refs & Annos)

Article XIIIID. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann.Cal.Const. Art. 13D, § 6

§ 6. New or existing increased fees and charges; procedures and requirements; voter approval

[Currentness](#)

Sec. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with [Section 4](#).

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

Credits

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

West's Ann. Cal. Const. Art. 13D, § 6, CA CONST Art. 13D, § 6
Current with urgency legislation through Ch. 10 of 2018 Reg.Sess

United States Code Annotated

Title 33. Navigation and Navigable Waters (Refs & Annos)

Chapter 26. Water Pollution Prevention and Control (Refs & Annos)

Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1342

§ 1342. National pollutant discharge elimination system

Effective: February 7, 2014

[Currentness](#)

(a) Permits for discharge of pollutants

(1) Except as provided in [sections 1328](#) and [1344](#) of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [section 1311\(a\)](#) of this title, upon condition that such discharge will meet either (A) all applicable requirements under [sections 1311](#), [1312](#), [1316](#), [1317](#), [1318](#), and [1343](#) of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to [section 407](#) of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under [section 407](#) of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under [section 407](#) of this title after October 18, 1972. Each application for a permit under [section 407](#) of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by [section 1314\(i\)\(2\)](#) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by [subsection \(i\)\(2\) of section 1314](#) of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of [sections 1311, 1312, 1316, 1317, and 1343](#) of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of [section 1318](#) of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in [section 1318](#) of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under [section 1317\(b\)](#) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in [section 1316](#) of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to [section 1311](#) of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with [sections 1284\(b\)](#), [1317](#), and [1318](#) of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under [section 1314\(i\)\(2\)](#) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to [section 1314\(i\)\(2\)](#) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate

corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals

A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to [subsection \(i\)\(2\) of section 1314](#) of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in [section 1292](#) of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to [section 1319\(a\)](#) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to [section 1319](#) of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of [sections 1319](#) and [1365](#) of this title, with [sections 1311](#), [1312](#), [1316](#), [1317](#), and [1343](#) of this title, except any standard imposed under [section 1317](#) of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) [section 1311](#), [1316](#), or [1342](#) of this title, or (2) [section 407](#) of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to

section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities

(A) NPDES permit requirements for silvicultural activities

The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) Other requirements

Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 1344 of this title, existing permitting requirements under section 1342 of this title, or from any other federal law.

(C) The authorization provided in Section 1365(a) of this title does not apply to any non-permitting program established under 1342(p)(6)² of this title for the silviculture activities listed in 1342(l)(3)(A)³ of this title, or to any other limitations that might be deemed to apply to the silviculture activities listed in 1342(l)(3)(A)³ of this title.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in [section 1292](#) of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to [section 1314\(a\)\(4\)](#) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and [section 1317\(b\)\(1\)](#) of this title. Nothing in this subsection shall affect the Administrator's authority under [sections 1317](#) and [1319](#) of this title, affect State and local authority under [sections 1317\(b\)\(4\)](#) and [1370](#) of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under [section 1314\(b\)](#) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of [section 1311\(b\)\(1\)\(C\)](#) or [section 1313\(d\)](#) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with [section 1313\(d\)\(4\)](#) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under [section 1311\(c\)](#), [1311\(g\)](#), [1311\(h\)](#), [1311\(i\)](#), [1311\(k\)](#), [1311\(n\)](#), or [1326\(a\)](#) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level

of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under [section 1313](#) of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

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

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

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

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and [section 1311](#) of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the “CSO control policy”).

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 402, as added [Pub.L. 92-500](#), § 2, Oct. 18, 1972, 86 Stat. 880; amended [Pub.L. 95-217](#), §§ 33(c), 50, 54(c)(1), 65, 66, Dec. 27, 1977, 91 Stat. 1577, 1588, 1591, 1599, 1600; [Pub.L. 100-4](#), Title IV, §§ 401 to 404(a), (c), formerly (d), 405, Feb. 4, 1987, 101 Stat. 65 to 67, 69; [Pub.L. 102-580](#), Title III, § 364, Oct. 31, 1992, 106 Stat. 4862; [Pub.L. 104-66](#), Title II, § 2021(e)(2), Dec. 21, 1995, 109 Stat. 727; [Pub.L. 106-554](#), § 1(a)(4) [Div. B, Title I, § 112(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A-224; [Pub.L. 110-288](#), § 2, July 29, 2008, 122 Stat. 2650; [Pub.L. 113-79](#), Title XII, § 12313, Feb. 7, 2014, 128 Stat. 992.)

Footnotes

- 1 So in original. Probably should not be capitalized.
 - 2 So in original. Probably should read “section 1342(p)(6) .
 - 3 So in original. Probably should read “section 1342(l)(3)(A) .
- 33 U.S.C.A. § 1342, 33 USCA § 1342
Current through P.L. 115-140.

United States Code Annotated

Title 33. Navigation and Navigable Waters (Refs & Annos)

Chapter 26. Water Pollution Prevention and Control (Refs & Annos)

Subchapter V. General Provisions

33 U.S.C.A. § 1370

§ 1370. State authority

Currentness

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 510, as added [Pub.L. 92-500](#), § 2, Oct. 18, 1972, 86 Stat. 893.)

Notes of Decisions (20)

33 U.S.C.A. § 1370, 33 USCA § 1370

Current through P.L. 115-140. Also includes P.L. 115-158 to 115-170. Title 26 includes updates from P.L. 115-141, Divisions M, T, and U.

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(i) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii) A discharge associated with industrial activity (see § 122.26(a)(4));

(iii) A discharge from a large municipal separate storm sewer system;

(iv) A discharge from a medium municipal separate storm sewer system;

(v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

(A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged to waters of the United States; and

(D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation

runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

NOTE TO PARAGRAPH (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) *Large and medium municipal separate storm sewer systems.* (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges

within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(1) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems

that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.

(vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4) *Discharges through large and medium municipal separate storm sewer systems.* In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5) *Other municipal separate storm sewers.* The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6) *Non-municipal separate storm sewers.* For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7) *Combined sewer systems.* Conveyances that discharge storm water runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of §122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to §122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see §124.52(c) of this chapter).

(b) *Definitions.* (1) *Co-permittee* means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) *Illicit discharge* means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) *Incorporated place* means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

(4) *Large municipal separate storm sewer system* means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate

storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(4) (i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4) (i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4) (i), (ii), (iii) of this section.

(5) *Major municipal separate storm sewer outfall* (or “major outfall”) means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent

(discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) *Major outfall* means a major municipal separate storm sewer outfall.

(7) *Medium municipal separate storm sewer system* means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7) (i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7) (i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7) (i), (ii), (iii) of this section.

(8) *Municipal separate storm sewer* means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) *Outfall* means a *point source* as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) *Overburden* means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) *Runoff coefficient* means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) *Significant materials* includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III

of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

(13) *Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) *Storm water discharge associated with industrial activity* means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this

section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in “industrial activity” for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373;

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221–25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a

part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25;

(15) *Storm water discharge associated with small construction activity* means the discharge of storm water from:

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

(A) The value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of *Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning With the Revised Universal Soil Loss Equation (RUSLE)*, pages 21-64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C 552(a) and 1 CFR part 51. Copies may be obtained from EPA's Water Resource Center, Mail Code RC4100, 401 M St. SW, Washington, DC 20460. A copy is also available for inspection at the U.S.

EPA Water Docket, 401 M Street SW, Washington, DC 20460, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

(B) Storm water controls are not needed based on a "total maximum daily load" (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(ii) Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

EXHIBIT 1 TO § 122.26(B)(15)—SUMMARY OF COVERAGE OF "STORM WATER DISCHARGES ASSOCIATED WITH SMALL CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Automatic Designation: Required Nationwide Coverage.	• Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres.
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EXHIBIT 1 TO § 122.26(b)(15)—SUMMARY OF COVERAGE OF “STORM WATER DISCHARGES ASSOCIATED WITH SMALL CONSTRUCTION ACTIVITY” UNDER THE NPDES STORM WATER PROGRAM—Continued

<p>Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator. Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority..</p>	<ul style="list-style-type: none"> • Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).) • Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).) <p>Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see § 122.26(b)(15)(i).)</p>
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(16) *Small municipal separate storm sewer system* means all separate storm sewers that are:

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as “large” or “medium” municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(17) *Small MS4* means a small municipal separate storm sewer system.

(18) *Municipal separate storm sewer system* means all separate storm sewers that are defined as “large” or “medium” or “small” municipal separate

storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

(19) *MS4* means a municipal separate storm sewer system.

(20) *Uncontrolled sanitary landfill* means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runoff or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

(c) *Application requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity*—(1) *Individual application*. Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit or any discharge of storm water which the Director is evaluating for designation (see § 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph.

(i) Except as provided in § 122.26(c)(1)(ii)–(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

(B) An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(C) A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for

the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

(D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(E) Quantitative data based on samples collected during storm events and collected in accordance with §122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(1) Any pollutant limited in an effluent guideline to which the facility is subject;

(2) Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

(3) Oil and grease, pH, BOD₅, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(4) Any information on the discharge required under §122.21(g)(7)(vi) and (vii);

(5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of §122.21 (g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

(G) Operators of new sources or new discharges (as defined in §122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of §122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of §122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

(A) The location (including a map) and the nature of the construction activity;

(B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

(C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

(D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

(E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is

completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(F) The name of the receiving water.

(iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

(iv) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

(v) Applicants shall provide such other information the Director may reasonably require under §122.21(g)(13) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

(2) [Reserved]

(d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent

or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

(1) *Part 1.* Part 1 of the application shall consist of;

(i) *General information.* The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

(ii) *Legal authority.* A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

(iii) *Source identification.* (A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

(B) A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(1) The location of known municipal storm sewer system outfalls discharging to waters of the United States;

(2) A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(3) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(4) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

(5) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

(6) The identification of publicly owned parks, recreational areas, and other open lands.

(iv) *Discharge characterization.* (A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.

(B) Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

(C) A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving such discharges have been:

(1) Assessed and reported in section 305(b) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

(2) Listed under section 304(1)(1)(A)(i), section 304(1)(1)(A)(ii), or section 304(1)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

(3) Listed in State Nonpoint Source Assessments required by section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water

quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

(5) Areas of concern of the Great Lakes identified by the International Joint Commission;

(6) Designated estuaries under the National Estuary Program under section 320 of the CWA;

(7) Recognized by the applicant as highly valued or sensitive waters;

(8) Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

(9) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

(D) *Field screening.* Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfactants) shall be provided along

with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

(1) A grid system consisting of perpendicular north-south and east-west lines spaced $\frac{1}{4}$ mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

(2) All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;

(3) Field screening points should be located downstream of any sources of suspected illegal or illicit activity;

(4) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

(5) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

(6) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created,

and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced $\frac{1}{4}$ mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

(E) *Characterization plan.* Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (see paragraph (d)(1)(iv)(C) of this section) to the extent practicable.

(v) *Management programs.* (A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may in-

clude, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

(B) A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

(vi) *Fiscal resources.* (A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

(2) *Part 2.* Part 2 of the application shall consist of:

(i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) *Source identification.* The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) *Characterization data.* When “quantitative data” for a pollutant are required under paragraph (d)(2)(iii)(A)(3) of this section, the applicant must collect a sample of effluent in accordance with 40 CFR 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(1) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the re-

quirements at §122.21(g)(7) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(3) For samples collected and described under paragraphs (d)(2)(iii)(A)(1) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)
Total dissolved solids (TDS)
COD
BOD₅
Oil and grease
Fecal coliform
Fecal streptococcus
pH
Total Kjeldahl nitrogen
Nitrate plus nitrite
Dissolved phosphorus
Total ammonia plus organic nitrogen
Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under §122.21(c)(7)) for BOD₅, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead,

and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(I) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm

sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(1) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

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

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C) A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated

with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD₅, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7) (vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(1) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(2) A description of requirements for nonstructural and structural best management practices;

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(4) A description of appropriate educational and training measures for construction site operators.

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

(vi) *Fiscal analysis.* For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary ex-

penditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

(e) *Application deadlines.* Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

(1) *Storm water discharges associated with industrial activity.* (i) Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

(2) For any group application submitted in accordance with paragraph (c)(2) of this section:

(i) *Part 1.* (A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(ii) Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

(iii) *Part 2.* (A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(iv) *Rejected facilities.* (A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

(B) Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than 180 days after

the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

(v) A facility listed under paragraph (b)(14) (i)–(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18, 1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

(3) For any discharge from a large municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by November 18, 1991;

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

(iii) Part 2 of the application shall be submitted to the Director by November 16, 1992.

(4) For any discharge from a medium municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by May 18, 1992.

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

(iii) Part 2 of the application shall be submitted to the Director by May 17, 1993.

(5) A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter), for:

(i) A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

(ii) A storm water discharge subject to paragraph (c)(1)(v) of this section.

(6) Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of 40 CFR 122.21 and 40 CFR 122.26(c) (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

(7) The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

(i)(A) Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

(B) For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

(ii) The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by No-

vember 16, 1992, one year after receipt of a complete permit application;

(iii) The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

(9) For any discharge from a regulated small MS4, the permit application made under § 122.33 must be submitted to the Director by:

(i) March 10, 2003 if designated under § 122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under § 123.35(d)(3) (see § 122.33(c)(1)); or

(ii) Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under § 122.32(a)(2) (see § 122.33(c)(2)).

(f) *Petitions.* (1) Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of

population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) *Conditional exclusion for “no exposure” of industrial activities and materials to storm water.* Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is “no exposure” of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. “No exposure” means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

(1) *Qualification.* To qualify for this exclusion, the operator of the discharge must:

(i) Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

(ii) Complete and sign (according to §122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

(iii) Submit the signed certification to the NPDES permitting authority once every five years;

(iv) Allow the Director to inspect the facility to determine compliance with the “no exposure” conditions;

(v) Allow the Director to make any “no exposure” inspection reports available to the public upon request; and

(vi) For facilities that discharge through an MS4, upon request, submit a copy of the certification of “no exposure” to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

(2) *Industrial materials and activities not requiring storm resistant shelter.* To qualify for this exclusion, storm resistant shelter is not required for:

(i) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak (“Sealed” means banded or otherwise secured and without operational taps or valves);

(ii) Adequately maintained vehicles used in material handling; and

(iii) Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(3) *Limitations.* (1) Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

(ii) This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be “no exposure” discharges, individual permit requirements should be adjusted accordingly.

(iii) If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for un-permitted discharge. Any conditionally exempt discharger who

anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

(iv) Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

(4) *Certification.* The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

(i) The legal name, address and phone number of the discharger (see § 122.21(b));

(ii) The facility name and address, the county name and the latitude and longitude where the facility is located;

(iii) The certification must indicate that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:

(A) Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed to storm water;

(B) Materials or residuals on the ground or in storm water inlets from spills/leaks;

(C) Materials or products from past industrial activity;

(D) Material handling equipment (except adequately maintained vehicles);

(E) Materials or products during loading/unloading or transporting activities;

(F) Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

(G) Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;

(H) Materials or products handled/stored on roads or railways owned or maintained by the discharger;

(I) Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);

(J) Application or disposal of process wastewater (unless otherwise permitted); and

(K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(iv) All “no exposure” certifications must include the following certification statement, and be signed in accordance with the signatory requirements of § 122.22: “I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of “no exposure” and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false

§ 122.27

information, including the possibility of fine and imprisonment for knowing violations.”

[55 FR 48063, Nov. 16, 1990]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §122.26, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 122.27 Silvicultural activities (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.

(b) *Definitions.* (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

(2) *Rock crushing and gravel washing facilities* means facilities which process crushed and broken stone, gravel, and riprap (See 40 CFR part 436, subpart B, including the effluent limitations guidelines).

(3) *Log sorting and log storage facilities* means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking). (See 40 CFR part 429, subpart I, including the effluent limitations guidelines).

40 CFR Ch. I (7–1–11 Edition)

§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).

(a) *Coverage.* The Director may issue a general permit in accordance with the following:

(1) *Area.* The general permit shall be written to cover one or more categories or subcategories of discharges or sludge use or disposal practices or facilities described in the permit under paragraph (a)(2)(ii) of this section, except those covered by individual permits, within a geographic area. The area should correspond to existing geographic or political boundaries such as:

- (i) Designated planning areas under sections 208 and 303 of CWA;
- (ii) Sewer districts or sewer authorities;
- (iii) City, county, or State political boundaries;
- (iv) State highway systems;
- (v) Standard metropolitan statistical areas as defined by the Office of Management and Budget;
- (vi) Urbanized areas as designated by the Bureau of the Census according to criteria in 30 FR 15202 (May 1, 1974); or
- (vii) Any other appropriate division or combination of boundaries.

(2) *Sources.* The general permit may be written to regulate one or more categories or subcategories of discharges or sludge use or disposal practices or facilities, within the area described in paragraph (a)(1) of this section, where the sources within a covered subcategory of discharges are either:

(i) Storm water point sources; or (ii) One or more categories or subcategories of point sources other than storm water point sources, or one or more categories or subcategories of “treatment works treating domestic sewage”, if the sources or “treatment works treating domestic sewage” within each category or subcategory all:

- (A) Involve the same or substantially similar types of operations;
- (B) Discharge the same types of wastes or engage in the same types of sludge use or disposal practices;
- (C) Require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal;
- (D) Require the same or similar monitoring; and (E) In the opinion of the

Environmental Protection Agency

§ 123.1

Hexachlorobenzene
Hexachlorobutadiene
Hexachlorocyclo-pentadiene
Hexachloroethane
Indeno(1,2,3-cd)pyrene
Isophorone
Naphthalene
Nitrobenzene
N-nitrosodi-n-propylamine
N-nitrosodimethylamine
N-nitrosodiphenylamine
Phenanthrene
Pyrene
1,2,4,-trichlorobenzene
[65 FR 42469, Aug. 4, 2000]

PART 123—STATE PROGRAM REQUIREMENTS

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123.2 Definitions.
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123.62 Procedures for revision of State programs.
123.63 Criteria for withdrawal of State programs.
123.64 Procedures for withdrawal of State programs.

AUTHORITY: Clean Water Act, 33 U.S.C. 1251 *et seq.*

SOURCE: 48 FR 14178, Apr. 1, 1983, unless otherwise noted.

Subpart A—General

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System—NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for

those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under §123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by §122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in ef-

fect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of §123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

[48 FR 14178, Apr. 1, 1983, as amended at 54 FR 256, Jan. 4, 1989; 54 FR 18784, May 2, 1989; 58 FR 67981, Dec. 22, 1993; 59 FR 64343, Dec. 14, 1994; 63 FR 45122, Aug. 24, 1998]

§ 123.2 Definitions.

The definitions in part 122 apply to all subparts of this part.

[63 FR 45122, Aug. 24, 1998]

State of California

GOVERNMENT CODE

Section 17500

17500. The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.

It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution. Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIII B of the California Constitution.

(Amended by Stats. 2004, Ch. 890, Sec. 2. Effective January 1, 2005.)

State of California

GOVERNMENT CODE

Section 17514

17514. "Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

(Added by Stats. 1984, Ch. 1459, Sec. 1.)

GOVERNMENT CODE

Section 17556

17556. The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

(a) The claim is submitted by a local agency or school district that requests or previously requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this subdivision. This subdivision applies regardless of whether the resolution from the governing body or a letter from a delegated representative of the governing body was adopted or sent prior to or after the date on which the statute or executive order was enacted or issued.

(b) The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) 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. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. This subdivision applies regardless of whether a statute, executive order, or appropriation in the Budget Act or other bill that either provides for offsetting savings that result in no net costs or provides for additional

revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

(f) The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

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

(Amended by Stats. 2010, Ch. 719, Sec. 31. (SB 856) Effective October 19, 2010.)

State of California

WATER CODE

Section 13001

13001. It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality. The state board and regional boards in exercising any power granted in this division shall conform to and implement the policies of this chapter and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state.

(Repealed and added by Stats. 1969, Ch. 482.)

State of California

WATER CODE

Section 13170

13170. The state board may adopt water quality control plans in accordance with the provisions of Sections 13240 to 13244, inclusive, insofar as they are applicable, for waters for which water quality standards are required by the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto. Such plans, when adopted, supersede any regional water quality control plans for the same waters to the extent of any conflict.

(Added by Stats. 1971, Ch. 1288.)

State of California

WATER CODE

Section 13370

13370. The Legislature finds and declares as follows:

(a) The Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.), as amended, provides for permit systems to regulate the discharge of pollutants and dredged or fill material to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Control Act for the purpose of carrying out its responsibilities under this program.

(Amended by Stats. 1987, Ch. 1189, Sec. 1.)

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SINCLAIR PAINT COMPANY,
Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION, Defendant
and Appellant; DEPARTMENT OF HEALTH
SERVICES et al., Interveners and Appellants.

No. S054115.
Supreme Court of California
June 26, 1997.

SUMMARY

The trial court granted a paint company summary judgment in the company's action against the Board of Equalization for a refund of fees paid pursuant to an assessment under the Childhood Lead Poisoning Prevention Act of 1991 ([Health & Saf. Code, § 105275](#) et seq.). The trial court found that the fees were taxes, and thus they were invalid since the Legislature passed the act by a simple majority, rather than by the two-thirds majority required by [Cal. Const., art. XIII A, § 3](#) (Prop. 13). (Superior Court of Sacramento County, No. CV541310, Joe S. Gray, Judge.) The Court of Appeal, Third Dist., No. C021559, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the Court of Appeal erred in ruling that "fees" assessed on manufacturers or other persons contributing to environmental lead contamination, pursuant to the Childhood Lead Poisoning Prevention Act of 1991, were in legal effect "taxes" required to be enacted by a two-thirds vote of the Legislature under Prop. 13. Rather, the fees imposed were bona fide regulatory fees. The act requires manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community. The shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of lead poisoning from the public to those persons deemed responsible for that poisoning is a reasonable police power decision. The fact that the fees were charged after, rather than

before, the product's adverse effects were realized was immaterial to the question whether the measure imposed valid regulatory fees rather than taxes. Also, if regulation is the primary purpose of a fee, the mere fact that revenue is also obtained does not make the imposition a tax. (Opinion by Chin, J., with George, C. J., Mosk, Kennard, Baxter, Werdegar, JJ., and Armstrong, J., * concurring.)

* Associate Justice of the Court of Appeal, Second District, Division Five, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

HEADNOTES

Classified to California Digest of Official Reports

(1)
Property Taxes § 7.2--Constitutional Provisions--
Proposition 13.

The purpose of Prop. 13 was to assure effective real property tax relief by means of an interlocking package consisting of a real property tax rate limitation ([Cal. Const., art. XIII A, § 1](#)), a real property assessment limitation ([Cal. Const., art. XIII A, § 2](#)), a restriction on state taxes ([Cal. Const., art. XIII A, § 3](#)), and a restriction on local taxes ([Cal. Const., art. XIII A, § 4](#)). Since any tax savings resulting from the operation of [Cal. Const., art. XIII A, §§ 1 and 2](#), could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, [Cal. Const., art. XIII A, §§ 3 and 4](#), combine to place restrictions upon the imposition of such taxes.

(2a, 2b, 2c)
Taxation § 2--Validity of Taxation Legislation--
Proposition 13--Fees Assessed Under Childhood
Lead Poisoning Prevention Act-- Applicability of
Supermajority Requirement:Property Taxes § 7.8--
Proposition 13.

The Court of Appeal erred in ruling that "fees" assessed on manufacturers or other persons contributing to environmental lead contamination, pursuant to the Childhood Lead Poisoning Prevention Act of 1991 ([Health & Saf. Code, § 105275](#) et seq.), which the Legislature had enacted by a simple majority, were in legal effect "taxes" required to be enacted by a two-thirds vote of the Legislature under Prop. 13 ([Cal. Const.,](#)

art. XIII A, § 3). Rather, the fees imposed were bona fide regulatory fees. The act requires manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community. The shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of lead poisoning from the public to those persons deemed responsible for that poisoning is a reasonable police power decision. The fact that the fees were charged after, rather than before, the product's adverse effects were realized was immaterial to the question whether the measure imposed valid regulatory fees rather than taxes. Also, if regulation is the primary purpose of a fee, the mere fact that revenue is also obtained does not make the imposition a tax.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 784.]

(3)

Property Taxes § 7.6--Constitutional Provisions-- Proposition 13-- Assessments as Fees or Taxes:Taxation § 3--Construction.

In determining under Prop. 13 (Cal. Const., art. XIII A, § 3), whether impositions are "taxes" or "fees" is a question of law for the appellate courts to decide on independent review of the facts. The term "tax" has no fixed meaning, and the distinction between taxes and fees is frequently blurred, taking on different meanings in different contexts. In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. But compulsory fees may be deemed legitimate fees rather than taxes.

(4a, 4b)

Property Taxes § 7.8--Constitutional Provisions-- Proposition 13--Special Taxes:Taxation § 3--Construction.

There are three general categories of fees or assessments involved in disputes concerning whether they are in legal effect "special taxes" required to be enacted by a two-thirds vote of the Legislature under Prop. 13 (Cal. Const., art. XIII A, §§ 3 and 4). They are (1) special assessments, based on the value of benefits conferred on property, (2) development fees, exacted in return for

permits or other government privileges, and (3) regulatory fees, imposed under the police power. Special assessments on property or similar business charges, in amounts reasonably reflecting the value of the benefits conferred by improvements, are not "special taxes." Similarly, development fees exacted in return for building permits or other governmental privileges are not special taxes if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer. Also, fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes, are not special taxes.

(5)

Property Taxes § 7.8--Constitutional Provisions-- Proposition 13-- Assessments as Regulatory Fee:Taxation § 3--Construction.

In order to show that an imposition is a regulatory fee and not a special tax under Prop. 13 (Cal. Const., art. XIII A, § 3), the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity.

COUNSEL

Daniel E. Lungren, Attorney General, Timothy G. Laddish, Assistant Attorney General, Lawrence K. Keethe and William L. Carter, Deputy Attorneys General, for Defendant and Appellant and Interveners and Appellants.

National Center for Youth Law, Alice Bussiere, Patrice McElroy, Long & Levit, Joyce C. Wang, Stephen P. Randall, Abrams & Abrams, Abrams & Hebert, William F. Abrams and William N. Hebert for Interveners and Appellants.

Carol A. Korade, City Attorney (Alameda), Jerome F. Coleman, City Attorney (Burlingame), Robert G. Boehm, City Attorney (Chico), Scott H. Howard, City Attorney (Glendale), John L. Cook, City Attorney (Indian Wells), Michael D. Milich, City Attorney (Modesto), Daniel J. McHugh, City Attorney (Redlands), Samuel L. Jackson, City Attorney (Sacramento), Louise Renne, City Attorney (San Francisco), Thomas Owen, Deputy City Attorney, Paul M. Valle-Riestra, Assistant City Attorney (Walnut

Creek), Ruth Sorensen, Catherine I. Hanson, Ellen G. Widess, Alden, Aronovsky & Sax and Ronald G. Aronovsky as Amici Curiae on behalf of Defendant and Appellant and Interveners and Appellants.

Livingston & Mattesich, Gene Livingston and Rebecca M. Ceniceros for Plaintiff and Respondent.

Jonathan M. Coupal, Trevor A. Grimm, Sharon L. Browne, Jeffrey Sinsheimer, Nielsen, Merksamer, Parrinello, Mueller & Naylor, John E. Mueller, Eric J. Miethke, Pillsbury, Madison & Sutro, Jeffrey M. Vesely and Richard E. Nielsen as Amici Curiae on behalf of Plaintiff and Respondent.

CHIN, J.

In 1991, by simple majority vote, the Legislature enacted the Childhood Lead Poisoning Prevention Act of 1991 (the Act) (Stats. 1991, ch. 799, § 3, amended Stats. 1995, ch. 415, § 5; see *870 Health & Saf. Code, § 105275 et seq.). The Act provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The Act's program was entirely supported by "fees" assessed on manufacturers or other persons contributing to environmental lead contamination. (See §§ 105305, 105310.) The question arises whether these fees were in legal effect "taxes" required to be enacted by a two-thirds vote of the Legislature. (See Cal. Const., art. XIII A, § 3.)

¹ All further statutory references are to the Health and Safety Code unless otherwise noted.

Contrary to the trial court and Court of Appeal, we conclude that the Act imposed bona fide regulatory fees, not taxes, because the Legislature imposed the fees to mitigate the actual or anticipated adverse effects of the fee payers' operations, and under the Act the amount of the fees must bear a reasonable relationship to those adverse effects. Accordingly, the trial court erred in granting summary judgment to award plaintiff Sinclair Paint Company (Sinclair) a refund of the fees it paid under the Act.

We take the following statement of uncontradicted facts largely from the Court of Appeal opinion in this case. Sinclair paid \$97,825.26 in fees for 1991. After the Board of Equalization (the Board) denied Sinclair's administrative claim for refund, Sinclair filed a complaint for refund, alleging the fees assessed under section 105310 were "actually taxes imposed by the

California [L]egislature in violation of Proposition 13, Article XIII A, Section 3 of the California Constitution." The court granted the request of the Department of Health Services (the Department) for leave to intervene. It also granted a similar request to intervene by Ray Cochenour and Cardaryl Commodore, representatives of a class of children suffering from lead poisoning, and People United for a Better Oakland, an unincorporated association whose members include the Act's intended beneficiaries (collectively Cochenour).

Sinclair moved for summary judgment, claiming the Act was invalid on its face because it was not passed by the requisite two-thirds majority vote of the Legislature. The court agreed the Act imposed an unconstitutional tax and granted Sinclair's motion.

The Board, the Department, and Cochenour appealed, contending the Act involves a regulatory fee, not a tax. Appellants also argued the court erred in granting Sinclair summary judgment without compelling it to produce discovery and improperly relied on legislative history in determining the Act's constitutionality. The Court of Appeal affirmed the judgment, concluding that the Act was unconstitutional on its face and rejecting appellants' other claims. We reverse the Court of Appeal's judgment. *871

Discussion

I. The Childhood Lead Poisoning Prevention Act of 1991

When the Legislature enacted the Act in 1991, it explained the Act's background and purpose in findings that described the numerous health hazards children face when exposed to lead toxicity and declared four state "goals," namely, (1) evaluating, screening, and providing case management for children at risk of lead poisoning, (2) identifying sources of lead contamination responsible for this poisoning, (3) identifying and utilizing programs providing adequate case management for children found to have lead poisoning, and (4) providing education on lead-poisoning detection and case management to state health care providers. (Stats. 1991, ch. 799, § 1.)

The Act directs the Department to adopt regulations establishing a standard of care for evaluation, screening (i.e., measuring lead concentration in blood), and medically necessary follow-up services for children determined to be at risk of lead poisoning. (§ 105285;

see § 105280, subd. (e).) If a child is identified as being at risk of lead poisoning, the Department must ensure “appropriate case management,” i.e., “health care referrals, environmental assessments, and educational activities” needed to reduce the child's exposure to lead and its consequences. (§§ 105280, subd. (a), 105290.) Additionally, the Act requires the Department to collect data and report on the effectiveness of case management efforts. (§ 105295.)

The Department has “broad regulatory authority to fully implement and effectuate the purposes” of the Act. (§ 105300.) This authority “include[s], but is not limited to,” the development of protocols for screening and for appropriate case management; the designation of laboratories qualified to analyze blood specimens for lead concentrations, and the monitoring of those laboratories for accuracy; the development of reporting procedures by laboratories; reimbursement for state-sponsored services related to screening and case management; establishment of lower lead concentrations in whole blood than those specified by the United States Centers for Disease Control for lead poisoning; notification to parents or guardians of the results of blood-lead testing and environmental assessment; and establishment of a periodicity schedule for evaluating childhood lead poisoning. (§ 105300.)

The Act states that its program of evaluation, screening, and follow-up is supported *entirely* by fees collected under the Act: “Notwithstanding the scope of activity mandated by this chapter, in no event shall this chapter be interpreted to require services necessitating expenditures in any fiscal year in excess of the fees, and earnings therefrom, collected pursuant to Section *872 105310. This chapter shall be implemented only to the extent fee revenues pursuant to Section 105310 are available for expenditure for purposes of this chapter.” (§ 105305.)

Section 105310 imposes the fees at issue here. In pertinent part, that section imposes fees on manufacturers and other persons formerly and/or presently engaged in the stream of commerce of lead or products containing lead, or who are otherwise responsible for identifiable sources of lead, which have significantly contributed and/or currently contribute to environmental lead contamination. (§ 105310, subd. (a).) The Department must determine fees based on the manufacturer's or other person's past and present responsibility for environmental lead

contamination, or its “market share” responsibility for this contamination. (§ 105310, subd. (b).)

Those persons able to show that their industry did not contribute to environmental lead contamination, or that their lead-containing product does not and did not “result in quantifiably persistent environmental lead contamination,” are exempt from paying the fees. (§ 105310, subd. (d).)

The Legislature has authorized the Department to adopt regulations establishing the specific fees to be assessed the parties identified in section 105310, subdivision (a). (§ 105310, subd. (b).) The formula for calculating fees attributable to leaded architectural coatings, including ordinary house paint, is set forth in [California Code of Regulations, title 17, section 33020](#).

II. Proposition 13

([1]) In June 1978, California voters added [article XIII A](#), commonly known as the Jarvis-Gann Property Tax Initiative or Proposition 13 (article XIII A), to the state Constitution. The initiative's purpose was to assure effective real property tax relief by means of an “interlocking 'package'” consisting of a real property tax rate limitation ([art. XIII A, § 1](#)), a real property assessment limitation ([art. XIII A, § 2](#)), a restriction on state taxes ([art. XIII A, § 3](#)), and a restriction on local taxes ([art. XIII A, § 4](#)). (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231 [149 Cal.Rptr. 239, 583 P.2d 1281] (*Amador Valley*); see also *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1451 [29 Cal.Rptr.2d 103].)

[Section 3 of article XIII A](#) restricts the enactment of changes in state taxes, as follows: “From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods *873 of computation must be imposed by an Act passed by not less than two-thirds of all members ... of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.”

[Section 4 of article XIII A](#) imposes similar restrictions on local entities: “Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose *special taxes* on such district, except

ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.” (Italics added.)

As we explained in *Amador Valley*, “... since any tax savings resulting from the operation of sections 1 and 2 [of article XIII A] could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes.” (*Amador Valley*, *supra*, 22 Cal.3d at p. 231.)

III. Taxes or Fees?

([2a]) Are the “fees” section 105310 imposes in legal effect “taxes enacted for the purpose of increasing revenues” under article XIII A, section 3, and therefore subject to a two-thirds majority vote? Although we have found no cases that interpret the language of section 3, several California appellate decisions have considered whether various fees are really “special taxes” under article XIII A, section 4. (See also *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 57 [184 Cal.Rptr. 713, 648 P.2d 935] [“special taxes” are taxes levied for a specific purpose rather than for general governmental purposes]; Gov. Code, § 50076 [excluding from the term “special tax” in article XIII A, section 4, “any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes”].) Because of the close, “interlocking” relationship between the various sections of article XIII A (see *Amador Valley*, *supra*, 22 Cal.3d at p. 231), we believe these “special tax” cases may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, “special taxes” under article XIII A, section 4, may apply equally to section 3 cases.²

² We are not here concerned with issues arising under constitutional amendments effected by a recent initiative measure (Proposition 218) adopted at the November 5, 1996, General Election. That measure contains new restrictions on local agencies' power to impose fees and assessments.

We first consider certain general guidelines used in determining whether “taxes” are involved in particular situations. ([3]) The cases agree that *874 whether impositions are “taxes” or “fees” is a question of law for the appellate courts to decide on independent review

of the facts. (*Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, 1216 [265 Cal.Rptr. 347]; *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 Cal.App.3d 212, 234 [253 Cal.Rptr. 497]; *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1504 [246 Cal.Rptr. 21].)

The cases recognize that “tax” has no fixed meaning, and that the distinction between taxes and fees is frequently “blurred,” taking on different meanings in different contexts. (*Russ Bldg. Partnership v. City and County of San Francisco*, *supra*, 199 Cal.App.3d at p. 1504; *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 905 [223 Cal.Rptr. 379]; *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 660 [166 Cal.Rptr. 674]; *County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 983-984 [156 Cal.Rptr. 777].) In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240 [1 Cal.Rptr.2d 818]; *County of Fresno v. Malmstrom*, *supra*, 94 Cal.App.3d at p. 983 [“Taxes are raised for the general revenue of the governmental entity to pay for a variety of public services.”].) Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. (*Shapell Industries, Inc. v. Governing Board*, *supra*, 1 Cal.App.4th at p. 240; *Russ Bldg. Partnership v. City and County of San Francisco*, *supra*, 199 Cal.App.3d at pp. 1505-1506; see *Terminal Plaza Corp. v. City and County of San Francisco*, *supra*, 177 Cal.App.3d at p. 907.) But compulsory fees may be deemed legitimate fees rather than taxes. (See *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1424 [23 Cal.Rptr.2d 910].)

([4a]) The “special tax” cases have involved three general categories of fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power. Although these three categories may overlap in a particular case, we consider them separately.

The cases uniformly hold that *special assessments* on property or similar business charges, in amounts reasonably reflecting the value of the benefits conferred by improvements, are not “special taxes” under article

XIII A, section 4. (*Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 735-739 [4 Cal.Rptr.2d 601] [assessments on businesses for downtown promotion]; *875 *J. W. Jones Companies v. City of San Diego* (1984) 157 Cal.App.3d 745, 750-758 [203 Cal.Rptr. 580] [facilities benefit assessments]; *City Council v. South* (1983) 146 Cal.App.3d 320, 332 [194 Cal.Rptr. 110] [special assessments on real property]; *County of Fresno v. Malmstrom, supra*, 94 Cal.App.3d at pp. 984-985 [special assessments for construction of streets].)

Similarly, *development fees* exacted in return for building permits or other governmental privileges are not special taxes if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer. (*Shapell Industries, Inc. v. Governing Board, supra*, 1 Cal.App.4th at p. 240 [school facilities fees]; *Bixel Associates v. City of Los Angeles, supra*, 216 Cal.App.3d at pp. 1211, 1218-1219 [fire hydrant fees]; *California Bldg. Industry Assn. v. Governing Bd., supra*, 206 Cal.App.3d at pp. 235-237 [school facilities development fees]; *Russ Bldg. Partnership v. City and County of San Francisco, supra*, 199 Cal.App.3d at pp. 1504-1506 [transit impact fees]; *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235-238 [211 Cal.Rptr. 567] [new facilities water hookup fees]; *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 325-328 [170 Cal.Rptr. 685] [fees as precondition for building permits]; *Mills v. County of Trinity, supra*, 108 Cal.App.3d at pp. 661-663 [fees for processing subdivision, zoning, and land use applications]; see *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 898 [50 Cal.Rptr.2d 242, 911 P.2d 429] (conc. opn. of Mosk, J.).)

According to Sinclair, because the present fees have been imposed solely to defray the cost of the state's program of evaluation, screening, and follow-up services for children determined to be at risk for lead poisoning, they are not analogous to either special assessments or development fees, for they neither reimburse the state for special benefits conferred on manufacturers of lead-based products nor compensate the state for governmental privileges granted to those manufacturers. As the Court of Appeal observed, the fees challenged here "do not constitute payment for a government benefit or service. The program described in the Act bears no resemblance to regulatory schemes involving special assessments, developer fees, or efforts to recoup the cost of processing

land use applications where the benefit analysis is typically applied. [Citations.] The face of the Act makes clear the funds collected pursuant to section 105310 are used to benefit children exposed to lead, not Sinclair or other manufacturers in the stream of commerce for products containing lead."

([2b]) Appellants argue, however, that the challenged fees fall squarely within a third recognized category not dependent on government-conferred benefits or privileges, namely, *regulatory fees* imposed under the police power, rather than the taxing power. We agree.

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([4b]) We have acknowledged that the term "special taxes" in article XIII A, section 4, "does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes." [Citations.]" (*Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375 [228 Cal.Rptr. 726, 721 P.2d 1111] (*Pennell*), *affd.* on other grounds *sub nom. Pennell v. San Jose* (1988) 485 U.S. 1 [108 S.Ct. 849, 99 L.Ed.2d 1], quoting from *Mills v. County of Trinity, supra*, 108 Cal.App.3d at pp. 659-660; see *City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 760-762 [53 Cal.Rptr.2d 120] [upholding regulatory fees charged to alcoholic beverage sale licensees to support pilot project to address public nuisances associated with those sales]; *Kern County Farm Bureau v. County of Kern, supra*, 19 Cal.App.4th at pp. 1422-1425 [upholding landfill assessment based on land use to reduce illegal waste disposal]; *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 280-285 [17 Cal.Rptr.2d 845] [upholding waste disposal surcharge imposed on waste haulers]; *Evans v. City of San Jose, supra*, 3 Cal.App.4th at p. 737; *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1145-1149 [250 Cal.Rptr. 420] (*SDG&E*) [upholding emissions-based formula for recovering direct and indirect costs of pollution emission permit programs]; *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 166-168 [154 Cal.Rptr. 263] (*United Business*) [upholding fees for inspecting and inventorying on-premises advertising signs].)

Pennell upheld rental unit fees that a city imposed under its rent control ordinance to assure it recovered the actual costs of providing and administering a rental dispute

hearing process. (*Pennell, supra*, 42 Cal.3d at p. 375.) We explained in *Pennell* that regulatory fees in amounts necessary to carry out the regulation's purpose are valid despite the absence of any perceived "benefit" accruing to the fee payers. (*Id.* at p. 375, fn. 11; see also *SDG&E, supra*, 203 Cal.App.3d at p. 1146, fn. 18; *Mills v. County of Trinity, supra*, 108 Cal.App.3d at p. 661.)

We observe that Sinclair, in moving for summary judgment, did not contend that the fees exceed in amount the reasonable cost of providing the protective services for which the fees are charged, or that the fees were levied for any *unrelated* revenue purposes. (See *Pennell, supra*, 42 Cal.3d at p. 375.) Moreover, Sinclair has not yet sought to establish that the amount of the fees bears no reasonable relationship to the social or economic "burdens" that Sinclair's operations generated. (See *SDG&E, supra*, 203 Cal.App.3d at p. 1146; see also § 105310, subds. (b), (d); *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 421 [*877 194 Cal.Rptr. 357, 668 P.2d 664] [persons challenging fees have burden of establishing invalidity].) Sinclair does contend, however, that the Act is not *regulatory* in nature, being primarily aimed at producing revenue.

According to Sinclair, the challenged fees were in effect "taxes" because the compulsory revenue measure that imposed them was not part of a *regulatory* effort. The Court of Appeal agreed, relying on prior cases indicating that where payments are exacted solely for *revenue* purposes and give the right to carry on the business with no further conditions, they are taxes. (E.g., *United Business, supra*, 91 Cal.App.3d at p. 165.) The Court of Appeal held that "Placing the factors distinguishing taxes and fees along a continuum, we conclude the monies paid by Sinclair pursuant to the Act are more like taxes than fees. [¶] *There is nothing on the face of the Act to show the fees collected are used to regulate Sinclair.* Apart from mere calculation of the payment, the Department's regulatory authority involves implementation of the program to evaluate, screen, and provide followup services to children at risk for lead poisoning. The Act does not require Sinclair to comply with any other conditions; it merely requires Sinclair to pay what the Department determines to be its share of the program cost."

Contrary to the Court of Appeal, we believe that section 105310 imposes bona fide regulatory fees. It requires manufacturers and other persons whose products have

exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community. Viewed as a "mitigating effects" measure, it is comparable in character to similar police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.

From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate. Moreover, imposition of "mitigating effects" fees in a substantial amount (Sinclair allegedly paid \$97,825.26 in 1991) also "regulates" future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products. (Cf. *SDG&E, supra*, 203 Cal.App.3d at p. 1147, fn. 20 [emissions-based fees provide incentive to use nonpollutant fuels].)

Sinclair disputes the state's authority to impose industry-wide "remediation fees" to compensate for the adverse societal effects generated by an industry's products. To the contrary, the case law previously cited or discussed clearly indicates that the police power is broad enough to include *878 mandatory remedial measures to mitigate the *past, present, or future* adverse impact of the fee payer's operations, at least where, as here, the measure requires a causal connection or nexus between the product and its adverse effects. (See *City of Oakland v. Superior Court, supra*, 45 Cal.App.4th at pp. 760-762; *Kern County Farm Bureau v. County of Kern, supra*, 19 Cal.App.4th at pp. 1422-1425; *City of Dublin v. County of Alameda, supra*, 14 Cal.App.4th at pp. 284-285; *SDG&E, supra*, 203 Cal.App.3d at pp. 1146-1149; *United Business, supra*, 91 Cal.App.3d at p. 168; *Russ Bldg. Partnership v. City and County of San Francisco, supra*, 199 Cal.App.3d at pp. 1504-1506 [fees to pay for increased transit costs]; *J. W. Jones Companies v. City of San Diego, supra*, 157 Cal.App.3d at pp. 755, 758 [fees to defray costs of additional public facilities]; *Trent Meredith, Inc. v. City of Oxnard, supra*, 114 Cal.App.3d at p. 325 [fees to reduce growth impact of new subdivision]; see also *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 694 [151 P. 398] [police power authorizes legislation necessary or proper for protection of legitimate public interest]; *County*

of *Plumas v. Wheeler* (1906) 149 Cal. 758, 761-764 [87 P. 909] [broad legislative discretion to regulate business, including license fees or charges]; 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 784, p. 311 [“police power is simply the power of sovereignty or power to govern—the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare”]; see generally, 6A McQuillan, The Law of Municipal Corporations (3d rev. ed. 1997) Municipal Police Power and Ordinances, § 24.01 et seq., p. 7 et seq.)

SDG&E involved regulatory fees comparable in some respects to the fees challenged here. (*SDG&E*, *supra*, 203 Cal.App.3d 1132.) There, 1982 legislation (see § 42311) empowered local air pollution control districts to apportion the costs of their permit programs among all monitored polluters according to a formula based on the amount of emissions they discharged. (See *SDG&E*, *supra*, 203 Cal.App.3d at p. 1135.) ([5]) The *SDG&E* court observed that “to show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on or benefits from the regulatory activity.” (*Id.* at p. 1146, fn. omitted; see *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.*, *supra*, 165 Cal.App.3d at pp. 234-235.)

In *SDG&E*, the amount of the regulatory fees was limited to the reasonable costs of each district’s program, and the allocation of costs based on emissions “fairly relates to the permit holder’s burden on the district’s programs.” (*SDG&E*, *supra*, 203 Cal.App.3d at p. 1146.) Accordingly, the *879 court concluded that the fees were not “special taxes” under article XIII A, section 4. (*SDG&E*, *supra*, 203 Cal.App.3d at p. 1148.)

As the court observed in *SDG&E*, “Proposition 13’s goal of providing effective property tax relief is not subverted by the increase in fees or the emissions-based apportionment formula. A reasonable way to achieve Proposition 13’s goal of tax relief is to shift the costs of controlling stationary sources of pollution from the tax-paying public to the pollution-causing industries themselves” (*SDG&E*, *supra*, 203 Cal.App.3d at p. 1148.) ([2c]) In our view, the shifting of costs of providing evaluation, screening, and medically necessary follow-up

services for potential child victims of lead poisoning from the public to those persons deemed responsible for that poisoning is likewise a reasonable police power decision. (See also *Mills v. County of Trinity*, *supra*, 108 Cal.App.3d at p. 663; *County of Fresno v. Malmstrom*, *supra*, 94 Cal.App.3d at p. 985 [special assessments have no impact on government spending].)

The fact that the challenged fees were charged after, rather than before, the product’s adverse effects were realized is immaterial to the question whether the measure imposes valid regulatory fees rather than taxes. *City of Oakland v. Superior Court* seems close on point. There, the court upheld city fees imposed on retailers of alcoholic beverages to defray the cost of providing and administering hearings into nuisance problems associated with the prior sale of those beverages. The court first observed that “If a business imposes an unusual burden on city services, a municipality may properly impose fees pursuant to its police powers” to assure that the persons responsible “pay their fair share of the cost of government.” (*City of Oakland v. Superior Court*, *supra*, 45 Cal.App.4th at p. 761.) The court concluded that “The ordinance’s primary purpose is regulatory—to create an environment in which nuisance and criminal activities associated with alcoholic beverage retail establishments may be reduced or eliminated. Thus, the fee imposed ... is not a tax imposed to pay general revenue to the local governmental entity, but is a regulatory fee intended to defray the cost of providing and administering the hearing process set out in the ordinance. [Citation.]” (*Id.* at p. 762.)

The court in *United Business* applied the “regulation/revenue” distinction to conclude that sign inventory fees adopted to recover the city’s cost of inventorying signs and bringing them into conformance with law were regulatory fees, not revenue-raising taxes. The court observed that, under the police power, municipalities may impose fees for the purpose of legitimate regulation, and not mere revenue-raising, if the fees do not exceed the reasonably necessary expense of the regulatory effort. (*880 *United Business*, *supra*, 91 Cal.App.3d at p. 165, and authorities cited.) Quoting with approval from an earlier decision, the court noted that, if revenue is the primary purpose, and regulation is merely incidental, the imposition is a tax, but if regulation is the primary purpose, the mere fact that revenue is also obtained does not make the imposition a tax. (*Ibid.*) Moreover, according to *United Business*, if a fee is exacted for revenue purposes, and its payment gives the

right to carry on business without any further conditions, it is a tax. (*Ibid.*; see also *City of Oakland v. Superior Court*, *supra*, 45 Cal.App.4th at p. 761; *County of Plumas v. Wheeler*, *supra*, 149 Cal. at p. 763 [fee in amount greater than reasonably needed to regulate business “cannot stand as an exercise of the police power”]; *Mills v. County of Trinity*, *supra*, 108 Cal.App.3d at pp. 659-660; *City & County of San Francisco v. Boss* (1948) 83 Cal.App.2d 445, 450-451 [189 P.2d 32].)

The Court of Appeal, citing *United Business*, stressed that the challenged fees were exacted solely for revenue purposes, and their payment gave Sinclair and others the right to carry on the business without any further conditions. We see two flaws in that analysis. First, *all* regulatory fees are necessarily aimed at raising “revenue” to defray the cost of the regulatory program in question, but that fact does not automatically render those fees “taxes.” As stated in *United Business*, if regulation is the primary purpose of the fee measure, the mere fact that the measure also generates revenue does not make the imposition a tax. (*United Business*, *supra*, 91 Cal.App.3d at p. 165; see also *Mills v. County of Trinity*, *supra*, 108 Cal.App.3d at p. 660 [rejecting broad definition of “tax” as including all fees and charges that exact money for public purposes].)

Second, we find inconclusive the fact that the Act permits Sinclair and other producers to carry on their operations without any further conditions *specified in the Act itself*. As we have indicated, fees can “regulate” business entities without directly licensing them by mitigating their operations' adverse effects. Moreover, as appellants observe, the Act is part of a broader regulatory scheme by which, under various state and federal statutes, the state regulates Sinclair and other manufacturers in the stream of commerce for products containing lead. That being so, Sinclair's payment of the challenged fees did not confer the right to carry on business without any further conditions or regulation.

The Court of Appeal rejected appellants' argument invoking other state and federal regulations: “First, there is nothing on the face of the Act or the accompanying

statement of legislative purpose which links the Act's programs for children at risk for lead poisoning with the cited state or federal statutes regulating lead. Second, none of the fees collected pursuant to *881 section 105310 are used to fund those regulatory efforts.” However, it is undisputed that Sinclair and other manufacturers of lead-based products remain subject to government regulation, that payment of the challenged fees therefore does not entitle those manufacturers to operate free of regulation, and that the state must use the funds it collects under section 105310 *exclusively* for mitigating the adverse effects of lead poisoning of children, and not for general revenue purposes. (§ 105310, subd. (f).)

Under existing case law, we can reasonably characterize the challenged fees as *regulatory fees* rather than as taxes. Accordingly, we conclude the trial court erred in granting Sinclair summary judgment on the constitutional issues. Of course, Sinclair should be permitted to attempt to prove at trial that the amount of fees assessed and paid exceeded the reasonable cost of providing the protective services for which the fees were charged, or that the fees were levied for unrelated revenue purposes. (See *Pennell*, *supra*, 42 Cal.3d at p. 375.) Additionally, Sinclair will have the opportunity to try to show that no clear nexus exists between its products and childhood lead poisoning, or that the amount of the fees bore no reasonable relationship to the social or economic “burdens” its operations generated. (*SDG&E*, *supra*, 203 Cal.App.3d at p. 1146; see also § 105310, subs. (b), (d).)

Disposition

The judgment of the Court of Appeal, affirming the trial court's grant of summary judgment in Sinclair's favor, is reversed.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Werdegar, J., and Armstrong, J., * concurred.

* Associate Justice of the Court of Appeal, Second District, Division Five, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [City of Arcadia v. State Water Resources Control Bd.](#),
Cal.App. 4 Dist., December 14, 2010

35 Cal.4th 613
Supreme Court of California

CITY OF BURBANK, Plaintiff and Appellant,
v.
STATE WATER RESOURCES CONTROL BOARD
et al., Defendants and Appellants.
City of Los Angeles, Plaintiff and Respondent,
v.
State Water Resources Control Board et al.,
Defendants and Appellants.

Nos. S119248, B151175, B152562.

April 4, 2005.

Rehearing Denied June 29, 2005.*

Synopsis

Background: Cities filed petitions for writs of mandate challenging pollutant limitations in wastewater discharge permits issued by regional water quality control boards. The Superior Court, Los Angeles County, Nos. BS060957 and BS060960, [Dzintra I. Janavs, J.](#), set aside permits. Regional board and state water resources control board appealed. The Court of Appeal consolidated the cases and reversed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, [Kennard, J.](#), held that:

^[1] regional board may not consider economic factors as justification for imposing pollutant restrictions in wastewater discharge permit which are less stringent than applicable federal standards, and

^[2] when imposing more stringent pollutant restrictions that those required by federal law, regional board may take economic factors into account.

Judgment of Court of Appeal affirmed, and matter remanded.

[Brown, J.](#), filed concurring opinion.



Opinion, [4 Cal.Rptr.3d 27](#), superseded.

West Headnotes (5)

^[1] **Environmental Law**
 Purpose

Clean Water Act is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., as amended, 33 U.S.C.A. § 1251 et seq.

[12 Cases that cite this headnote](#)

^[2] **Environmental Law**
 Conditions and limitations
States
 Environment; nuclear projects

Regional water quality control board may not consider economic factors as justification for imposing pollutant restrictions in wastewater discharge permit which are less stringent than applicable federal standards, despite statute directing board to take such factors into consideration, because the federal constitutional supremacy clause requires state law to yield to federal law. U.S.C.A. Const. Art. 6, cl. 2; Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 301(a), (b)(1)(B, C), 402(a)(1, 3), as amended, 33 U.S.C.A. §§ 1251 et seq., 1311(a), (b)(1)(B, C), 1342(a)(1, 3); West's Ann.Cal.Water Code §§ 13000 et seq., 13241(d), 13263, 13377.

See 4 *Witkin, Summary of Cal. Law (9th ed. 1987) Real Property*, §§ 68, 69; 8 *Miller & Starr, Cal. Real Estate (3d ed. 2001) § 23:54*; *Cal. Jur. 3d, Pollution and Conservation Laws*, § 126.

[16 Cases that cite this headnote](#)

[3] **Statutes**

🔑 Purpose and intent

When construing any statute, the court's task is to determine the Legislature's intent when it enacted the statute so as to adopt the construction that best effectuates the purpose of the law.

[13 Cases that cite this headnote](#)

[4] **States**

🔑 Conflicting or conforming laws or regulations

Under the federal Constitution's supremacy clause, a state law that conflicts with federal law is without effect. *U.S.C.A. Const. Art. 6, cl. 2.*

[Cases that cite this headnote](#)

[5] **Environmental Law**

🔑 Conditions and limitations

When imposing more stringent pollutant restrictions in a wastewater discharge permit than those required by federal law, a regional water quality control board may take into account the economic effects of doing so. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 101(b), 510, as amended, 33 U.S.C.A. §§ 1251 et seq., 1251(b), 1370; *West's Ann.Cal.Water Code* §§ 13000 et seq., 13241(d), 13263, 13377.

[19 Cases that cite this headnote](#)

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Opinion

[KENNARD, J.](#)

***618 **864** Federal law establishes national water quality standards but allows the states to enforce their own water quality laws so long as they comply with federal standards. Operating within this federal-state framework, California's nine Regional Water Quality Control Boards establish water quality policy. They also issue permits for the discharge of treated wastewater; these permits specify the maximum allowable concentration of chemical pollutants in the discharged wastewater.

The question here is this: When a regional board issues a permit to a wastewater treatment facility, must the board take into account the facility's costs of complying with the board's restrictions on pollutants in the wastewater to be discharged? The trial court ruled that California law required a regional board to weigh the economic burden on the facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The Court of Appeal disagreed. On petitions by the municipal operators of three wastewater treatment facilities, we granted review.

We reach the following conclusions: Because both California law and federal law require regional boards to comply with federal clean water standards, and because the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal law requires, California law allows the board to take into account economic ****865** factors, including the wastewater discharger's cost of compliance.

We remand this case for further proceedings to determine whether the pollutant limitations in the permits challenged here meet or exceed federal standards.

*619 I. STATUTORY BACKGROUND

The quality of our nation's waters is governed by a "complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities." (*PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 704, 114 S.Ct. 1900, 128 L.Ed.2d 716.) We first discuss California law, then federal law.

A. California Law

In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (*Wat.Code*, § 13000 *et seq.*, added by Stats.1969, ch. 482, § 18, p. 1051.)¹ Its goal is "to attain the highest water ****307** quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board).²

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

B. Federal Law

^[1] In 1972, Congress enacted amendments (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816) to the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*), which,

as amended in 1977, is commonly known as the Clean *620 Water Act. The Clean Water Act is a “comprehensive water quality statute designed ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ ” (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, supra*, 511 U.S. at p. 704, 114 S.Ct. 1900, quoting 33 U.S.C. § 1251(a).) The Act’s national goal was to eliminate by the year 1985 “the discharge of pollutants into the navigable waters” of the United States. (33 U.S.C. § 1251(a)(1).) To accomplish this goal, the Act established “effluent limitations,” which are restrictions on the “quantities, rates, and concentrations of chemical, physical, biological, and other constituents”; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards. (33 U.S.C. §§ 1311, 1362(11).)

Under the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not “less stringent” than those set out in the Clean Water Act. (33 U.S.C. § 1370.) This led the California Legislature in 1972 to amend the state’s Porter–Cologne Act “to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act.” (§ 13372.)

866 Roughly a dozen years ago, the United States Supreme Court, in *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239, described the distinct roles of the state and federal agencies in enforcing water quality: “The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ 33 U.S.C. § 1251(a). Toward *308 this end, [the Clean Water Act] provides for two sets of water quality measures. ‘Effluent limitations’ are promulgated by the [Environmental Protection Agency (EPA)] and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources.³ See §§ 1311, 1314. ‘[W]ater quality standards’ are, in general, promulgated by the States and establish the desired condition of a waterway. See § 1313. These standards supplement effluent limitations ‘so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.’ *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12, 96 S.Ct. 2022, 2025, n. 12, 48 L.Ed.2d 578 (1976).

*621 “The EPA provides States with substantial guidance

in the drafting of water quality standards. See generally 40 CFR pt. 131 (1991) (setting forth model water quality standards). Moreover, [the Clean Water Act] requires, *inter alia*, that state authorities periodically review water quality standards and secure the EPA’s approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State. 33 U.S.C. § 1313(c).” (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 101, 112 S.Ct. 1046.)

Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), “[t]he primary means” for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)

With this federal and state statutory framework in mind, we now turn to the facts of this case.

II. FACTUAL BACKGROUND

This case involves three publicly owned treatment plants that discharge wastewater under NPDES permits issued by the Los Angeles Regional Board.

The City of Los Angeles owns and operates the Donald C. Tillman Water Reclamation Plant (Tillman Plant), which serves the San Fernando Valley. The City of Los Angeles also owns and operates the Los Angeles–Glendale Water Reclamation Plant (Los Angeles–Glendale Plant), which processes wastewater from areas within the City of Los Angeles and the independent cities of Glendale and Burbank. Both the Tillman Plant and the Los Angeles–Glendale Plant discharge wastewater directly into the Los Angeles River, now a concrete-lined flood control channel that runs through the City of Los Angeles, ending at the Pacific Ocean. The State Board and the Los Angeles Regional Board consider the Los Angeles River to be a navigable water of the United States for purposes of the federal Clean Water Act.

The third plant, the Burbank Water Reclamation Plant (Burbank Plant), is owned and operated by the City of

Burbank, ***309 serving residents and businesses within that city. The Burbank Plant discharges wastewater into the Burbank Western Wash, which drains into the Los Angeles River.

*622 All three plants, which together process hundreds of millions of gallons of sewage **867 each day, are tertiary treatment facilities; that is, the treated wastewater they release is processed sufficiently to be safe not only for use in watering food crops, parks, and playgrounds, but also for human body contact during recreational water activities such as swimming.

In 1998, the Los Angeles Regional Board issued renewed NPDES permits to the three wastewater treatment facilities under a basin plan it had adopted four years earlier for the Los Angeles River and its estuary. That 1994 basin plan contained general narrative criteria pertaining to the existing and potential future beneficial uses and water quality objectives for the river and estuary.⁴ The narrative criteria included municipal and domestic water supply, swimming and other recreational water uses, and fresh water habitat. The plan further provided: "All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life." The 1998 permits sought to reduce these narrative criteria to specific numeric requirements setting daily maximum limitations for more than 30 pollutants present in the treated wastewater, measured in milligrams or micrograms per liter of effluent.⁵

The Cities of Los Angeles and Burbank (Cities) filed appeals with the State Board, contending that achievement of the numeric requirements would be too costly when considered in light of the potential benefit to water quality, and that the pollutant restrictions in the NPDES permits were unnecessary to meet the narrative criteria described in the basin plan. The State Board summarily denied the Cities' appeals.

Thereafter, the Cities filed petitions for writs of administrative mandate in the superior court. They alleged, among other things, that the Los Angeles Regional Board failed to comply with sections 13241 and 13263, part of California's Porter-Cologne Act, because it did not consider the economic burden on the Cities in having to reduce substantially the pollutant content of their discharged wastewater. They also alleged that compliance with the pollutant restrictions set out in the NPDES permits issued by the regional *623 board would greatly increase their costs of treating the wastewater to be discharged into the Los Angeles River. According to

the City of Los Angeles, its compliance costs would exceed \$50 million annually, representing more than 40 percent of its entire budget for operating its four wastewater treatment plants and its sewer system; the City of Burbank estimated its added costs at over \$9 million annually, a nearly 100 percent increase above its \$9.7 million annual budget for wastewater treatment.

***310 The State Board and the Los Angeles Regional Board responded that sections 13241 and 13263 do not require consideration of costs of compliance when a regional board issues a NPDES permit that restricts the pollutant content of discharged wastewater.

The trial court stayed the contested pollutant restrictions for each of the three wastewater treatment plants. It then ruled that sections 13241 and 13263 of California's Porter-Cologne Act required a regional board to consider costs of compliance not only when it adopts a basin or water quality plan but also when, as here, it issues an NPDES permit setting the allowable pollutant content of a treatment plant's discharged wastewater. The court found no evidence that the Los Angeles Regional Board had considered economic factors at either stage. Accordingly, the trial court granted the Cities' petitions for writs of mandate, and it ordered the Los Angeles Regional Board to vacate the contested restrictions on pollutants in the wastewater discharge permits issued to the three municipal plants here and to conduct hearings **868 to consider the Cities' costs of compliance before the board's issuance of new permits. The Los Angeles Regional Board and the State Board filed appeals in both the Los Angeles and Burbank cases.⁶

The Court of Appeal, after consolidating the cases, reversed the trial court. It concluded that sections 13241 and 13263 require a regional board to take into account "economic considerations" when it adopts water quality standards in a basin plan but not when, as here, the regional board sets specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards. We granted the Cities' petition for review.

*624 III. DISCUSSION

A. Relevant State Statutes

The California statute governing the issuance of *wastewater permits* by a regional board is section 13263, which was enacted in 1969 as part of the Porter-Cologne Act. (See 26 Cal.Rptr.3d pp. 306-307, 108 P.3d p. 865, *ante.*) Section 13263 provides in relevant part: "The

regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge [of wastewater]. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241." (§ 13263, subd. (a), italics added.)

Section 13241 states: "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

***311 "(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) *Economic considerations.*

"(e) The need for developing housing within the region.

"(f) The need to develop and use recycled water." (Italics added.)

The Cities here argue that section 13263's express reference to section 13241 requires the Los Angeles Regional Board to consider section 13241's listed factors, notably "[e]conomic considerations," before issuing NPDES permits requiring specific pollutant reductions in discharged effluent or treated wastewater.

[2] *625 Thus, at issue is language in section 13263 stating that when a regional board "prescribe[s] requirements as to the nature of any proposed discharge" of treated wastewater it must "take into consideration" certain factors including "the provisions of Section 13241." According to the Cities, this statutory language requires that a regional board make an independent evaluation of

the section 13241 factors, including "economic considerations," before restricting the pollutant content in an NPDES permit. This was the view expressed in the trial court's ruling. The Court of Appeal rejected that view. It held that a regional board need consider the section 13241 factors only when it adopts a basin or water quality plan, but not when, as in this case, it issues a wastewater discharge **869 permit that sets specific numeric limitations on the various chemical pollutants in the wastewater to be discharged. As explained below, the Court of Appeal was partly correct.

B. Statutory Construction

[3] When construing any statute, our task is to determine the Legislature's intent when it enacted the statute "so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715, 3 Cal.Rptr.3d 623, 74 P.3d 726; *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268, 121 Cal.Rptr.2d 203, 47 P.3d 1069.) In doing this, we look to the statutory language, which ordinarily is "the most reliable indicator of legislative intent." (*Hassan, supra*, at p. 715, 3 Cal.Rptr.3d 623, 74 P.3d 726.)

As mentioned earlier, our Legislature's 1969 enactment of the Porter-Cologne Act, which sought to ensure the high quality of water in this state, predated the 1972 enactment by Congress of the precursor to the federal Clean Water Act. Included in California's original Porter-Cologne Act were sections 13263 and 13241. Section 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in section 13241. Listed among the section 13241 factors is "[e]conomic considerations." (§ 13241, subd. (d).) The plain language of sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit.

Our construction of sections 13263 and 13241 does not end with their plain statutory language, however. We must also analyze them in the context of the statutory scheme of which they are a part. ***312 (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043, 12 Cal.Rptr.3d 343, 88 P.3d 71.) Like sections 13263 and 13241, section 13377 is part of the Porter-Cologne Act. But unlike the former two statutes, section 13377 was *626 not enacted until 1972, shortly after Congress, through adoption of the Federal Water Pollution Control Act Amendments, established a comprehensive water quality policy for the nation.

[4] Section 13377 specifies that wastewater discharge permits issued by California’s regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board’s consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the act’s clean water standards, regardless of cost (see *id.*, §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3)). Because section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards.⁷ Such a construction of section 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature’s **870** declaration in section 13377 that all discharged wastewater must satisfy federal standards.⁸ This was also the conclusion of the Court of Appeal. Moreover, under the federal Constitution’s supremacy clause (art. VI), a state law that conflicts with federal law is “ ‘without effect.’ ” (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407; *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923, 12 Cal.Rptr.3d 262, 88 P.3d 1.) To comport with the principles of federal supremacy, California law cannot authorize this **627** state’s regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations **313** that would exceed the mandates of federal law.

Thus, in this case, whether the Los Angeles Regional Board should have complied with sections 13263 and 13241 of California’s Porter–Cologne Act by taking into account “economic considerations,” such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits, depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act. We therefore remand this matter for the trial court to resolve that issue.

C. Other Contentions

The Cities argue that requiring a regional board at the wastewater discharge permit stage to consider the permit holder’s cost of complying with the board’s restrictions on pollutant content in the water is consistent with federal

law. In support, the Cities point to certain provisions of the federal Clean Water Act. They cite section 1251(a)(2) of title 33 United States Code, which sets, as a national goal “*wherever attainable*,” an interim goal for water quality that protects fish and wildlife, and section 1313(c)(2)(A) of the same title, which requires consideration, among other things, of waters’ “*use and value for navigation*” when revising or adopting a “water quality standard.” (Italics added.) These two federal statutes, however, pertain not to permits for wastewater discharge, at issue here, but to establishing water quality standards, not at issue here. Nothing in the federal Clean Water Act suggests that a state is free to disregard or to weaken the federal requirements for clean water when an NPDES permit holder alleges that compliance with those requirements will be too costly.

[5] At oral argument, counsel for amicus curiae National Resources Defense Council, which argued on behalf of California’s State Board and regional water boards, asserted that the federal Clean Water Act incorporates state water policy into federal law, and that therefore a regional board’s consideration of economic factors to justify greater pollutant concentration in discharged wastewater would conflict with the federal act even if the specified pollutant restrictions were not less stringent than those required under federal law. We are not persuaded. The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to “enforce any effluent limitation” that is not “*less stringent*” than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit **628** a state—when imposing effluent limitations that are *more stringent* than required by federal law—from taking into account the economic effects of doing so.

Also at oral argument, counsel for the Cities asserted that if the three municipal wastewater treatment facilities ceased releasing their treated wastewater into the concrete channel that makes up the Los Angeles River, it would (other than during the rainy season) contain no water at all, and thus would not be a “navigable water” of the **871** United States subject to the Clean Water Act. (See *Solid Waste Agency v. United States Army Corps of Engineers* (2001) 531 U.S. 159, 172, 121 S.Ct. 675, 148 L.Ed.2d 576 [“The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”].) It is unclear when the Cities first raised this issue. The Court of Appeal did

not discuss it in its opinion, and the Cities did not seek rehearing on this ground. (See ***314 Cal. Rules of Court, rule 28(c)(2).) Concluding that the issue is outside our grant of review, we do not address it.

CONCLUSION

Through the federal Clean Water Act, Congress has regulated the release of pollutants into our national waterways. The states are free to manage their own water quality programs so long as they do not compromise the federal clean water standards. When enacted in 1972, the goal of the Federal Water Pollution Control Act Amendments was to *eliminate* by the year 1985 the discharge of pollutants into the nation's navigable waters. In furtherance of that goal, the Los Angeles Regional Board indicated in its 1994 basin plan on water quality the intent, insofar as possible, to remove from the water in the Los Angeles River toxic substances in amounts harmful to humans, plants, and aquatic life. What is not clear from the record before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles–Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements. This is an issue of fact to be resolved by the trial court.

DISPOSITION

We affirm the judgment of the Court of Appeal reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants are necessary to satisfy federal Clean Water Act requirements for treated wastewater. The Court of Appeal is directed to remand this *629 matter to the trial court to decide whether any numeric limitations, as described in the permits, are “more stringent” than required under federal law and thus should have been subject to “economic considerations” by the Los Angeles Regional Board before inclusion in the permits.

WE CONCUR: [GEORGE](#), C.J., [BAXTER](#),
[WERDEGAR](#), [CHIN](#), and [MORENO](#), JJ.

Concurring Opinion by [BROWN](#), J.

I write separately to express my frustration with the apparent inability of the government officials involved here to answer a simple question: How do the federal clean water standards (which, as near as I can determine, are the state standards) prevent the state from considering economic factors? The majority concludes that because “the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than applicable federal standards require.” (Maj. opn., *ante*, 26 Cal.Rptr.3d at p. 306, 108 P.3d at p. 864.) That seems a pretty self-evident proposition, but not a useful one. The real question, in my view, is whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions that *meet* the clean water standards in more cost-effective and economically efficient ways. I can see no reason why a federal law—which purports to be an example of cooperative federalism—would decree such a result. I do not think the majority’s reasoning is at fault here. Rather, the agencies involved seemed to have worked hard to make this simple question impenetrably obscure.

A brief review of the statutory framework at issue is necessary to understand my concerns.

***315 **872 I. Federal Law

“In 1972, Congress enacted the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*), commonly known as the Clean Water Act (CWA) [Citation.] ... [¶] Generally, the CWA ‘prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]’ ... The most important of those exceptions is pollution discharge under a valid NPDES [National Pollution Discharge Elimination System] permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California’s. [Citations.] NPDES permits are valid for five years. [Citation.] [¶] Under the CWA’s NPDES permit program, the states are required to develop *water quality standards*. [Citations.] A water quality standard ‘establish[es] the desired condition of a waterway.’ [Citation.] A water quality standard for any *630 given waterway, or ‘water body,’ has two components: (1) the designated beneficial uses of the water body and (2) the *water quality criteria* sufficient to protect those uses. [Citations.] [¶] Water

quality criteria can be either *narrative* or *numeric*. [Citation.]” (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092–1093, 1 Cal.Rptr.3d 76.)

With respect to satisfying water quality standards, “a polluter must comply with *effluent limitations*. The CWA defines an effluent limitation as ‘any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.’ [Citation.] ‘Effluent limitations are a means of *achieving* water quality standards.’ [Citation.] [¶] NPDES permits establish effluent limitations for the polluter. [Citations.] CWA’s NPDES permit system provides for a two-step process for the establishing of effluent limitations. First, the polluter must comply with *technology-based effluent limitations*, which are limitations based on the best available or practical technology for the reduction of water pollution. [Citations.] [¶] Second, the polluter must also comply with more stringent *water quality-based effluent limitations* (WQBEL’s) where applicable. In the CWA, Congress ‘supplemented the “technology-based” effluent limitations with “water quality-based” limitations “so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.’ ” [Citation.] [¶] The CWA makes WQBEL’s applicable to a given polluter whenever WQBEL’s are ‘necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations....’ [Citations.] Generally, NPDES permits must conform to state water quality laws insofar as the state laws impose more stringent pollution controls than the CWA. [Citations.] Simply put, WQBEL’s implement water quality standards.” (*Communities for a Better Environment v. State Water Resources Control Bd.*, *supra*, 109 Cal.App.4th at pp. 1093–1094, 1 Cal.Rptr.3d 76, fn. omitted.)

This case involves water quality-based effluent limitations. As set forth above, “[u]nder the CWA, states have the primary role in promulgating water quality standards.” (*Piney Run Preservation Ass’n v. Commrs. of Carroll Co.* (4th Cir.2001) 268 F.3d 255, 265, fn. 9.) “Under the CWA, the water quality standards referred to in section 301 [see 33 U.S.C. § 1311] are primarily the states’ handiwork.” ***316 (*American Paper Institute, Inc. v. U.S. Env’tl. Protection Agency* (D.C.Cir.1993) 996 F.2d 346, 349 (*American Paper*).) In fact, upon the 1972

passage of the CWA, “[s]tate water quality standards in effect at the time ... were deemed to be the initial water quality benchmarks for CWA purposes.... The states were to revisit and, if *631 necessary, revise those initial standards at least once every three years.” (*American Paper*, at p. 349.) Therefore, “once a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard.” (*American Paper*, at p. 350.) Accordingly, it appears that in most instances, **873 state water quality standards are identical to the federal requirements for NPDES permits.

II. State Law

In California, pursuant to the Porter–Cologne Water Quality Control Act (*Wat.Code*, § 13000 *et seq.*; Stats.1969, ch. 482, § 18, p. 1051; hereafter Porter–Cologne Act), the regional water quality control boards establish water quality standards—and therefore federal requirements for NPDES permits—through the adoption of water quality control plans (basin plans). The basin plans establish water quality objectives using enumerated factors—including economic factors—set forth in *Water Code* section 13241.

In addition, as one court observed: “The Porter–Cologne Act ... established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (*Wat.Code*, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter–Cologne Act identified these permits as ‘waste discharge requirements,’ and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (*Wat.Code*, §§ 13263, subd. (a), 13377, 13374.) [¶] Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added Chapter 5.5 to the Porter–Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (*Wat.Code*, § 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards ‘shall, as required or authorized by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.’ (*Wat.Code*, § 13377.) *Water Code* section 13374 provides

that “[t]he term “waste discharge requirements” as referred to in this division is the equivalent of the term “permits” as used in the [Clean Water Act].” [¶] California subsequently obtained the required approval to issue NPDES permits. [Citation.] Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat.Code, § 13374.)” (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875, 22 Cal.Rptr.3d 128.)

***632** Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board)—the body responsible to enforce the statutory framework—failed to comply with its statutory mandate.

*****317** For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirement set forth in [Water Code section 13241](#) in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of “gotcha” by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.

Moreover, the Board acknowledges that it has neglected other statutory provisions that might have provided an additional opportunity to air these concerns. As set forth above, pursuant to the CWA, “[t]he states were to revisit and, if necessary, revise those initial standards at least once every three years—a process commonly known as triennial review. [Citation.] Triennial reviews consist of public hearings in which current water quality standards are examined to assure that they ‘protect the public health or welfare, enhance the quality of water and serve the purposes’ of the Act. [Citation.] Additionally, the CWA ****874** directs states to consider a variety of competing policy concerns during these reviews, including a waterway’s ‘use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.’ ” (*American Paper*, *supra*, 996 F.2d at p. 349.)

According to the Cities, “[t]he last time that the narrative

water quality objective for toxicity contained in the Basin Plan was reviewed and modified was 1994.” The Board does not deny this claim. Accordingly, the Board has failed its duty to allow public discussion—including economic considerations—at the required intervals when making its determination of proper water quality standards.

What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.

***633** Our decision today arguably allows the Board to continue to shirk its statutory duties. The majority holds that when read together, [Water Code sections 13241, 13263, and 13377](#) do not allow the Board to consider economic factors when issuing NPDES permits to satisfy federal CWA requirements. (Maj. opn., *ante*, 26 Cal.Rptr.3d at pp. 311–312, 108 P.3d at pp. 869–870.) The majority then bifurcates the issue when it orders the Court of Appeal “to remand this matter to the trial court to decide whether any numeric limitations, as described in the permits, are ‘more stringent’ than required under federal law and thus should have been subject to ‘economic considerations’ by the Los Angeles Regional Board before inclusion in the permits.” (*Id.* at p. 314, 108 P.3d at p. 871.)

The majority overlooks the feedback loop established by the CWA, under which federal standards are linked to state-established water quality standards, including narrative water quality criteria. (See [33 U.S.C. § 1311\(b\)\(1\)\(C\)](#); [40 C.F.R. § 122.44\(d\)\(1\)](#) (2004).) Under the CWA, NPDES permit requirements include the state narrative criteria, which are incorporated into the Board’s basin plan under the description “no toxins in toxic amounts.” As far as I can determine, NPDES permits *****318** designed to achieve this narrative criteria (as well as designated beneficial uses) will usually implement the state’s basin plan, while satisfying federal requirements as well.

If federal water quality standards are typically identical to state standards, it will be a rare instance that a state exceeds its own requirements and economic factors are taken into consideration.¹ In light of the Board’s initial failure to consider costs of compliance and its repeated failure to conduct required triennial reviews, the result here is an unseemly bureaucratic bait-and-switch that we should not endorse. The likely outcome of the majority’s decision is that the Cities will be economically burdened to meet standards imposed on them in a highly

questionable manner.² In these times of tight fiscal budgets, it is difficult to imagine imposing additional financial burdens on municipalities without at least allowing them to present alternative views.

Based on the facts of this case, our opinion today appears to largely retain the status quo for the Board. If the Board can actually demonstrate that only the precise limitations at issue here, implemented in only one way, will achieve the desired water standards, perhaps its obduracy is justified. That case has yet to be made.

*634 Accordingly, I cannot conclude that the majority's decision is wrong. The analysis **875 may provide a reasonable accommodation of conflicting provisions.

However, since the Board's actions "make me wanna holler and throw up both my hands,"³ I write separately to set forth my concerns and concur in the judgment—*dubitante*.⁴

All Citations

35 Cal.4th 613, 108 P.3d 862, 26 Cal.Rptr.3d 304, 60 ERC 1470, 35 Env'tl. L. Rep. 20,071, 05 Cal. Daily Op. Serv. 2861, 2005 Daily Journal D.A.R. 3870

Footnotes

* [Brown, J.](#), did not participate therein.

¹ Further undesignated statutory references are to the Water Code.

² The Los Angeles water region "comprises all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River drainages." (§ 13200, subd. (d).)

³ A "point source" is "any discernable, confined and discrete conveyance" and includes "any pipe, ditch, channel ... from which pollutants ... may be discharged." (33 U.S.C. § 1362(14).)

⁴ This opinion uses the terms "narrative criteria" or descriptions, and "numeric criteria" or effluent limitations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, "no toxic pollutants in toxic amounts" would be a narrative description. This contrasts with numeric criteria, which detail specific pollutant concentrations, such as parts per million of a particular substance.

⁵ For example, the permits for the Tillman and Los Angeles–Glendale Plants limited the amount of fluoride in the discharged wastewater to 2 milligrams per liter and the amount of mercury to 2.1 micrograms per liter.

⁶ Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that (1) the Los Angeles Regional Board failed to show how it derived from the narrative criteria in the governing basin plan the specific numeric pollutant limitations included in the permits; (2) the administrative record failed to support the specific effluent limitations; (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages; and (4) the permits improperly specified the manner of compliance.

⁷ The concurring opinion misconstrues both state and federal clean water law when it describes the issue here as "whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions *that meet the clean water standards in more cost-effective and economically efficient ways.*" (Conc. Opn. of [Brown, J.](#), *post*, 26 Cal.Rptr.3d p. 314, 108 P.3d at p. 871, some italics added.) This case has nothing to do with meeting federal standards in more cost effective and economically efficient ways. State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit. (§§ 13241 & 13263.) Federal law, by contrast, as stated above in the text, "prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the [federal] act's *clean water standards, regardless of cost* (see *id.*, §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3))." (Italics added.)

8 As amended in 1978, [section 13377](#) provides for the issuance of waste discharge permits that comply with federal clean water law “together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.” We do not here decide how this provision would affect the cost-consideration requirements of [sections 13241](#) and [13263](#) when more stringent effluent standards or limitations in a permit are justified for some reason independent of compliance with federal law.

1 (But see *In the Matter of the Petition of City and County of San Francisco, San Francisco Baykeeper et al.* (Order No. WQ 95-4, Sept. 21, 1995) 1995 WL 576920.)

2 Indeed, given the fact that “water quality standards” in this case are composed of broadly worded components (i.e., a narrative criteria and “designated beneficial uses of the water body”), the Board possessed a high degree of discretion in setting NPDES permit requirements. Based on the Board’s past performance, a proper exercise of this discretion is uncertain.

3 Marvin Gaye (1971) “Inner City Blues.”

4 I am indebted to Judge Berzon for this useful term. (See *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir.2005) 400 F.3d 1119 (conc. opn. of Berzon, J.).)

210 Cal.App.3d 1421, 259 Cal.Rptr. 132

TAHOE-SIERRA PRESERVATION
COUNCIL et al., Plaintiffs and Appellants,
v.
STATE WATER RESOURCES CONTROL
BOARD et al., Defendants and Respondents

No. C000386.

Court of Appeal, Third District, California.

May 30, 1989.

SUMMARY

Landowners, who were precluded from constructing new residences on their lots due to a State Water Resources Control Board's Lake Tahoe water quality control plan, challenged the validity of that plan on the basis of its conflict with state and federal law, and on the basis that it was a taking of land without just compensation in violation of *U.S. Const.*, 5th and 14th Amends. The plan had been adopted to prevent increased surface runoff of water carrying soil products into Lake Tahoe, caused by the increased land coverage of new development, and the plan effectively limited new development by requiring permits. The trial court granted the state board's motion for judgment on the pleadings. (Superior Court of Placer County, No. 58789, Richard A. Sims and George Yonehiro, Judges.)

The Court of Appeal affirmed with modifications. It held that federal law regarding water pollution acted as a minimum standard that states are required to follow, but does not preclude states from enacting more restrictive measures. It also held that the unjust taking of property claim was not ripe since the landowners had not alleged that a waste discharge requirement under the plan had been sought, and had not sought compensation from the state. (Opinion by Blease, J., with Puglia, P. J., and Evans, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Pollution and Conservation Laws § 5--Water Pollution--
Definition-- Nonpoint Source of Pollution.

For purposes of water pollution statutes, "nonpoint sources of pollution" are defined by inference from the definition of "point sources of water pollution," which are sources of pollution directly attributable to a specific property or project or action. A "point source" is defined under the Federal Water Pollution Control Act as a discernible, confined, and discrete conveyance from which pollutants are or may be discharged (*33 U.S.C. § 1362(14)*).

(2)
Pollution and Conservation Laws § 5--Water Pollution--
State Permit System--Compliance With Federal Law.
Measures adopted by the State Water Resources Control Board which utilized a state waste discharge permit system to regulate nonpoint source pollution into Lake Tahoe were not beyond the authority granted the board under *Wat. Code, § 13170*, to enact a water quality control plan required by the Federal Water Pollution Control Act (*33 U.S.C. § 1251 et seq.*). Although federal permits are not used for regulation of nonpoint sources of pollution under the federal act, a state is not precluded from resorting to this method of regulation under its own authority. The Water Code is designed to insure a limited conformity of state law with federal law, not to oust the state of its own powers to control nonpoint sources of water pollution. *Wat. Code, § 13374* requires equivalency with federal law only for purposes of state compliance with the minimum requirements of the federal mandate, and federal law does not preclude the state from utilizing its broader authority to regulate nonpoint sources of pollution.

[See *Cal.Jur.3d, Pollution and Conservation Laws, § 84 et seq.*; *Am.Jur.2d, Pollution Control, § 129 et seq.*]

(3)
Pollution and Conservation Laws § 5--Water Pollution--
Water Control Plan--Conflict With Statute Regarding
Compliance With Water Discharge Requirements in
Specific Manner.
Wat. Code, § 13360 (circumstances justifying order to comply with water quality requirements in specific manner), is a shield against unwarranted interference with the ingenuity of a party subject to a waste discharge requirement; it is not a sword precluding regulation of discharges of pollutants. Thus, the State Water Resources Control Board's plan that set a discharge prohibition of pollutants into Lake Tahoe did not conflict with *§ 13360*, and the trial court properly granted the

board's motion for judgment on the pleadings of a complaint brought by landowners who were precluded from constructing residences on their lots due to the Lake Tahoe water quality control plan promulgated by the board, notwithstanding that the only concurrently feasible method of preventing discharge was compliance with the plan's standards. Where the lack of available alternatives is a constraint imposed by present technology and the laws of nature, rather than the law of the board specifying design, location, type of construction, or particular manner of compliance, there is no violation of § 13360.

(4a, 4b)

Pollution and Conservation Laws § 5--Water Pollution--Water Quality Plan--Due Process--Validity.

A water quality plan designed to prevent increased surface runoff of water carrying soil products into Lake Tahoe waters did not deny landowners, who were precluded from building residences on their property due to the plan, from procedural due process of law, notwithstanding the landowners' argument that the plan failed to specify discharge in terms of quantities of materials. The classification system incorporated in the plan and the provisions of the plan itself afforded the landowners sufficient information concerning the causes and nature of the discharge of soil products into Lake Tahoe attributable to excess coverage of land by new development to address the discharge prohibition. Also, the landowners were afforded an opportunity to show their development was in compliance with the prohibition. The landowners presented no substantive due process claim, notwithstanding there was no feasible technology that would enable them to develop in excess of the coverage restrictions and not cause incremental detrimental runoff, since avoidance of this consequences was a legitimate state interest. Also, the discharge standard in the plan did not operate as a conclusive presumption since the prohibition did not preclude the landowners from showing that, despite excess coverage, there was no prohibited discharge for a proposed development.

(5)

Administrative Law § 29--Effect and Validity of Rules and Regulations.

An administrative rule, legislative in character is subject to the same test of validity as an act of the Legislature.

One who attacks such a rule has the burden of showing its unreasonableness. A standard that has no content is no standard at all and is unreasonable.

(6a, 6b, 6c)

Constitutional Law § 48--Police Power--Property and Its Uses--Taking--Ripeness.

A claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulation to the property at issue. Also, a taking claim is not ripe until the claimant has sought and been denied just compensation through available adequate procedures for obtaining compensation. Thus, the trial court properly granted the State Water Resources Control Board's motion for judgment on the pleadings of a complaint brought by landowners who were precluded from constructing residences on their lots due to a Lake Tahoe water quality control plan promulgated by the board. The landowners had not alleged that water discharge requirements under the plan had been sought, had not taken the proper steps so that the plan could be challenged on its face, and had not sought compensation for their property.

(7)

Constitutional Law § 49--Police Power--Court Review of Exercise-- Constitutionality of Regulation's Application.

The question whether an alleged unconstitutional application of a governmental regulation may be avoided is not governed by the conclusional allegations of the complaint. Rather, it turns upon the court's appraisal of the legal effect of the regulation.

(8)

Constitutional Law § 23--Constitutionality of Legislation--Raising Question of Constitutionality--Burden of Proof.

Landowners could not challenge the facial constitutionality of a Lake Tahoe water quality control plan promulgated by the State Water Resources Control Board, where they had not carried their burden of pleading compliance with available administrative means by which they might escape the strictures of the plan. Carrying that burden is a condition for obtaining an adjudication of the plan's constitutionality. The landowners' allegation that a specific application of the

plan's land classification scheme to their property was a foregone conclusion did not meet their burden, since the allegation was not supported by a persuasive showing. Thus, the landowners were limited to an attack on the plan as applied to themselves.

COUNSEL

Ronald A. Zumbrun, Robin L. Rivett and Fred A. Slimp II for Plaintiffs and Appellants.

John K. Van de Kamp, Attorney General, Robert H. Connett, Assistant Attorney General, and Edna Walz, Deputy Attorney General, for Defendants and Respondents. *1425

BLEASE, J.

This appeal concerns the lawfulness of measures adopted by the State Water Resources Control Board (Water Board) to prevent increased surface runoff of water carrying soil products into Lake Tahoe, caused by the increased land coverage of new development, from turning the lake from clear blue to turbid brown. The Lake Tahoe Basin Water Quality Plan (Plan) establishes standards which have the effect of limiting the amounts of land coverage by roads, buildings and the like, in designated areas within the basin. New development which exceeds land coverage standards in the Plan requires a permit from a regional board charged with the responsibility of enforcing the Plan.

Tahoe-Sierra Preservation Council, a nonprofit corporation, and eight owners of lots in the Lake Tahoe basin (plaintiffs) seek to invalidate the Plan as exceeding the statutory and constitutional authority of the Water Board. Plaintiffs contend that the trial court erred in granting judgment on the pleadings in their action for declaratory and injunctive relief. We hold that the Plan does not exceed the Water Board's statutory and constitutional authority to employ a permit system to enforce the Plan and conclude that the claims of unconstitutional taking are not ripe.

We will affirm the judgment with modifications.

Introduction

The plaintiffs first challenge the validity of the enforcement mechanism employed in the Plan, a permit system adopted pursuant to the waste discharge requirements provisions of the Water Code. (Wat. Code,

§§ 13260-13273.) We hereafter refer to this enforcement mechanism as the state permit system or waste discharge permit system. ([1])(See fn. 2.) Plaintiffs claim that the Water Board lacks statutory authority to adopt a water quality control plan which enforces limits on "nonpoint" sources of pollution, as here,² by means of such a state permit system. *1426

1 All further unspecified references to sections are to the Water Code.

2 Nonpoint sources are defined by obverse inference from the definition of point sources of water pollution, generally sources of pollution directly attributable to a specific property or project or action. A point source is defined under the Federal Water Pollution Control Act as a "discernible, confined and discrete conveyance ... from which pollutants are or may be discharged. ' (33 U.S.C. § 1362(14)); see *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 204 48 L.Ed.2d 578, 583, 96 S.Ct. 2022].) So viewed, we assume for purposes of this case that impervious surface coverage is a nonpoint source of the pollutants entering Lake Tahoe.

The challenge to the permit system implicates the scope of the Water Board's authority, under section 13170, to "adopt water quality control plans ... for waters for which water quality standards are required by the Federal Water Pollution Control Act" (FWPCA.) Plaintiffs argue that this authority is limited by the constraint they derive from federal law that a federal permit may not be used to regulate the nonpoint sources of pollution of waters subject to the FWPCA. As we show, the argument fails because the restrictions of the federal system do not limit the state's enforcement authority and hence are not applicable to the Plan.

Alternatively, plaintiffs claim that the Plan violates section 13360, which prohibits the Water Board from specifying the particular manner of compliance with the state permit system. The Plan precludes water runoff above that which could occur under the permitted limitations on land coverage. As we shall explain, the Plan does not preclude any means of compliance with this runoff limitation and hence does not improperly specify the particular manner of compliance.

Plaintiffs also claim the Plan is unconstitutional. They first claim that the Plan's coverage standards deny them procedural due process of law. They argue that the waste

discharge standards must be stated in terms of quantities of identified materials that may be discharged from their property; that since the Plan regulates the sources of pollution by restricting land coverages they are deprived of a fair opportunity to prove that they can develop their lands in excess of the permitted coverage without adversely affecting the water quality of the lake. The challenge fails for the reason that plaintiffs are afforded an adequate opportunity under the Plan to show compliance with the substantive runoff standard and that is all the process which they are due. Plaintiffs' alternative casting of the perceived defect, as a prohibited conclusive presumption - that the land classification conclusively determines the permitted amount of discharge - fails for the same reason. The Plan does not rule out any mode of evidence that plaintiffs might adduce to establish compliance by their proposed development with the substantive rule of discharge.

Plaintiffs then claim that the Plan amounts to an unconstitutional regulatory taking of their property without just compensation. We shall conclude that the claim is not ripe.

Facts and Procedural Background

The appeal arises from a judgment on the pleadings. For that reason, the factual assertions material to the resolution of the appeal are derived from *1427 the pleadings and matters which were judicially noticed by the trial court or are so noticeable by this court. The following claims of fact are derived from plaintiffs' complaint, the Plan as amended which is incorporated therein, and a Plan amendment adopted in January 1983 which was put before the trial court by the Water Board's motion for judicial notice.

Lake Tahoe is extraordinarily clear and pure. It is possible to see to depths of over 120 feet. Extremely low rates of growth of algae in the lake impart a deep blue color, unsurpassed by any lake in the world. Geology, soils, vegetation, and human activities profoundly influence the rate of nutrient input to the waters of the Lake Tahoe basin and thus determine the quality of the lake and its tributaries. Rapid development in the basin over the past two decades is causing a deterioration of the water quality of the lake. Over the past 20 years, the rate of algal growth in the lake has doubled. The algal growth rate is increasing at an accelerating rate. Evidence indicates that the lake's exceptional water clarity has diminished within the last

decade. If the trend continues, the lake's translucent blue color will be altered.

The surface runoff of water carrying soil products into the lake is the principal source of pollutants which induce the growth of algae in the lake. Water runoff breaks down basin soils and transports erosion products to the lake. These erosion products include soil particles, which cause turbidity and sedimentation, and nutrients, which stimulate algal growth. Under natural conditions, surface runoff of water entering Lake Tahoe contains extremely low concentrations of suspended sediment and nutrients. The natural balance, however, is easily upset.

Development in the basin has greatly upset the natural balance by the increased generation of sediment and nutrients. This occurs because development removes the vegetative cover decreasing the infiltration of water into the soil by precipitation, thereby increasing the runoff of water and the accompanying soils. Erosion rates dramatically increase and the uptake of nutrients by vegetative cover decreases when the cover is removed. Development increases impervious surface area, i.e. area impervious to the penetration and infiltration of water. The construction of structures, paved areas, and other impervious surfaces decreases infiltration of water and greatly increases surface runoff of water. Natural channels downstream of paved areas experience increased runoff rates and erosion. Finally, development creates unstable conditions. Areas stripped of vegetative cover are left bare. Cut and fill slopes often are steeper than the natural angle of repose and have no surface protection. Stream environment zones are overloaded by *1428 increased runoff and sediment loads. Construction and filling within stream environment zones convert slow sheet flow into channelized flow.

The need for water quality standards and water quality planning to protect Lake Tahoe has long been recognized. In 1966, the Federal Water Pollution Control Administration (now the Environmental Protection Agency) convened the Conference of the Matter of Pollution of the Interstate Waters of Lake Tahoe and Its Tributaries. The conference found that sewage disposal and erosion caused by development within the basin threatened the water quality of the lake. The conference recommended adoption of more stringent water quality standards, export of all wastewater and solid waste from the basin, and enforcement of tighter

controls over development. Shortly after the conference the California Regional Water Quality Control Board, Lahontan Region, adopted a water quality control policy. Nevada adopted standards in 1967.

The primary objective of the policy adopted by the Lahontan Regional Board was "to maintain the waters of Lake Tahoe in their present natural state of crystal clarity and pristine purity." The policy prohibited the discharge of sewage or solid waste to surface waters in the Lake Tahoe basin. It also called for control of erosion and urban runoff. Various measures were undertaken to abate problems attributable to sewage and solid waste. These efforts have been successful in large part.

The principal remaining threat to Lake Tahoe is erosion. In 1970 the Lahontan Regional Board adopted the addendum to the Lake Tahoe water quality control policy regarding control of siltation. The addendum prohibits the discharge of earthen materials to surface waters. Any activity causing erosion which adds silt to Lake Tahoe or its tributaries violates the prohibition. The addendum also prohibits the deposit of any earthen material below the high water mark of the lake or within the 100-year flood plain of any stream. Nevada adopted similar standards in 1973.

A system developed by the forest service in 1971, in cooperation with the Tahoe Regional Planning Agency (TRPA), provides a relative quantification of tolerance of land in the basin to human disturbance. The classification system provides allowable percentages of impervious cover and is set out in Bailey, Land Capability Classification of the Lake Tahoe Basin, California-Nevada (1974). (Hereafter Bailey system.) Factors evaluated under the Bailey system in determining an area's land capability include the hazards from floods, high water tables, poorly drained soils, landslides, fragile flora and fauna, soil erodibility, and slope steepness. All of these factors affect sediment generation from an area following disturbance. *1429 Lands in the basin are grouped into three general risk categories, high, moderate, and low, representing the hazard of disturbance from development. The Bailey system was made the basis of coverage standards adopted by the TRPA and the California TRPA.

In July 1978 the Water Board, dissatisfied with efforts of the TRPA to establish controls and enforcement

mechanisms that would abate the persistent water quality problems caused by erosion resolved to prepare its own plan. The Plan was released in draft form in January 1980. It was adopted by the Water Board on October 29, 1980. The Plan incorporates the Bailey system. It prohibits discharge of waste attributable to new development in stream environmental zones or new development which is not in accordance with the classification system. The Plan was drafted to satisfy California's obligations for an areawide waste treatment plan under the FWPCA. However, the Plan was also independently grounded in the Water Board's authority under state law.

Soon after the Water Board adopted the Plan plaintiffs filed this action challenging its validity. The Water Board moved for judgment on the pleadings, which the trial court, in August 1982, granted in part and denied in part with leave to amend. The plaintiffs then filed their second amended complaint, which provides the grist for this appeal. In it plaintiffs allege, in material part, as follows:

The plaintiffs who are landowners purchased six lots in single family residence subdivisions, in areas subject to the Plan restrictions, respectively in 1960, 1975, 1975, 1978, 1978, and 1979. Two of them are in areas designated as stream environment zones, three are in areas designated as class 1 zones, and one is in an area designated as a class 3 zone. As a result of the restrictions in the Plan plaintiffs with lots in stream environment zones are precluded from constructing residences upon these lots. As a result of restrictions in the Plan combined with limitations of minimum coverage requirements imposed by *other* governmental regulations the other landowner plaintiffs are precluded from constructing residences.

The Water Board answered the second amended complaint and again moved for judgment on the pleadings. The trial court granted the motion as to all but two counts of the second amended complaint. The Water Board responded to the partial denial by promulgating an amendment to the Plan in January 1983 to explicitly state that landowners would be afforded an opportunity to prove that a proposed development exceeding the coverage limitations would *not* result in a discharge of sediment and nutrients greater than that which would occur if the coverage standard was met. The Water *1430 Board then moved for judgment on the pleadings

(with judicial notice of the Plan amendment) as to the outstanding counts. The motion was granted.

Discussion

I

The Plan seeks to control the water quality of Lake Tahoe by limiting the introduction of sediment, nutrients and other soil products into the lake through water runoff by regulation of the amount of impervious surface coverage of land within the Lake Tahoe basin. It expressly provides for enforcement of the land coverage limitations by a permit system under the waste discharge requirements provisions of the [Water Code](#) (§§ 13260-13273).

(2) Plaintiffs seek invalidation of the use of the state permit system and with it the entire Plan.³ They argue that this means of enforcement may not be employed to regulate a nonpoint source of pollution affecting the waters of Lake Tahoe, in which category they place impervious surfaces.⁴ They claim that the Water Board's authority under [section 13170](#) to enact a water quality control plan "required by" the FWPCA (33 U.S.C. § 1251) precludes the use of the state permit system to regulate nonpoint sources of pollution. They reason that since under the federal act federal permits are not used for regulation of nonpoint sources of pollution the state may *not* do so by resort to its own authority.

³ Plaintiffs do not address the question whether the enforcement mechanism of the Plan, the permit system, is an inseparable part of the Plan such as to require invalidation of the whole if the part is found defective. (Cf. *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 329 334 226 Cal.Rptr. 640.) Rather, they assume that to be the case. The assumption is not viable. If plaintiffs' argument were persuasive this would not compel invalidation of the Plan. The Water Board in a water quality control plan within its jurisdiction may "specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted. (§ 13243.) Such discharge prohibitions may be enforced by cease and desist orders of the regional water quality control board. (See § 13303; Ayer, *Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup* (1971) 1 Ecology L.Q. 40, fn. 245.) Since we find no flaw in the use of

the waste discharge permit system we need not pursue this analysis.

⁴ An initial difficulty with plaintiffs' claim that the Plan is invalid on this ground is that it is nowhere alleged in the plaintiffs' second amended complaint. Nonetheless, we consider the claim because it was presented in a plaintiffs' memorandum and was considered and rejected on its merits by the trial court. This action may have misled the plaintiffs into the otherwise insupportable belief that their pleading was adequate to tender the claim. Though we consider the claim, we do not approve this as a proper manner of pleading a cause of action.

Plaintiffs principally rely upon [section 13374](#) as the interpretive springboard for this view. It provides that "The term 'waste discharge requirements' *1431 as referred to in this division is the equivalent of the term 'permits' as used in the Federal Water Pollution Control Act, as amended." Plaintiffs argue that this equation of the state with the federal permit system restricts the employment of the state permit system to the regulation of the point sources of pollution to which the federal permit system is limited. They reason that, because the state is carrying out a federal mandate, its authority must be limited in precisely the same way that the federal regulatory authority is limited. Plaintiffs do not comment on the inconsistent fact that the federal act *mandates* state regulation of nonpoint sources by means of the state's choosing.

The Water Board replies that the equivalency contemplated by [section 13374](#) "shall apply only to *actions required* [of the states] under the [FWPCA]" (§ 13372, italics added) and that the use of the state permit system to enforce limitations in the Plan on nonpoint sources of pollution is not such an action. Simply put, the Water Board says that the state is free to regulate nonpoint sources as it chooses, and it has chosen to do so by employment of the state's waste discharge permit system.

We agree with the Water Board. The flaw in plaintiffs' argument is that it requires that we read provisions of the Water Code, designed to ensure a limited conformity of state law with federal law, to *oust* the state of its *own* powers to control nonpoint sources of water pollution. Such an implied repeal of existing regulatory authority is impermissible where unaccompanied, as here, by an express intention to accomplish that result. (See, e.g., *Fuentes v. Workers' Compensation Appeals Bd.* (1976)

16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449]; *American Friends Service Committee v. Proconier* (1973) 33 Cal.App.3d 252, 260 [109 Cal.Rptr. 22].) We read section 13374 as requiring equivalency *only* for purposes of state compliance with the *minimum* requirements of the federal mandate. The federal law does not preclude the state from utilizing its broader authority to regulate nonpoint sources of pollution by means of its waste discharge permit system. In fact it mandates that some means of regulation under state law be applied to those sources. The proof of these conclusions requires an analysis of the history and structure of the material portions of the California water control law.

A.

The Water Board's regulatory authority over the waters of Lake Tahoe derives from section 13170. It provides that the Water Board "may adopt water quality control plans ... for waters for which water quality standards are required by the Federal Water Pollution Control Act" The section was enacted in 1971, the year before the enactment of section 13374, *1432 the provision relied on by plaintiffs. (Stats. 1971, ch. 1288, § 6, p. 2524.) The provisions, of which section 13374 is a part, were enacted by the Legislature in 1972 as chapter 5.5 of division 7 of the Water Code. The announced purpose of this enactment was to ensure "consistency" of California's water quality control law with the FWPCA, as amended in 1972. (§ 13372; Stats. 1972, ch. 1256, eff. Dec. 19, 1972.)

Nothing in the enactment suggests that the Legislature meant thereby to oust the state of its regulatory authority, contained in division 7 of the Water Code, providing that it is consistent with federal law. On the contrary, section 13372 declares that "[t]o the extent other provisions of this division are consistent" with the new provisions those "provisions shall be applicable to actions and procedures provided for in this chapter." The consistency contemplated by this provision is measured by the purpose of the federal law to control water pollution in navigable waters. There is nothing in the federal act to suggest that a state may not provide for more stringent regulation. Indeed, as we will show, both federal and state law contemplate the opposite, *state* regulation of nonpoint sources of pollution pursuant to *state* law. This brings us to the state law and its relation to the FWPCA.

B.

The Plan contemplates enforcement of its standards under sections of the Water Code which provide for issuance of waste discharge permits which prescribe the nature of proposed discharges, existing discharges, or material changes therein. (§ 13263.) A discharge or threat of discharge of waste in violation of requirements subjects the violator to civil penalties. (See § 13301 et seq.) Plaintiffs argue that this means of enforcement can only be used to regulate water pollution from activities that are "point sources" within the meaning of the FWPCA. As related, they principally rely upon section 13374.

Section 13374 must be viewed against the backdrop of the provisions of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), division 7 of the Water Code was enacted in 1969. (§ 13020.) The act assigns the governance of water quality to the Water Board and nine regional boards. (§§ 13050, 13200 et seq.) At the outset the Water Board was assigned authority to adopt water quality control plans for interstate or coastal waters or other waters of interregional or statewide interest. (Former § 13142, subd. (c); Stats. 1969, ch. 482, § 18, p. 1055.) The authority to adopt water quality control plans carries with it the authority to employ the waste discharge permit system as a means of enforcement set forth in division 7 of the Water Code. That is so because a water quality control *1433 plan consists of a statement of: "(1) beneficial uses to be protected, (2) water quality objectives, and (3) a program of implementation needed for achieving water quality objectives." (§ 13050, subd. (j).) The program of implementation contemplates employment of the various remedial devices set forth in division 7 of the Water Code.

In 1971 the Porter-Cologne Act was amended and the provision assigning the Water Board responsibility for interstate, coastal, interregional, and statewide interest waters was deleted. (Stats. 1971, ch. 1288, § 2, p. 2523.) In its place section 13170 was enacted which says the Water Board may adopt water quality control plans "for waters for which water quality standards are required by the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto." (Stats. 1971, ch. 1288, § 6, p. 2524, fn. omitted.) Upon adoption such plans supersede regional plans to the extent of any conflict. (*Ibid.*)

The Water Board asserts that the Plan is a water quality control plan adopted under section 13170.⁵ Under the

Porter-Cologne Act a water quality control plan may specify certain conditions or areas where the discharge of waste, or certain types of waste will not be permitted. (§ 13243; also see § 13170.) Anyone who discharges or proposes to discharge waste must file a report with the appropriate regional board. (§ 13260.) The regional board may waive this requirement where waiver is not against the public interest. (§ 13269.) The regional board implements the water quality control plans by prescribing requirements for particular discharges. (§ 13263.)

5 Plaintiffs' opening brief characterizes the Plan as a 208 plan under the FWPCA and claims that the Water Board is without authority to adopt such a plan. The argument leads down a blind alley. Plaintiffs concede that the Plan was submitted to EPA as a 303 plan under 33 United States Code section 1313. Since the Water Board's authority under section 13170 extends to a 303 plan, the 208 plan argument is a meaningless excursion. Neither party addresses the relationship under the FWPCA of the two types of plans, nor is such a discussion to be found in the FWPCA or secondary materials we have reviewed.

C.

In October 1972 Congress enacted Public Law number 92-500, an extensive amendment, reorganization, and expansion of the FWPCA. (A succinct discussion of the purposes and effect of the enactment is provided in *EPA v. State Water Resources Control Board*, *supra*, 426 U.S. 200 [48 L.Ed.2d 578], hereafter *EPA v. Water Board*.) Under the prior law, states had only been required to develop standards for interstate navigable waters. *The means of enforcement were left to the states.* (See Sen.Rep. No. 92-414 [hereafter Senate Report], as reprinted in 1972 U.S. Code Cong. & Admin. News, at pp. 3668-3669.) Under the 1972 amendments states are required to *1434 develop standards for all navigable waters including intrastate navigable waters. (See 33 U.S.C. § 1313(a).) Additionally, states are required to prepare and establish an inventory of publicly owned freshwater lakes and adopt procedures to control sources of pollution in such lakes. (33 U.S.C. § 1324.)

The 1972 enactment made other significant changes in the FWPCA system. Congress was apparently dissatisfied with the pace of correction under the prior regime in which the means of enforcement of water quality standards was unspecified and left to the states to develop without a structured federal procedure. (See Stewart & Krier,

Environmental Law and Policy (1978) pp. 505-510.) To remedy this defect the 1972 enactment provides for direct restrictions on discharges of pollution by establishment of "effluent limitations" (restrictions on constituents which are discharged to navigable waters from any point source, 33 U.S.C. § 1362(11)) for "point sources." (33 U.S.C. § 1342.) Effluent limitations on point sources of pollution are enforced by a permit system, the National Pollution Discharge Elimination System (NPDES). (*Ibid.*)

The FWPCA provides that states with appropriate regulatory systems may administer the NPDES. (See Sen.Rep., U.S. Code Cong. & Admin. News, *supra*, p. 3675; 33 U.S.C. § 1342.) It also retains the earlier federal law which requires that nonpoint sources of water pollution *must* be identified in areawide waste treatment management plans developed by state or regional entities and controlled to the extent feasible by (unspecified) means available to state and local authorities. (33 U.S.C. § 1288.) States thus are not only free to adopt but are *mandated* to adopt and enforce standards with enforcement mechanisms derived from state law. (33 U.S.C. § 1370.)

D.

In response to the FWPCA California replaced former section 13142, subdivision (c), with section 131270. In response to the 1972 amendment of the FWPCA California added chapter 5.5 to division 7 of the Water Code. The purpose of this amendment is set out in the urgency clause: "The Federal Water Pollution Control Act as amended in 1972 requires the state to have certain powers in order to continue to regulate waste discharges to navigable waters of the United States. The powers contained in this act will allow the State Water Resources Control Board and the regional water quality control boards to comply with federal requirements and continue to regulate waste discharges." (Stats. 1972, ch. 1256, § 3, p. 2490.) Section 13374, upon which plaintiffs' argument hinges, was enacted as part of this amendment. As related, it says that "waste discharge requirements" as *1435 referred to in division 7 is the "equivalent" of "permits" as used in the FWPCA.

The federal permit system, NPDES, applies only to point sources of pollution. (33 U.S.C. §§ 1311(a), 1362(12); see *National Wildlife Federation v. Gorsuch* (D.C. Cir. 1982) 693 F.2d 156, 164-165 [693 F.2d 156].) As the Water Board notes, the waste discharge permit system

long predates the NPDES and has been employed to regulate water pollution regardless of its origin in a point or nonpoint source under the authority of state law. (See, e.g., 63 Ops.Cal.Atty.Gen. 51 (1980).) This usage was expressly endorsed by the Legislature in the enactment of the Porter-Cologne Act. (See Stats. 1969, ch. 482, § 36; 63 Ops.Cal.Atty.Gen. at pp. 56-57.) It is reflected in the organization of regulations of the Water Board which contain separate articles addressed to procedures for waste discharge requirements pertaining to discharges from point sources to navigable waters and to discharges other than from point sources to navigable waters. (23 Cal. Code Regs., subchapter 9, arts. 2 and 3.)

E.

That brings us back to the provisions of [section 13374](#). It provides: “The term ‘waste discharge requirements’ as referred to in this division is the equivalent of the term ‘permits’ as used in the Federal Water Pollution Control Act, as amended.”

Plaintiffs concede that prior to enactment of [section 13374](#) the Water Board was free to enforce water pollution standards implicated by discharges from nonpoint sources by means of waste discharge requirements under section 13263. Moreover, they assert that this means may be used to enforce water pollution standards implicated by nonpoint sources if the water being polluted is *not* a body for which standards are mandated by the FWPCA. However, they read [section 13374](#) as a voluntary relinquishment of state power to use the waste discharge permit system with respect to nonpoint sources of pollution implicating water quality standards in waters subject to the FWPCA. Plaintiffs suggest no persuasive reason for such a selective relinquishment of authority to achieve water quality standards. There is nothing in the history or provisions of the statutory system of water pollution control to suggest such an intention. It is not to be drawn from the provisions of [section 13374](#), to which we will turn for detailed analysis.

In section 13000 the Legislature set out various findings at the time of enactment of the Porter-Cologne Act. One of these findings is “that the state must be prepared to exercise its full power and jurisdiction to protect *1436 the quality of waters in the state from degradation originating inside or outside the boundaries of the state” (*Ibid.*) It is unnatural to read a relinquishment

of state power and jurisdiction into this act absent an unambiguous legislative direction.

The obvious purpose of the declaration of equivalence in [section 13374](#) between waste discharge requirements under the act and the term permits under the FWPCA is to qualify California to self-administer the NPDES. (See § 13370.) This is evident in the urgency clause of the enactment in which chapter 5.5 was contained. As related, “The [FWPCA] as amended in 1972 requires the state to have certain powers in order to continue to regulate waste discharges to navigable waters of the United States. The powers contained in this act will allow the [Water Board] and the regional water quality control boards to comply with federal requirements and continue to regulate waste discharges.” (Stats. 1972, ch. 1256, § 3, p. 2490.) In order to qualify to administer the NPDES a state must meet various criteria concerning the kind of permits issuable under state law. (33 U.S.C. § 1344(h).) However, use of an identical permit system, under state law, to regulate nonpoint sources of pollution would not *disqualify* the state to self-administer the NPDES.

The function of [section 13374](#) is to incorporate the federal criteria into the definition of waste discharge requirements. This purpose fully accounts for the meaning of “equivalent” in [section 13374](#). To accomplish this purpose it is not necessary that [section 13374](#) be read as a limitation on the ends to which state permits (waste discharge requirements) may be employed when *not* required under the NPDES. That is especially true since the FWPCA recognizes the problem of nonpoint sources of pollution but leaves it to the states to fashion suitable remedial devices. There is no federal constraint which requires a different system for state permits issued under NPDES and permits issued under state authority to regulate activities not subject to the NPDES. When we say A is the equivalent of B with respect to an end in view that does not entail the conclusion that A and B are identical with respect to other ends. Hence, the first answer to plaintiffs’ interpretive claim is that equivalent does not mean identical with respect to restrictions not required by federal law.

F.

There are additional answers. As the Water Board notes, section 13372 qualifies the application of [section 13374](#). Section 13372, as it now reads, says: “This chapter shall be construed to assure consistency with the

requirements for state programs implementing the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto. To the *1437 extent other provisions of this division are consistent with the provisions of this chapter and with the requirements for state programs implementing the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, those provisions shall be applicable to actions and procedures provided for in this chapter. The provisions of this chapter shall prevail over other provisions of this division to the extent of any inconsistency. The provisions of this chapter shall apply only to actions required under the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto. The provisions of this chapter relating to the discharge of dredged and fill material shall be applicable only to discharges for which the state has an approved permit program, in accordance with the provisions of the Federal Water Pollution Control Act, as amended, for the discharge of dredged and fill material.” (Stats. 1987, ch. 1189, § 3.) Section 13372 and section 13374 must be read together and in the context of enactment of chapter 5.5 for the purpose of allowing California to administer the NPDES.

The Water Board suggests that “actions required under the [FWPCA]” in section 13372 only means actions pertaining to the administration of the NPDES (and any other federally required permit systems under the FWPCA.) This is consistent with the purpose of chapter 5.5. Plaintiffs’ ultimate thesis is that the chapter is applicable to all “actions” taken under the FWPCA including all components of the adoption of water quality standards and implementation plans. Under their reading, section 13374 would preclude the state agency charged with adopting water quality standards and implementation plans under the FWPCA (33 U.S.C. § 1313) from continuing to use the state’s permit system to regulate pollution from nonpoint sources as a part of its implementation plan.

Assuming for the sake of argument that the import of section 13372 is that chapter 5.5 is to apply to all actions required under the FWPCA,⁶ plaintiffs’ reading is nevertheless unpersuasive. It is inconsistent with the history of California’s statutory program to regulate water pollution and the action is not “required by” the FWPCA. The federal law neither requires nor prohibits the control of pollution from nonpoint sources by means

of a permit system. Accordingly, the employment of a permit system to regulate nonpoint source pollution in a plan implementing the federal law is not an “action [] required under the [FWPCA].” (§ 13372, italics added.)

*1438

6 The Water Board notes that the direction that chapter 5.5 is applicable “only to actions required under the FWPCA] does not mean that the chapter is applicable to every action required under the FWPCA. Carefully read this only says that the chapter is inapplicable to actions not required under the FWPCA.

II

([3]) Plaintiffs contend that the Plan is invalid because it conflicts with section 13360.⁷ Section 13360 says that the Water Board may not prescribe the manner in which compliance may be achieved with a discharge standard. That is to say, the Water Board may identify the disease and command that it be cured but not dictate the cure. The Plan sets a discharge prohibition - no greater discharge than would occur if the coverage standard were met. It does not dictate the manner in which a landowner can meet the standard. This presents no violation of section 13360. Plaintiffs appear to argue that the Water Board has violated section 13360 because the Water Board expects that the only practical manner of complying with the discharge standard is to comply with the coverage restrictions. Plaintiffs’ claim, boiled to its essence, is that if only one manner of meeting a discharge standard is feasible the Water Board may not prohibit the discharge. This contention is devoid of merit.

7 Section 13360 said at the pertinent time: “No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply therewith in any lawful manner. However, regarding disposal sites other than evaporation ponds from which there is no drainage or seepage, the restrictions of this section shall not apply to waste discharge requirements or orders or decrees with respect to the discharge of solid waste requiring the installation of riprap, the construction of walls and dikes, the installation of surface and underground

drainage facilities to prevent runoff from entering the disposal area or leakage to underground or surface waters, or other reasonable requirements to achieve the above or similar purposes. If the court, in an action for an injunction brought under this division, finds that the enforcement of an injunction restraining the discharger from discharging waste would be impracticable, the court may issue any order reasonable under the circumstances requiring specific measures to be undertaken by the discharger to comply with the discharge requirements, order or decree. (Stats. 1981, ch. 714, § 453, p. 2803.)

Section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement; it is not a sword precluding regulation of discharges of pollutants. It preserves the freedom of persons who are subject to a discharge standard to elect between available strategies to comply with that standard. That is all that it does. If, under present conditions of knowledge and technology, there is only one manner in which compliance may be achieved, that is of no moment. (*Pacific Water Conditioning Assn., Inc. v. City Council* (1977) 73 Cal.App.3d 546, 554 [140 Cal.Rptr. 812].) Where the lack of available alternatives is a constraint imposed by present technology and the laws of nature rather than a law of the Water Board specifying design, location, type of construction or particular manner of compliance, there is no violation of **section 13360**. *1439

III

([4a]) Plaintiffs contend that the Plan denies them procedural due process of law because the discharge prohibition is no greater discharge than would occur because of development within the permitted coverage restrictions. Plaintiffs argue that it is a denial of due process to fail to specify discharge in terms of quantities of materials. They argue that they are unfairly precluded from showing they can develop and nonetheless meet the Plan water quality standards because the coverage standard does not specify discharge in terms of quantities of materials. As appears, plaintiffs' real grievance is not that the form of the discharge prohibition is unfair but rather that the substance of the discharge prohibition may preclude a showing that a development with excess coverage is in compliance with the prohibition. We perceive no cognizable unfairness in the standard which undergirds the discharge prohibition.

The Water Board's discharge prohibition is an administrative rule. ([5]) An administrative rule, legislative in character, is subject to the same tests of validity as an act of the Legislature. (See *Knudsen Creamery Co. v. Brock* (1951) 37 Cal.2d 485, 494 [234 P.2d 26].) One who attacks such a rule has the burden of showing its unreasonableness. (E.g. *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408 [95 Cal.Rptr. 852].) A standard that has no content is no standard at all and is unreasonable. (See generally *Wheeler v. State Bd. of Forestry* (1983) 144 Cal.App.3d 522, 527-528 [192 Cal.Rptr. 693].) Plaintiffs claim that the discharge prohibition is unreasonable on this ground, but do not support it by persuasive reasoning or examples of the manner in which the prohibition is deficient.

([4b]) Plaintiffs argue that they cannot show that a development exceeding the coverage restriction will not cause a prohibited discharge because the Plan does not tell them what a prohibited discharge is in terms of amounts of materials attributable to incremental runoff. Plaintiffs assert that they cannot compare the discharge attributable to a development with excess coverage with a permissible coverage development without a qualitative and quantitative analysis of a permissible discharge. They suggest that it is incumbent upon the Water Board to assert the quantities of materials that are permitted so that the landowner can prove that a proposed development exceeding the coverage restrictions would not generate an impermissible discharge. The argument is faintly reminiscent of the disingenuous request in Hansel and Gretel that Gretel be shown how to enter the oven.

We are given no reason why the classification system, incorporated in the Plan, and the provisions of the Plan do not afford a landowner sufficient *1440 information concerning the causes and nature of the discharge of soil products into Lake Tahoe attributable to excess coverage of land to address the discharge prohibition. The factors causing discharge are listed in those materials. There is no indication that it is impossible to reason from those factors and the quantitative coverage standards contained in the land classification scheme to an adequate approximation of the permissible incremental runoff. To make the comparison called for by the discharge prohibition the landowner must show that in some fashion the incremental runoff caused by excess coverage will be contained and disposed of in a manner that will not give rise to increased discharge of sediment and nutrients into

Lake Tahoe. If the landowner can show that additional runoff, attributable to the impervious surface coverage of his parcel, has been averted in some manner, this will satisfy the standard upon which discharge prohibition is predicated. We perceive no intrinsic unfairness in this kind of standard in light of the nature of the problem that is addressed by the Plan.

Plaintiffs' real complaint is that they know of no present, feasible technology that would enable them to develop in excess of the coverage restrictions and not cause incremental detrimental runoff. That problem, however, is one of substantive due process and not procedural due process. The plaintiffs have not pled such a claim and hence that question is not properly before us. Nonetheless, we note that nothing in plaintiffs' arguments poses a tenable substantive due process claim. To prevail on such a claim plaintiffs would have to establish that the discharge of pollutants attributable to added impervious surface is not rationally related to a legitimate state interest. (See *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 368-369 [204 Cal.Rptr. 671, 683 P.2d 670, 41 A.L.R.4th 233].) On this record there is no lack of support for the conclusion by the Water Board that water runoff in excess of that attributable to the permitted coverage will cause increased erosion and increased transportation of sediment and nutrients into Lake Tahoe with a consequent increase in the turbidity and discoloration of the lake. It is incontestable that avoidance of this consequence is a legitimate state interest. (See *Morshead v. California Regional Water Quality Control Bd.* (1975) 45 Cal.App.3d 442, 449 [119 Cal.Rptr. 586].) Indeed, plaintiffs impliedly concede as much in their "taking" argument.

Plaintiffs' related attack on the form of the discharge standard is that it operates as a conclusive presumption. This attack is also unpersuasive. Plaintiffs argue that the discharge prohibition eliminates the means by which they might show that a proposed excess-coverage development will not in fact result in a prohibited discharge. They imply that the "elimination" of the opportunity is achieved by failure to state a discharge standard *1441 in quantitative terms. But the discharge prohibition does not preclude plaintiffs from showing that, despite excess coverage, there is no prohibited discharge for a proposed development, as explained above. No mode of evidence to prove the ultimate fact of the absence of excess discharge

is barred by the discharge prohibition. It does not operate as a conclusive presumption.

IV

[(6a)] Plaintiffs contend that the trial court erred in rejecting the claim that Plan is invalid because it amounts to a taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and article I, section 19, of the California Constitution. Plaintiffs argue that the Plan restrictions constitute an unreasonably excessive regulation which rises to the level of a taking. Their second amended complaint seeks a declaration that: "... the absolute prohibitions against development in the Tahoe Plan are facially invalid and invalid *as applied* to plaintiffs' property because they preclude substantially all reasonable and beneficial use of plaintiffs' property, thereby constituting a taking of private property for public use without payment of just compensation" (Original italics.) Thus, two kinds of takings claims are proffered. The Water Board argues, inter alia, that these claims are not ripe for adjudication. This argument is persuasive and dispositive.⁸

⁸ The position of the Water Board on the merits is that there is no taking, even assuming as pled that the effect of the Plan is to preclude substantially all reasonable and beneficial use. The Water Board argues there is no "right to use land in a manner that causes water pollution, such use is a public nuisance or similar to a public nuisance, and a prohibition of an activity does not count as a taking. This rationale was recently discussed in *Keystone Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 491 494 94 L.Ed.2d 472, 490 493, 107 S.Ct. 1232]. We entertained a similar defense in *Fallen Leaf Protection Assn. v. State of California* (1975) 46 Cal.App.3d 816. The trial court accepted the Water Board's position on the merits. "The Water Board] correctly point s] out, however, that proscriptions on the taking of private property have not been applied so as to require government to pay for the abatement of the pollution of its waters or other forms of direct nuisance. Citations omitted.] ¶ The bottom line is that the State of California does not have to pay people to keep them from turning Lake Tahoe brown. Because the claims here are not ripe we do not reach this issue.

The preliminary question is whether plaintiffs have tendered a triable takings claim that the Plan is invalid on its face. A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties. (See, e.g., *Pennell v. City of San Jose* (1986) 42 Cal.3d 365 [228 Cal.Rptr. 726, 721 P.2d 1111]; *CSEA v. State of California* (1988) 199 Cal.App.3d 840, 846 [245 Cal.Rptr. 232]; 2 Longtin's Cal. Land Use *1442 (2d ed. 1987) §§ 12.04[5], 12.15[3], 12.30[3].) This restraint stems from the prudent judicial policy of avoiding officious checking of the political branches of the government. (See Tribe, *American Constitutional Law* (1988) § 3-10; cf., e.g., *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65-66 [195 P.2d 1]; *People v. Williams* (1976) 16 Cal.3d 663, 667 [128 Cal.Rptr. 888, 547 P.2d 1000].) ([7]) The question whether an alleged unconstitutional *application* of a regulation may be avoided is not governed by the conclusional allegations of the complaint. Rather, it turns upon the court's appraisal of the legal effect of the regulation. (See, e.g., *Agins v. Tiburon* (1980) 447 U.S. 255, 259, fn. 6 [65 L.Ed.2d 106, 111, 100 S.Ct. 2138].)

([6b]) We will assume, for the sake of the present argument, that the Plan would count as a taking by overregulation if it were applied to preclude the construction of any residential structure on the parcels of the landowner plaintiffs. However, we cannot accept the conclusional assumptions of the plaintiffs concerning how the Plan would be applied to them. Specifically, we cannot accept as true the controverted allegations concerning how the parcels in issue would be characterized under the classification system of the Plan. Under the Plan each plaintiff is entitled to an administrative review of the applicability of the land coverage standards, established for the zone in which his parcel is located, and may show that the specific property does not share the characteristics of the standards by which the general classification is measured. (See *California Tahoe Regional Planning Agency v. Day & Night Electric, Inc.* (1985) 163 Cal.App.3d 898, 901 [210 Cal.Rptr. 48] [property classification altered from 1 percent to 24 percent coverage in an administrative review process].)

Until plaintiffs have sought a waste discharge requirement under the Plan from the responsible administrative authorities, it cannot be ascertained whether there is any potential taking in the application of the Plan to the

“complaining parties” for it cannot be shown that the Plan has any effect on the beneficial use of the plaintiff's property. For the reasons that follow concerning the lack of ripeness of a claim that the Plan results in a taking as applied to the parcels in issue, plaintiffs are necessarily limited to an attack on the Plan as applied.⁹ We note that this was the view of the trial court in *1443 granting judgment on the pleadings to plaintiffs' facial taking claim in their penultimate complaint.

9 Plaintiffs fare no better if we assume for the sake of argument that they could tender a third party taking claim, i.e., without showing that they are a person affected by the regulation. For example, plaintiffs assert that since under the Plan new coverage is effectively precluded in “stream environmental zones SEZ] the Plan is amenable to a facial attack with respect to that aspect. However, it cannot be said from looking at the face of the Plan that such rule necessarily results in a taking. (Once again, assuming for the sake of argument that barring new development here is not justified under the nuisance exception to the takings prohibition.) The rule as to SEZ's could only result in a facial taking if it were incontestable that there is land subject to the rule for which there is no feasible economic use that does not require new coverage. But it is not self evident that there is such land for which there are categorically no feasible alternative uses. That question turns upon the nature and character of particular parcels and the economic viability of alternative uses that may be available depending, for example, upon the terrain, location, and customs of land usage. To attack the rule plaintiffs must adduce an evidentiary showing that the application of the rule to their land would leave them without a viable economic use. That is to say they must attack the rule *as applied* to a particular piece of property.

A.

“[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” (*Williamson Planning Comm'n. v. Hamilton Bank* (1985) 473 U.S. 172, 186 [87 L.Ed.2d 126, 139, 105 S.Ct. 3108].) Here, none of the landowner plaintiffs alleges that a waste discharge requirement for a proposed development was sought. As the Water Board notes, the Plan does not establish the classification of *parcels* of

property. It sets forth a methodology for ascertaining the appropriate classification and presumptively places land in zones bearing that classification. The general classification scheme assumes that all of the land within a zone shares the characteristics arrived at by application of the land classification methodology. However, the methodology is amenable to specific application to a parcel of property and the reviewing body has interpretive latitude in making that determination. (Cf. *California Tahoe Regional Planning Agency v. Day & Night Electric, Inc.*, *supra*, 163 Cal.App.3d at p. 901.) The exercise of this interpretive latitude is assigned in the first instance to the regional water quality control board that must pass upon a request for a waste discharge requirement.

Plaintiffs argue that they should not be required to obtain a determination of classification from the regional water quality control board because they have alleged in the complaint the land classifications of their parcels. They rely upon their good faith belief that these allegations are correct and assert that the classification of their parcels under the system incorporated into the Plan is “inexorable and inevitable.” But the plaintiffs cannot by means of alleging conclusions plead themselves into a *facial* challenge to the constitutionality of the Plan. ([8]) Where, as here, administrative means are at hand by which an individual plaintiff may escape the strictures of the Plan, the burden of pleading compliance with that means is on the plaintiffs. Carrying that burden is a condition for obtaining an adjudication of the *1444 constitutionality of the state's adoption of the Plan. As related, such adjudication is not lightly to be undertaken. Plaintiffs' assertion that the specific application of the land classification scheme to their property would be a foregone conclusion in administrative proceedings before the regional water quality control board is not backed by a persuasive showing that it is correct. It is belied by analogous authority emanating from this court. (See *Day and Night Electric, supra*, 163 Cal.App.3d 901.) Absent such backing it cannot be accepted.

Plaintiffs' remaining rejoinder to the Water Board's prematurity argument is that applying for a waste discharge requirement is necessarily a futile act. Plaintiffs argue that because of the Plan's narrative standard of compliance they could never establish conformity with the standard. However, this argument is founded on the unsupported view that there is no possibility of obtaining a more favorable land classification in waste discharge

requirement proceedings before the regional water quality control board. ⁰ *1445

10 We note that the concerns which undergird ripeness doctrine also require the landowner plaintiffs to show that but for the Plan they would have been able to build at the time of the alleged taking by the Plan. Plaintiffs have not alleged facts showing that a denial of a waste discharge requirement allowing development was *the* cause of the claimed diminution in value of their parcels. No plaintiff alleges formulation of an actual development proposal and pursuit of such a proposal by obtaining or attempting to obtain the other permits that are a prerequisite to development. We shall assume that such matters need not be pled, or that it would be unfair to uphold the judgment on the basis of such a pleading defect without granting an opportunity for amendment. Nonetheless, in the absence of an attempt to develop the parcels, proof that development at any particular point in time was precluded solely by reason of the Plan would present knotty and perhaps insurmountable problems.

Plaintiffs concede that before they could begin development of their parcels they must obtain sewer permits from the local sanitation district, a county building permit, and a Tahoe Regional Planning Agency building permit, in addition to a waste discharge requirement under the Plan. They implicitly concede that they have not obtained these prerequisites since their briefing on the point asserts that such permits either are or were: available from the pertinent government entity; limited but obtainable in a private (transfer) market for a price; or unavailable but that the question of availability is being litigated. Assuming that plaintiffs could address the causation question in this abstract manner, showing the probable aggregate effect of the various restrictions over time could cross the border between acceptable proof and speculation. The better, perhaps the only, way to show that development is precluded by the Plan in this context would be to formulate a proposal and pursue it to the point where the Plan is the only remaining obstacle.

The development of land in the Lake Tahoe basin is subject to multiple layers of restriction by various government entities; local, state, interstate, and federal. The Plan itself alludes to an independent restriction on the number of sewer permits available for residences. The Tahoe Regional Planning Compact (Gov. Code, §§ 66800 66801) limited the number of building permits for residential units

during 1980, 1981, 1982, and portions of 1983. Plaintiffs' theory in the complaint, as to the parcels alleged to be classified so some coverage is permitted, is that the preclusion of development is caused by the combination of the maximum coverage restrictions of the Plan and the local zoning ordinance requirements for minimal coverage. Yet there is no indication of submission of a development proposal conforming to coverage restrictions of the Plan and refusal of a variance by the local zoning authorities. (We imply no view on how a taking, if any, attributable to such a regulatory composite should be remedied under *Agins v. City of Tiburon* (1979) 24 Cal.3d 266 157 Cal.Rptr. 372, 598 P.2d 25].)

B.

([6c]) That brings us to the question of prematurity for failure to seek just compensation. A takings claim is also not ripe until the claimant has sought and been denied just compensation through available adequate procedures for obtaining compensation. (*Williamson Planning Comm'n. v. Hamilton Bank, supra*, 473 U.S. at pp. 194-197 [87 L.Ed.2d at pp. 143-145].) “[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” (*Id.*, at p. 195 [87 L.Ed.2d at p. 144].)

The Lake Tahoe Acquisitions Bond Act (Act) provides a funded program “[f]or the acquisition of undeveloped lands threatened with development that will adversely affect the [Tahoe basin's] natural environment” (*Gov. Code, § 66957*, subd. (a).) “In particular, preference shall be given to the acquisition of undeveloped lands within stream environment zones and other undeveloped lands that, if developed, would be likely to erode or contribute to the further eutrophication or degradation of the waters of the region due to that or other causes.” (*Gov. Code, § 66957*, subd. (a).) It appears that the Act provides a source of compensation for the plaintiff landowners. Accordingly, we requested briefing on whether the Act is a procedure for obtaining just compensation within the meaning of *Williamson Planning Comm'n v. Hamilton Bank, supra*.

Plaintiffs' sole argument on the point is that the amount of compensation actually available under the Act is not just compensation. *Government Code section 66959* is as follows. “If the value of any land to be purchased by

the agency has been substantially reduced by any statute, ordinance, rule, regulation, or other order adopted after January 1, 1980, by state or local government for the purpose of protecting water quality or other resources in the region, the agency may purchase the land for a price it determines would assure fairness to the landowner. In determining the price to be paid for the land, the agency may consider the price which the owner originally paid for the land, any special assessments paid by the landowner, and any other factors the agency determines should be considered to ensure that the landowner receives a fair and reasonable price for the land.”

Plaintiffs argue that the terms of this statute permit payment of less than just compensation as measured by fair market value at the time of the alleged taking. They assert that it has been the practice under the Act to *1446 offer amounts less than just compensation as measured by this standard. The plaintiffs' argument is unpersuasive because nothing in the text of the Act precludes payment of an amount equal to just compensation and their bare factual assertion of the practice under the Act cannot be accepted as accurate for appellate purposes. As with independent development strictures briefly noted *ante*, at footnote 9, the only sure way to ascertain the amount that would be offered under the Act is to solicit an offer from the authorities who administer it. Certainly plaintiffs are free under the text of the Act to argue in such negotiations that the amount that should be offered to assure fairness and to avoid potential detrimental development, in view of potential takings claims, is fair market value as they view it.

However, there are considerations, unaddressed by the parties, which impel us not to rest the disposition of this appeal upon failure to seek compensation under the Act. The essential problem is that the Act was enacted after the filing of plaintiffs' original complaint; albeit before the amendment of the complaint to allege a claim of a taking by the Plan as applied. The result of these circumstances is not obvious. Perhaps when such a program is enacted after a claimed taking by overregulation the action should be abated and resort to the program required in order to determine if the claim has become moot. Such a course of action might be prudent since otherwise under the *Agins* approach of invalidation of the regulation the state's policy could be frustrated unnecessarily. Since we have decided that plaintiffs' takings claims are not ripe in any event, we decline to render an advisory opinion on the

abatement point. If plaintiffs renew the takings claim proffered in this case it would be prudent first to seek compensation under the Act. In view of the foregoing none of the other points raised by the parties warrants discussion.

Disposition

As to plaintiffs' claims of takings by unreasonable overregulation the judgment is modified to one of dismissal on the ground that the claim is not ripe for the reasons given in this opinion. As so modified, the

judgment is affirmed. The parties shall recover their own costs on appeal.

Puglia, P. J., and Evans, J., concurred.

A petition for a rehearing was denied June 28, 1989, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied September 21, 1989. Panelli, J., did not participate therein. *1447

98 Cal.App.4th 1351, 121 Cal.Rptr.2d 228, 02 Cal. Daily Op. Serv. 4853, 2002 Daily Journal D.A.R. 6161

HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Appellants,

v.

CITY OF SALINAS et al., Defendants and Respondents.

No. Ho22665.

Court of Appeal, Sixth District, California.

June 3, 2002.

SUMMARY

A taxpayers association filed an action against a city alleging that a storm drainage fee, which was imposed by the city for the management of storm water runoff from the impervious areas of each parcel in the city, was a property-related fee that required voter approval under Prop. 218 (Cal. Const., art. XIII D, § 6, subd. (c)). The trial court entered judgment for the city, finding that the fee was not property related and that it was exempt from the voter-approval requirement because it was related to sewer and water services. (Superior Court of Monterey County, No. M45873, Richard M. Silver, Judge.)

The Court of Appeal reversed. The court held that the fee was property related and subject to the voter approval requirement. The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property-related. (Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.)

HEADNOTES

(1a, 1b)

Drains and Sewers § 3--Fees and Assessments--Storm Drain Fee-- Application of Voter Approval Requirement for Property-related Fees:Property Taxes § 7.8--Special Taxes.

A storm water management fee resolution established a property-related fee for a property-related service, the management of storm water runoff from the impervious

areas of each parcel in the city, and thus required voter approval under Prop. 218 (Cal. Const., art. XIII D, § 6, subd. (c)). The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property related. The fee did not come within the exception related to sewer and water services. Giving the constitutional provision the required liberal construction, and applying the principle that exceptions to a general rule of an enactment must be strictly construed, "sewer services" must be given its narrower, more common meaning applicable to sanitary sewerage, thus excluding storm drainage. Also, the average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants and discharges it.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 109C; West's Key Number Digest, Municipal Corporations 956(4).]

(2)

Constitutional Law § 12--Construction--Ordinary Language--Amendments.

Courts are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

COUNSEL

Timothy J. Morgan; Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Appellants.

James C. Sanchez, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick K. Bobko for Defendants and Respondents.

ELIA, J.

In this "reverse validation" action, plaintiff taxpayers challenged a storm drainage fee imposed by the City of Salinas. Plaintiffs contended that the fee was a "property-related" fee requiring voter approval, pursuant to California Constitution, article XIII D, section 6, subdivision (c), which was added by the passage of Proposition 218. The trial court ruled that the fee did not violate this provision because (1) it was not a property-

related fee *1353 and (2) it met the exemption for fees for sewer and water services. We disagree with the trial court's conclusion and therefore reverse the order.

Background

In an effort to comply with the 1987 amendments to the federal Clean Water Act (33 U.S.C. § 1251 et seq.; 40 C.F.R. § 122.26(a) et seq. (2001)), the Salinas City Council took measures to reduce or eliminate pollutants contained in storm water, which was channeled in a drainage system separate from the sanitary and industrial waste systems. On June 1, 1999, the city council enacted two ordinances to fund and maintain the compliance program. These measures, ordinance Nos. 2350 and 2351, added former chapters 29 and 29A, respectively, to the Salinas City Code. Former section 29A-3 allowed the city council to adopt a resolution imposing a "Storm Water Management Utility fee" to finance the improvement of storm and surface water management facilities. The fee would be imposed on "users of the storm water drainage system."

On July 20, 1999, the city council adopted resolution No. 17019, which established rates for the storm and surface water management system. The resolution specifically states: "There is hereby imposed on each and every developed parcel of land within the City, and the owners and occupiers thereof, jointly and severally, a storm drainage fee." The fee was to be paid annually to the City "by the owner or occupier of each and every developed parcel in the City who shall be presumed to be the primary utility rate payer" The amount of the fee was to be calculated according to the degree to which the property contributed runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of "impervious area" on that parcel.

1 "Impervious Area, according to resolution No. 17019, is "any part of any developed parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes any hard surface area which either prevents or retards the entry of water into the soil mantle as it entered under natural conditions pre-existent to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions pre-existent to development.

Undeveloped parcels-those that had not been altered from their natural state-were not subject to the storm drainage fee. In addition, developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services. *1354

On September 15, 1999, plaintiffs filed a complaint under Code of Civil Procedure section 863 to determine the validity of the fee.² Plaintiffs alleged that this was a property-related fee that violated article XIII D, section 6, subdivision (c), of the California Constitution because it had not been approved by a majority vote of the affected property owners or a two-thirds vote of the residents in the affected area. The trial court, however, found this provision to be inapplicable on two grounds: (1) the fee was not "property related" and (2) it was exempt from the voter-approval requirement because it was "related to" sewer and water services.

2 Plaintiffs are the Howard Jarvis Taxpayers Association, the Monterey Peninsula Taxpayers Association, and two resident property owners.

Discussion

Article XIII D was added to the California Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act. Section 6 of article XIII D³ requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. (§ 6, subd. (a)(2).) The provision at issue is section 6, subdivision (c) (hereafter section 6(c)), which states, in relevant part: "Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area."

3 All further unspecified section references are to article XIII D of the California Constitution.

Section 2 defines a "fee" under this article as a levy imposed "upon a parcel or upon a person as an incident

of property ownership, including a user fee or charge for a property-related service.” (§ 2, subd. (e).) A “property-related service” is “a public service having a direct relationship to property ownership.” (§ 2, subd. (h).) ([1a]) The City maintains that the storm drainage fee is not a property-related fee, but a “user fee” which the property owner can avoid simply by maintaining a storm water management facility on the property. Because it is possible to own property without being subject to the fee, the City argues this is not a fee imposed “as an incident of property ownership” or “for a property-related service” within the meaning of section 2.

We cannot agree with the City's position. Resolution No. 17019 plainly established a property-related fee for a property-related service, the management of storm water runoff from the “impervious” areas of each parcel in the *1355 City. The resolution expressly stated that “each owner and occupier of a developed lot or parcel of real property within the City, is served by the City's storm drainage facilities” and burdens the system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property “should therefore pay for the improvement, operation and maintenance of such facilities.” Accordingly, the resolution makes the fee applicable to “*each and every developed parcel* of land within the City.” (Italics added.) This is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, as the City suggests. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838 [102 Cal.Rptr.2d 719, 14 P.3d 930] [art. XIII D inapplicable to inspection fee imposed on private landlords; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79 [101 Cal.Rptr.2d 905] [water usage rates are not within the scope of art. XIII D].)

The “Proportional Reduction” clause on which the City relies does not alter the nature of the fee as property related.⁴ A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee nonetheless is a fee for a public service having a direct relationship to the ownership of developed property. The City's characterization of the proportional reduction as a simple “opt-out” arrangement is misleading, as it suggests the property owner can avoid the fee altogether by declining the service. Furthermore, the reduction is not proportional to the amount of services requested or

used by the occupant, but on the physical properties of the parcel. Thus, a parcel with a large “impervious area” (driveway, patio, roof) would be charged more than one consisting of mostly rain-absorbing soil. Single-family residences are assumed to contain, on average, a certain amount of impervious area and are charged \$18.66 based on that assumption.

4 According to the public works director, proportional reductions were not anticipated to apply to a large number of people.

Proposition 218 specifically stated that “[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.” (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Cal.Const. (2002 supp.) foll. art. XIII C, p. 38 [hereafter Historical Notes].) ([2]) We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers-in this case, the voters of California-in a manner that effectuates their purpose in adopting the law. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 244-245 [149 Cal.Rptr. 239, 583 P.2d 1281]; *Arden Carmichael, Inc. v. County of Sacramento* (2000) 93 Cal.App.4th 507, 514-515 [113 Cal.Rptr.2d 248]; *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 863 *1356 [167 Cal.Rptr. 820, 616 P.2d 802].) ([1b]) To interpret the storm drainage fee as a use-based charge would contravene one of the stated objectives of Proposition 218 by “frustrat[ing] the purposes of voter approval for tax increases.” (Prop. 218, § 2.) We must conclude, therefore, that the storm drainage fee “burden[s] landowners as landowners,” and is therefore subject to the voter-approval requirements of article XIII D unless an exception applies. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra*, 24 Cal.4th at p. 842.)

Exception for “Sewer” or “Water” Service

As an alternative ground for its decision, the trial court found that the storm drainage fee was “clearly a fee related to 'sewer' and 'water' services.” The exception in section 6(c) applies to fees “for sewer, water, and refuse collection services.” Thus, the question we must next address is whether the storm drainage fee was a charge for sewer service or water service.

The parties diverge in their views as to whether the reach of California Constitution, article XIII D, [section 6\(c\)](#) extends to a storm drainage system as well as a sanitary or industrial waste sewer system. The City urges that we rely on the “commonly accepted” meaning of “sewer,” noting the broad dictionary definition of this word.⁵ The City also points to [Public Utilities Code section 230.5](#) and the Salinas City Code, which describe storm drains as a type of sewer.⁶

⁵ Webster's Third New International Dictionary, for example, defines “sewer” as “1: a ditch or surface drain 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works). (Webster's 3d New Internat. Dict. (1993) p. 2081.) The American Heritage Dictionary also denotes the function of “carrying off sewage or rainwater. (American Heritage College Dict. (3d ed. 1997) p. 1248.) On the other hand, the Random House Dictionary of the English Language (2d ed. 1987) page 1754, does not mention storm or rainwater in defining “sewer” as “an artificial conduit, usually underground, for carrying off waste water and refuse, as in a town or city.

⁶ [Public Utilities Code section 230.5](#) defines “Sewer system” to encompass all property connected with “sewage collection, treatment, or disposition for sanitary or drainage purposes, including ... all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters. Salinas City Code section 36 2, subdivision (31) defines “storm drain” as “a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water.

Plaintiffs “do not disagree that storm water is carried off in storm sewers,” but they argue that we must look beyond mere definitions of “sewer” to examine the legal meaning in context. Plaintiffs note that the storm water management system here is distinct from the sanitary sewer system and the industrial waste management system. Plaintiffs' position echoes that of the *1357 Attorney General, who observed that several California statutes differentiate between management of storm drainage and sewerage systems.⁷ (81 Ops.Cal.Atty.Gen.

104, 106 (1998).) Relying extensively on the Attorney General's opinion, plaintiffs urge application of a different rule of construction than the plain-meaning rule; they invoke the maxim that “if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted.” (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827 [46 Cal.Rptr.2d 198].) Thus, while section 5, which addresses assessment procedures, refers to exceptions specifically for “sewers, water, flood control, [and] drainage systems” (italics added), the exceptions listed in [section 6\(c\)](#) pertain only to “sewer, water, and refuse collection services.” Consequently, in plaintiffs' view, the voters must have intended to exclude drainage systems from the list of exceptions to the voter-approval requirement.

⁷ For example, [Government Code section 63010](#) specifies “storm sewers” in delimiting the scope of “'drainage,'” while separately identifying the facilities and equipment used for “'sewage collection and treatment.’” (*Gov. Code, § 63010, subd. (q) (3), (10).*) [Government Code section 53750](#), part of the Proposition 218 Omnibus Implementation Act, explains that for purposes of articles XIII C and article XIII D “'drainage system’” means “any system of public improvements that is intended to provide for erosion control, landslide abatement, or for other types of water drainage. [Health and Safety Code section 5471](#) sets forth government power to collect fees for “services and facilities ... in connection with its water, sanitation, storm drainage, or sewerage system.

The statutory construction principles invoked by both parties do not assist us. The maxim proffered by plaintiffs, “although useful at times, is no more than a rule of reasonable inference” and cannot control over the lawmakers' intent. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 350 [45 Cal.Rptr.2d 279, 902 P.2d 297]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 991 [73 Cal.Rptr.2d 682, 953 P.2d 858].) On the other hand, invoking the plain-meaning rule only begs the question of whether the term “sewer services” was intended to encompass the more specific sewerage with which most voters would be expected to be familiar, or all types of systems that use sewers, including storm drainage and industrial waste. The popular, nontechnical sense of sewer service, particularly when placed next to “water” and

“refuse collection” services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

We conclude that the term “sewer services” is ambiguous in the context of both [section 6\(c\)](#) and Proposition 218 as a whole. We must keep in mind, however, the voters' intent that the constitutional provision be construed liberally to curb the rise in “excessive” taxes, assessments, and fees exacted *1358 by local governments without taxpayer consent. (Prop. 218, §§ 2, 5; reprinted at Historical Notes, *supra*, p. 38.) Accordingly, we are compelled to resort to the principle that exceptions to a general rule of an enactment must be strictly construed, thereby giving “sewer services” its narrower, more common meaning applicable to sanitary sewerage.⁸ (Cf. *Estate of Banerjee* (1978) 21 Cal.3d 527, 540 [147 Cal.Rptr. 157, 580 P.2d 657]; *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal.App.4th 1005 [20 Cal.Rptr.2d 658].)

⁸ Sanitary sewerage carries “putrescible waste from residences and businesses and discharges it into the sanitary sewer line for treatment by the Monterey Regional Water Pollution Control Agency. (Salinas City Code, § 36 2, subd. (26).)

The City itself treats storm drainage differently from its other sewer systems. The stated purpose of ordinance No. 2350 was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of “non-storm water” into the storm drainage system, which channels storm water into state waterways. According to John Fair, the public works director, the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water.⁹ The Salinas City Code contains requirements addressed specifically to the management of storm water runoff.⁰ (See, e.g., Salinas City Code, §§ 31-802.2, 29-15.)

⁹ Resolution No. 17019 defined “Storm Drainage Facilities as “the storm and surface water sewer drainage systems comprised *sic*] of storm water control facilities and any other natural features that] store, control, treat and/or convey surface and storm

water. The Storm Drainage Facilities shall include all natural and man made elements used to convey storm water from the first point of impact with the surface of the earth to a suitable receiving body of water or location internal or external to the boundaries of the City... . The “storm drainage system was defined to include pipes, culverts, streets and gutters, “storm water sewers, ditches, streams, and ponds. (See also Salinas City Code, former § 29 3, subd. (l) defining “storm drainage system].)

10 Storm water under ordinance No. 2350 includes “stormwater runoff, snowmelt runoff, and surface runoff and drainage. (Salinas City Code, former § 29 3, subd. (dd).)

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

We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of *1359 the affected area. The trial court therefore erred in ruling that ordinance Nos. 2350 and 2351 and Resolution No. 17019 were valid exercises of authority by the city council.

Disposition

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Premo, Acting P. J., and Mihara, J., concurred.
A petition for a rehearing was denied July 2, 2002, and respondents' petition for review by the Supreme Court was denied August 28, 2002. *1360

124 Cal.App.4th 866
Court of Appeal, Fourth District, Division 1,
California.

BUILDING INDUSTRY ASSOCIATION OF SAN
DIEGO COUNTY et al., Plaintiffs and Appellants,
v.
STATE WATER RESOURCES CONTROL BOARD
et al., Defendants and Respondents,
San Diego Baykeeper et al., Interveners and
Respondents.

No. Do42385.

Dec. 7, 2004.

Certified for Partial Publication.*

As Modified on Denial of Rehearing Jan. 4, 2005.

Review Denied March 30, 2005.*

Synopsis

Background: Building industry association filed petition for writ of mandate against regional and state water control boards, challenging issuance of comprehensive municipal stormwater sewer permit, as including water quality standard provisions which allegedly were too stringent and impossible to satisfy, and so violative of federal Clean Water Act standard. Environmental groups intervened as defendants. The Superior Court, San Diego County, Wayne L. Peterson, J., denied petition. Association appealed.

[Holding:] The Court of Appeal, Haller, J., held that water boards were not prohibited by Clean Water Act "maximum extent practicable" standard of stormwater pollutant abatement from including provisions in permit which required that municipalities comply with state water quality standards.

Affirmed.

West Headnotes (12)

🔑 Presumptions
Administrative Law and Procedure
🔑 Burden of showing error

In exercising its independent judgment when reviewing an administrative proceeding, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.

2 Cases that cite this headnote

[2] **Administrative Law and Procedure**
🔑 Scope

On review of a trial court's determination of a challenge to an administrative ruling, the Court of Appeal applies a substantial evidence standard when reviewing the trial court's factual determinations on the administrative record.

1 Cases that cite this headnote

[3] **Administrative Law and Procedure**
🔑 Scope

On review of a trial court's determination of a challenge to an administrative ruling, an appellate court conducts a de novo review of the trial court's legal determinations, and is also not bound by the legal determinations made by the agency.

1 Cases that cite this headnote

[4] **Administrative Law and Procedure**
🔑 Deference to agency in general

[1] **Administrative Law and Procedure**

Court of Appeal gives appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute.

4 Cases that cite this headnote

[5] **Administrative Law and Procedure**

🔑 Environment and health

Environmental Law

🔑 Water pollution

In determining the meaning of the Clean Water Act and its amendments, federal courts generally defer to the construction of a statutory provision by the Environmental Protection Agency (EPA) if the disputed portion of the statute is ambiguous. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

2 Cases that cite this headnote

[6] **Administrative Law and Procedure**

🔑 Environment and health

Environmental Law

🔑 Water pollution

Court of Appeal considers and gives due deference to statutory interpretations of Clean Water Act by regional and state water control boards. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

8 Cases that cite this headnote

[7] **Environmental Law**

🔑 Conditions and limitations

Regional and state water control boards, in issuing comprehensive municipal stormwater sewer permit, were not prohibited by Clean Water Act "maximum extent practicable" standard of stormwater pollutant abatement from

including provisions in permit which required that municipalities comply with state water quality standards; language of pertinent statute communicated basic principle that boards, which had been federally approved to issue permit, retained discretion to impose appropriate water pollution controls in addition to those that came within definition of "maximum extent practicable," this principle was consistent with legislative history and purpose of Act, and there was no showing that applicable water quality standards were unattainable. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(3)(B)(iii), 33 U.S.C.A. § 1342(p)(3)(B)(iii).

See 4 *Witkin, Summary of Cal. Law (9th ed. 1987) Real Property*, §§ 66-69; *Cal. Jur. 3d, Pollution and Conservation Laws*, § 113 et seq.

14 Cases that cite this headnote

[8] **Statutes**

🔑 Grammar, spelling, and punctuation

While punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature.

Cases that cite this headnote

[9] **Administrative Law and Procedure**

🔑 Plain, literal, or clear meaning; ambiguity

Statutes

🔑 Extrinsic Aids to Construction

If the statutory language is susceptible to more than one reasonable interpretation, a court must look to a variety of extrinsic aids to interpreting the statute, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

2 Cases that cite this headnote

[10] **Appeal and Error**

- 🔑 Motions, hearings, and orders in general
- Appeal and Error**
- 🔑 Judgment in General

All lower court judgments and orders are presumed correct, and persons challenging them on appeal must affirmatively show reversible error.

Cases that cite this headnote

[11] **Appeal and Error**

- 🔑 Statement of evidence

A party challenging the sufficiency of evidence to support a judgment on appeal must summarize, and cite to, all of the material evidence, not just the evidence favorable to his or her appellate positions.

1 Cases that cite this headnote

[12] **Administrative Law and Procedure**

- 🔑 Burden of showing error

The party challenging the scope of an administrative permit has the burden of showing the agency abused its discretion or its findings were unsupported by the facts.

Cases that cite this headnote

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Opinion

HALLER, J.

*871 This case concerns the environmental regulation of municipal storm sewers that carry excess water runoff to lakes, lagoons, rivers, bays, and the ocean. The waters flowing through these sewer systems have accumulated numerous harmful pollutants that are then discharged into the water body without receiving any treatment. To protect against the resulting water quality impairment, federal and state laws impose regulatory controls on storm sewer discharges. In particular, municipalities and other public entities are required to obtain, and comply with, a regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems.

In this case, the California Regional Water Control Board, San Diego Region, (Regional Water Board) conducted numerous public hearings and then issued a comprehensive municipal storm sewer permit governing 19 local public entities. Although these entities did not bring an administrative challenge to the permit, one business organization, the Building Industry Association of San Diego County (Building Industry), filed an administrative appeal with the State Water Resources Control Board (State Water Board). After making some modifications to the permit, the State Water Board denied

the appeal. Building Industry then petitioned for a writ of mandate in the superior court, asserting numerous claims, including that the permit violates state and federal law because the permit provisions are too stringent and impossible to satisfy. Three environmental groups intervened as defendants in the action. After a hearing, the trial court found Building Industry failed to prove its claims and entered judgment in favor of the administrative agencies (the Water Boards) and the intervenor environmental groups.

On appeal, Building Industry's main contention is that the regulatory permit violates federal law because it allows the Water Boards to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable." (**131 33 U.S.C. § 1342(p)(3)(B)(iii).)² In the published portion of this opinion, we reject this contention, and conclude the Water Boards had the authority to include a permit provision requiring compliance with state water quality standards. In the unpublished portion of the opinion, we find Building Industry's additional contentions to be without merit. We affirm the judgment.

*872 RELEVANT BACKGROUND INFORMATION

I. Summary of Relevant Clean Water Act Provisions

Before setting forth the factual background of this particular case, it is helpful to summarize the federal and state statutory schemes for regulating municipal storm sewer discharges.³

A. Federal Statutory Scheme

When the United States Congress first enacted the Federal Water Pollution Control Act in 1948, the Congress relied primarily on state and local enforcement efforts to remedy water pollution problems. (*Middlesex Cty. Sewerage Auth. v. Sea Clammers* (1981) 453 U.S. 1, 11, 101 S.Ct. 2615, 69 L.Ed.2d 435; *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1433, 259 Cal.Rptr. 132.) However, by the early 1970's, it became apparent that this reliance on local enforcement was ineffective and had resulted in the "accelerating environmental degradation of rivers, lakes, and streams...." (*Natural Resources Defense Council, Inc. v. Costle* (D.C.Cir.1977) 568 F.2d 1369, 1371 (*Costle*));

see *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 203, 96 S.Ct. 2022, 48 L.Ed.2d 578.) In response, in 1972 Congress substantially amended this law by mandating compliance with various minimum technological effluent standards established by the federal government and creating a comprehensive regulatory scheme to implement these laws. (See *EPA v. State Water Resources Control Board, supra*, 426 U.S. at pp. 204-205, 96 S.Ct. 2022.) The objective of this law, now commonly known as the Clean Water Act, was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (§ 1251(a).)

The Clean Water Act employs the basic strategy of prohibiting pollutant emissions from "point sources"⁴ unless the party discharging the pollutants obtains a permit, known as an NPDES⁵ permit. (See *EPA v. State Water Resources Control Board, supra*, 426 U.S. at p. 205, 96 S.Ct. 2022.) It is "unlawful *873 for any person to discharge a pollutant without obtaining a permit and complying with its terms." (*Ibid.*; § 1311(a); see **132 *Costle, supra*, 568 F.2d at p. 1375.) An NPDES permit is issued by the United States Environmental Protection Agency (EPA) or by a state that has a federally approved water quality program. (§ 1342(a), (b); *EPA v. State Water Resources Control Board, supra*, 426 U.S. at p. 209, 96 S.Ct. 2022.) Before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. (See 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10; see generally Wardzinski et al., *National Pollutant Discharge Elimination System Permit Application and Issuance Procedures*, in *The Clean Water Act Handbook* (Evans edit., 1994) pp. 72-74 (*Clean Water Act Handbook*).) NPDES permits are valid for five years. (§ 1342(b)(1)(B).)

Under the Clean Water Act, the proper scope of the controls in an NPDES permit depends on the applicable state water quality standards for the affected water bodies. (See *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092, 1 Cal.Rptr.3d 76.) Each state is required to develop water quality standards that establish " 'the desired condition of a waterway.' " (*Ibid.*) A water quality standard for any given water segment has two components: (1) the designated beneficial uses of the water body; and (2) the water quality criteria sufficient to protect those uses. (*Ibid.*) As enacted in 1972, the Clean Water Act mandated that an NPDES permit require compliance with state water quality standards and that this goal be met by setting forth a specific "effluent limitation," which is a restriction on the amount of pollutants that may be discharged at the point source. (§§

1311, 1362(11).)

Shortly after the 1972 legislation, the EPA promulgated regulations exempting most municipal storm sewers from the NPDES permit requirements. (*Costle, supra*, 568 F.2d at p. 1372; see *Defenders of Wildlife v. Browner* (9th Cir.1999) 191 F.3d 1159, 1163 (*Defenders of Wildlife*).) When environmental groups challenged this exemption in federal court, the Ninth Circuit held a storm sewer is a point source and the EPA did not have the authority to exempt categories of point sources from the Clean Water Act's NPDES permit requirements. (*Costle, supra*, 568 F.2d at pp. 1374–1383.) The *Costle* court rejected the EPA's argument that effluent-based storm sewer regulation was administratively infeasible because of the variable nature of storm water pollution and the number of affected storm sewers throughout the country. (*Id.* at pp. 1377–1382.) Although the court acknowledged the practical problems relating to storm sewer regulation, the court found the EPA had the flexibility under the Clean Water Act to design regulations that would overcome these problems. (*Id.* at pp. 1379–1383.)

*874 During the next 15 years, the EPA made numerous attempts to reconcile the statutory requirement of point source regulation with the practical problem of regulating possibly millions of diverse point source discharges of storm water. (*Defenders of Wildlife, supra*, 191 F.3d at p. 1163; see Gallagher, *Clean Water Act in Environmental Law Handbook* (Sullivan edit., 2003) p. 300 (Environmental Law Handbook); Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff* (1995) 48 Wash. U.J. Urb. & Contemp. L. 1, 40–41 (*Regulation of Urban Stormwater Runoff*).)

Eventually, in 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. (§ 1342(p); see *Defenders of Wildlife, supra*, **133 191 F.3d at p. 1163; *Natural Resources Defense Council v. U.S. E.P.A.* (1992) 966 F.2d 1292, 1296.) In these amendments, enacted as part of the Water Quality Act of 1987, Congress distinguished between industrial and municipal storm water discharges. With respect to *industrial* storm water discharges, Congress provided that NPDES permits “shall meet all applicable provisions of this section and section 1311 [requiring the EPA to establish effluent limitations under specific timetables]” (§ 1342(p)(3)(A).) With respect to *municipal* storm water discharges, Congress clarified that the EPA had the authority to fashion NPDES permit requirements to meet water quality standards without specific numerical effluent limits and instead to impose “controls to reduce

the discharge of pollutants to the maximum extent practicable” (§ 1342(p)(3)(B)(iii); see *Defenders of Wildlife, supra*, 191 F.3d at p. 1163.) Because the statutory language pertaining to municipal storm sewers is at the center of this appeal, we quote the relevant portion of the statute in full:

“(B) Permits for discharges from municipal storm sewers—

“(i) may be issued on a system- or jurisdiction-wide basis;

“(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

“(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” (§ 1342(p)(3)(B).)

To ensure this scheme would be administratively workable, Congress placed a moratorium on many new types of required stormwater permits until 1994 (§ 1342(p)(1)), and created a phased approach to necessary municipal *875 stormwater permitting depending on the size of the municipality (§ 1342(p)(2)(D)). (See *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir.2003) 344 F.3d 832, 841–842.)

B. State Statutory Scheme

Three years before the 1972 Clean Water Act, the California Legislature enacted its own water quality protection legislation, the Porter–Cologne Water Quality Control Act (Porter–Cologne Act), seeking to “attain the highest water quality which is reasonable....” (*Wat.Code*, § 13000.) The Porter–Cologne Act created the State Water Board to formulate statewide water quality policy and established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (*Wat.Code*, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter–Cologne Act identified these permits as “waste discharge requirements,” and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (*Wat.Code*, §§ 13263, subd. (a), 13377, 13374.)

Shortly after Congress enacted the Clean Water Act in

1972, the California Legislature added chapter 5.5 to the Porter–Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. ([Wat.Code, § 13370, subd. \(c\)](#).) As part of these amendments, the Legislature provided that the state and regional water boards “shall, as required or authorized by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions ****134** [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.” ([Wat.Code, § 13377](#).) [Water Code section 13374](#) provides that “[t]he term ‘waste discharge requirements’ as referred to in this division is the equivalent of the term ‘permits’ as used in the [Clean Water Act].”

California subsequently obtained the required approval to issue NPDES permits. ([WaterKeepers Northern California v. State Water Resources Control Bd.](#) (2002) 102 Cal.App.4th 1448, 1453, 126 Cal.Rptr.2d 389.) Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. ([Wat.Code, § 13374](#).)

II. The NPDES Permit at Issue in this Case

Under its delegated authority and after numerous public hearings, in February 2001 the Regional Water Board issued a 52–page NPDES permit ***876** and Waste Discharge Requirements (the Permit) governing municipal storm sewers owned by San Diego County, the San Diego Unified Port District, and 18 San Diego-area cities (collectively, “Municipalities”).⁶ The first 10 pages of the Permit contain the Regional Water Board’s detailed factual findings. These findings describe the manner in which San Diego-area water runoff absorbs numerous harmful pollutants and then is conveyed by municipal storm sewers into local waters without any treatment. The findings state that these storm sewer discharges are a leading cause of water quality impairment in the San Diego region, endangering aquatic life and human health. The findings further state that to achieve applicable state water quality objectives, it is necessary not only to require municipalities to comply with existing pollution-control technologies, but also to require compliance with applicable “receiving water limits” (state water quality standards) and to employ an “iterative process” of “development, implementation, monitoring, and assessment” to improve existing technologies.

Based on these factual findings, the Regional Water Board included in the Permit several overall prohibitions applicable to municipal storm sewer discharges. Of critical importance to this appeal, these prohibitions concern two categories of restrictions. First, the Municipalities are prohibited from discharging those pollutants “which have not been reduced to the *maximum extent practicable*....”⁷ (Italics added). Second, the Municipalities are ****135** prohibited from discharging pollutants “which cause or contribute to exceedances of receiving water quality objectives ...” and/or that “cause or contribute to the violation of water quality standards....” This second category of restrictions (referred to in this opinion as the “Water Quality Standards provisions”) essentially provide that a Municipality may not discharge pollutants if those pollutants would cause the receiving water body to exceed the applicable water quality standard. It is these latter restrictions that are challenged by Building Industry in this appeal.

***877** Part C of the Permit (as amended) qualifies the Water Quality Standards provisions by detailing a procedure for enforcing violations of those standards through a step-by-step process of “timely implementation of control measures ...,” known as an “iterative” process. Under this procedure, when a municipality “caus[es] or contribute[s] to an exceedance of an applicable water quality standard,” the municipality must prepare a report documenting the violation and describing a process for improvement and prevention of further violations. The municipality and the regional water board must then work together at improving methods and monitoring progress to achieve compliance. But the final provision of Part C states that “Nothing in this section shall prevent the [Regional Water Board] from enforcing any provision of this Order while the [municipality] prepares and implements the above report.”

In addition to these broad prohibitions and enforcement provisions, the Permit requires the Municipalities to implement, or to require businesses and residents to implement, various pollution control measures referred to as “best management practices,” which reflect techniques for preventing, slowing, retaining or absorbing pollutants produced by stormwater runoff. These best management practices include structural controls that minimize contact between pollutants and flows, and non-structural controls such as educational and public outreach programs. The Permit also requires the Municipalities to regulate discharges associated with new development and redevelopment and to ensure a completed project will not result in significantly increased discharges of pollution from storm water runoff.

III. *Administrative and Trial Court Challenges*

After the Regional Water Board issued the Permit, the Building Industry, an organization representing the interests of numerous construction-related businesses, filed an administrative challenge with the State Water Board. Although none of the Municipalities joined in the administrative appeal, Building Industry claimed its own independent standing based on its assertion that the Permit would impose indirect obligations on the regional building community. (See *Wat.Code*, § 13320 [permitting any “aggrieved person” to challenge regional water board action].) Among its numerous contentions, Building Industry argued that the Water Quality Standards provisions in the Permit require strict compliance with state water quality standards beyond what is “practicable” and therefore violate federal law.

In November 2001, the State Water Board issued a written decision rejecting Building Industry’s appeal after making certain modifications to the Permit. (Cal. Wat. Resources Control Bd. Order WQ2001–15 (Nov. 15, 2001).) Of particular relevance here, the State Water Board modified the Permit to make clear that the iterative enforcement process applied to the Water Quality Standards provisions in the Permit. But *878 the State Water Board did not delete the Permit’s provision stating **136 that the Regional Water Board retains the authority to enforce the Water Quality Standards provisions even if a Municipality is engaged in this iterative process.

Building Industry then brought a superior court action against the Water Boards, challenging the Regional Board’s issuance of the Permit and the State Water Board’s denial of Building Industry’s administrative challenge.⁸ Building Industry asserted numerous legal claims, including that the Water Boards: (1) violated the Clean Water Act by imposing a standard greater than the “maximum extent practicable” standard; (2) violated state law by failing to consider various statutory factors before issuing the Permit; (3) violated the California Environmental Quality Act (CEQA) by failing to prepare an environmental impact report (EIR); and (4) made findings that were factually unsupported.

Three environmental organizations, San Diego BayKeeper, Natural Resources Defense Council, and California CoastKeeper (collectively, Environmental Organizations), requested permission to file a complaint in intervention, seeking to uphold the Permit and asserting a direct and substantial independent interest in the subject

of the action. Over Building Industry’s objections, the trial court permitted these organizations to file the complaint and enter the action as parties-interveners.

After reviewing the lengthy administrative record and the parties’ briefs, and conducting an oral hearing, the superior court ruled in favor of the Water Boards and Environmental Organizations (collectively, respondents). Applying the independent judgment test, the court found Building Industry failed to meet its burden to establish the State Water Board abused its discretion in approving the Permit or that the administrative findings are contrary to the weight of the evidence. In particular, the court found Building Industry failed to establish the Permit requirements were “impracticable under federal law or unreasonable under state law,” and noted that there was evidence showing the Regional Water Board considered many practical aspects of the regulatory *879 controls before issuing the Permit. Rejecting Building Industry’s legal arguments, the court also stated that under federal law the Water Boards had the discretion “to require strict compliance with water quality standards” or “to require less than strict compliance with water quality standards.” The court also sustained several of respondents’ evidentiary objections, including to documents relating to the legislative history of the Clean Water Act.

Building Industry appeals, challenging the superior court’s determination that the Permit did not violate the federal Clean Water Act. In its appeal, Building Industry does not reassert its claim that the Permit violates state law, except for its contentions pertaining to CEQA.

DISCUSSION

I. *Standard of Review*

^[1] A party aggrieved by a final decision of the State Water Board may obtain review of the decision by filing a timely **137 petition for writ of mandate in the superior court. (*Wat.Code*, § 13330, subd. (a).) *Code of Civil Procedure* section 1094.5 governs the proceedings, and the superior court must exercise its independent judgment in examining the evidence and resolving factual disputes. (*Wat.Code*, § 13330, subd. (d).) “In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the

evidence.” (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817, 85 Cal.Rptr.2d 696, 977 P.2d 693.)

[2] [3] [4] [5] [6] In reviewing the trial court’s factual determinations on the administrative record, a Court of Appeal applies a substantial evidence standard. (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 824, 85 Cal.Rptr.2d 696, 977 P.2d 693.) However, in reviewing the trial court’s legal determinations, an appellate court conducts a de novo review. (See *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 129, 133 Cal.Rptr.2d 249.) Thus, we are not bound by the legal determinations made by the state or regional agencies or by the trial court. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) But we must give appropriate consideration to an administrative agency’s expertise underlying its interpretation of an applicable statute.⁹ (*Ibid.*)

***880 II. Water Boards’ Authority to Enforce Water Quality Standards in NPDES Permit**

Building Industry’s main appellate contention is very narrow. Building Industry argues that two provisions in the Permit (the Water Quality Standards provisions) violate federal law because they prohibit the Municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.¹⁰ Building Industry contends that under federal law the “maximum extent practicable” standard is the “exclusive” measure that may be applied to municipal storm sewer discharges and a regulatory agency may not require a Municipality to comply with a state water quality standard if the required controls exceed a “maximum extent practicable” standard.

In the following discussion, we first reject respondents’ contentions that Building Industry waived these arguments by failing to raise a substantial evidence challenge to the court’s factual findings and/or **138 to reassert its state law challenges on appeal. We then focus on the portion of the Clean Water Act (§ 1342(p)(3)(B)(iii)) that Building Industry contends is violated by the challenged Permit provisions. On our de novo review of this legal issue, we conclude the Permit’s Water Quality Standards provisions are proper under federal law, and Building Industry’s legal challenges are unsupported by the applicable statutory language, legislative purpose, and legislative history.

A. Building Industry Did Not Waive the Legal Argument

Respondents (the Water Boards and Environmental Organizations) initially argue that Building Industry waived its right to challenge the Permit’s consistency with the maximum extent practicable standard because Building Industry did not challenge the trial court’s *factual* findings that Building Industry failed to prove any of the Permit requirements were “impracticable” or “unreasonable.”

In taking this position, respondents misconstrue the nature of Building Industry’s appellate contention challenging the Water Quality Standards provisions. Building Industry’s contention concerns the scope of the authority given to the Regional Water Board under the Permit terms. Specifically, *881 Building Industry argues that the Regional Water Board does not have the authority to require the Municipalities to adhere to the applicable water quality standards because federal law provides that the “maximum extent practicable” standard is the exclusive standard that may be applied to storm sewer regulation. This argument—concerning the proper scope of a regulatory agency’s authority—presents a purely legal issue, and is not dependent on the court’s factual findings regarding the practicality of the specific regulatory controls identified in the Permit.

Respondents alternatively contend that Building Industry waived its right to challenge the propriety of the Water Quality Standards provisions under federal law because the trial court found the provisions were valid under state law and Building Industry failed to reassert its state law challenges on appeal. Under the particular circumstances of this case, we conclude Building Industry did not waive its rights to challenge the Permit under federal law.

Although it is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law (§ 1370; see *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 705, 114 S.Ct. 1900, 128 L.Ed.2d 716; *Northwest Environmental Advocates v. Portland* (9th Cir.1995) 56 F.3d 979, 989), and California law specifically allows the imposition of controls more stringent than federal law (*Wat.Code*, § 13377), the Water Boards made a tactical decision in the superior court to assert the Permit’s validity based solely on federal law, and repeatedly made clear they were not seeking to justify the Permit requirements based on the Boards’ independent authority to act under state law. On appeal, the Water Boards continue to rely primarily on

federal law to uphold the Permit requirements, and their assertions that we may decide the matter based solely on state law are in the nature of asides rather than direct arguments. On this record, it would be improper to rely solely on state law to uphold the challenged Permit provisions.

B. The Water Quality Standards Requirement Does Not Violate Federal Law

[7] We now turn to Building Industry's main substantive contention on appeal— ****139** that the Permit's Water Quality Standards provisions (fn.10, *ante*) violate federal law. Building Industry's contention rests on its interpretation of the 1987 Water Quality Act amendments containing NPDES requirements for municipal storm sewers. The portion of the relevant statute reads: "(B) Permits for discharges from municipal storm sewers ... [¶] ... [¶] (iii) shall require controls to reduce the discharge of pollutants to the *maximum extent practicable, including* management practices, control techniques and ***882** system, design and engineering methods, and such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." (§ 1342(p)(3)(B)(iii), italics added.)

1. Statutory Language

Focusing on the first 14 words of subdivision (iii), Building Industry contends the statute means that the maximum extent practicable standard sets the upper limit on the type of control that can be used in an NPDES permit, and that each of the phrases following the word "*including*" identify examples of "maximum extent practicable" controls. (§ 1342(p)(3)(B)(iii), italics added.) Building Industry thus reads the final "and such other provisions" clause as providing the EPA with the authority only to include *other* types of "maximum extent practicable" controls in an NPDES storm sewer permit.

Respondents counter that the term "including" refers only to the three identified types of pollution control procedures—(1) "management practices"; (2) "control techniques"; and (3) "system, design and engineering methods"—and that the last phrase, "*and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants,*" provides the EPA (or the approved state regulatory agency) the specific authority to go beyond the maximum extent practicable standard to impose effluent limitations or water-quality based standards in an NPDES permit. In

support, respondents argue that because the word "system" in section 1342(p)(3)(B)(iii) is singular, it necessarily follows from parallel-construction grammar principles that the word "system" is part of the phrase "system, design and engineering methods" rather than the phrase "control techniques and system." Under this view and given the absence of a comma after the word "techniques," respondents argue that the "and such other provisions" clause cannot be fairly read as restricted by the "maximum extent practicable" phrase, and instead the "and such other provisions" clause is a separate and distinct clause that acts as a second direct object to the verb "require" in the sentence. (§ 1342(p)(3)(B)(iii).)

Building Industry responds that respondents' proposed statutory interpretation is "not logical" because if the "and such other provisions" phrase is the direct object of the verb "require," the sentence would not make sense. Building Industry states that "permits" do not generally "require" provisions; they "include" or "contain" them.

As a matter of grammar and word choice, respondents have the stronger position. The second part of Building Industry's proposed interpretation—"control techniques and system, design, and engineering methods"—without a comma after the word "techniques" does not logically serve as a ***883** parallel construct with the "and such other provisions" clause. Moreover, we disagree that the "and such other provisions" clause cannot be a direct object to the word "require." (§ 1342(p)(3)(B)(iii).) Although it is not the clearest way of articulating the concept, the language of section 1342(p)(3)(B)(iii) does communicate the basic ****140** principle that the EPA (and/or a state approved to issue the NPDES permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of " 'maximum extent practicable.' " (*Defenders of Wildlife, supra*, 191 F.3d at pp. 1165–1167.) We find unpersuasive Building Industry's reliance on several statutory interpretation concepts, *eiusdem generis*, *noscitur a sociis*, and *expressio unius est exclusion alterius*, to support its narrower statutory construction.

2. Purpose and History of Section 1342(p)(3)(B)(iii)

[8] [9] Further, "[w]hile punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature." (*In re John S.* (2001) 88 Cal.App.4th 1140, 1144, fn. 1, 106 Cal.Rptr.2d 476; see *Estate of Coffee* (1941) 19 Cal.2d 248, 251, 120 P.2d 661.) If the statutory language is susceptible to more than one reasonable interpretation, a court must also "look to a

variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.” (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340, 14 Cal.Rptr.3d 857, 92 P.3d 350.)

The legislative purpose underlying the Water Quality Act of 1987, and section 1342(p) in particular, supports that Congress intended to provide the EPA (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, particularly where, as here, that compliance will be achieved primarily through an iterative process.

Before section 1342(p) was enacted, the courts had long recognized that the EPA had the authority to require a party to comply with a state water quality standard even if that standard had not been translated into an effluent limitation. (See *EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at p. 205, fn. 12, 96 S.Ct. 2022; *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, *supra*, 511 U.S. at p. 715, 114 S.Ct. 1900; *Northwest Environmental Advocates v. Portland* (9th Cir.1995) 56 F.3d 979, 987; *Natural Resources Defense Council v. U.S.E.P.A.* (9th Cir.1990) 915 F.2d 1314, 1316.) Specifically, section 1311(b)(1)(C) gave the regulatory agency the authority to impose “any more stringent limitation including those necessary to meet water quality standards,” and section 1342(a)(2) provided that “[t]he [EPA] Administrator shall *884 prescribe conditions for [NPDES] permits to assure compliance” with requirements identified in section 1342(a)(1), which encompass state water quality standards. The United States Supreme Court explained that when Congress enacted the 1972 Clean Water Act, it retained “[w]ater quality standards ... as a supplementary basis for effluent limitations, ... so that numerous point sources despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels....” (*EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at p. 205, fn. 12, 96 S.Ct. 2022; see also *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239.)

There is nothing in section 1342(p)(3)(B)(iii)’s statutory language or legislative history showing that Congress intended to eliminate this discretion when it amended the Clean Water Act in 1987. **141 To the contrary, Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act by making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators have

pointed out, although Congress was reacting to the physical differences between municipal storm water runoff and other pollutant discharges that made the 1972 legislation’s blanket effluent limitations approach impractical and administratively burdensome, the primary point of the legislation was to address these administrative problems while giving the administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution. (See *Regulation of Urban Stormwater Runoff*, *supra*, 48 Wash.U.J. Urb. & Contemp. L. at pp. 44–46; Environmental Law Handbook, *supra*, at p. 300; Clean Water Act Handbook, *supra*, at pp. 62–63.) In the 1987 congressional debates, the Senators and Representatives emphasized the need to prevent the widespread and escalating problems resulting from untreated storm water toxic discharges that were threatening aquatic life and creating conditions dangerous to human health. (See Remarks of Sen. Durenberger, 133 Cong. Rec. 1279 (Jan. 14, 1987); Remarks of Sen. Chaffee, 133 Cong. Rec. S738 (daily ed. Jan 14, 1987); Remarks of Rep. Hammerschmidt, 133 Cong. Rec. 986 (Jan. 8, 1987); Remarks of Rep. Roe, 133 Cong. Rec. 1006, 1007 (Jan. 8, 1987); Remarks of Sen. Stafford, 132 Cong. Rec. 32381, 32400 (Oct. 16, 1986).) This legislative history supports that in identifying a maximum extent practicable standard Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent water quality standard if the agency, based on its expertise and technical factual information and after the required administrative hearing procedure, found this standard to be a necessary and workable enforcement mechanism to achieving the goals of the Clean Water Act.

To support a contrary view, Building Industry relies on comments by Minnesota Senator David Durenberger during the lengthy congressional *885 debates on the 1987 Water Quality Act amendments.¹¹ (132 Cong. Rec. 32400 (Oct. 16, 1986); 133 Cong. Rec. S752 (daily ed. Jan. 14, 1987).) In the cited portions of the Congressional Record, Senator Durenberger states that NPDES permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable. Such controls include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the stormwater discharge.” (*Ibid.*) When viewing these statements in context, it is apparent that the Senator was merely paraphrasing the words of the proposed statute and was not intending to address the issue of whether the maximum extent practicable standard was a regulatory ceiling or whether he believed the proposed amendments limited the EPA’s existing discretion.¹²

****142** Building Industry's reliance on comments made by Georgia Representative James Rowland, who participated in drafting the 1987 Water Quality Act amendments, is similarly unhelpful. During a floor debate on the proposed amendments, Representative Rowland noted that cities have "millions of" stormwater discharge points and emphasized the devastating financial burden on cities if they were required to obtain a permit for each of these points. (133 Cong. Rec. 522 (daily ed. Feb. 3, 1987).) Representative Rowland then explained that the amendments would address this problem by "allow[ing] communities to obtain far less costly single jurisdictionwide permits." (*Ibid.*) Viewed in context, these comments were directed at the need for statutory provisions permitting the EPA to issue jurisdiction-wide permits thereby preventing unnecessary administrative costs to the cities, and do not reflect a desire to protect cities from the cost of complying with strict water quality standards when deemed necessary by the regulatory agency.

3. Interpretations by the EPA and Other Courts

Our conclusion that Congress intended [section 1342\(p\)\(3\)\(B\)\(iii\)](#) to provide the regulatory agency with authority to impose standards stricter than a "maximum extent practicable" standard is consistent with interpretations by ***886** the EPA and the Ninth Circuit. In its final rule promulgated in the Federal Register, the EPA construed [section 1342\(p\)\(3\)\(B\)\(iii\)](#) as providing the administrative agency with the authority to impose water-quality standard controls in an NPDES permit if appropriate under the circumstances. Specifically, the EPA stated this statutory provision requires "controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls" (55 Fed.Reg. 47990, 47994 (Nov. 16, 1990), italics added.) We are required to give substantial deference to this administrative interpretation, which occurred after an extensive notice and comment period. (See *ibid.*; *Chevron, supra*, 467 U.S. at pp. 842–844, 104 S.Ct. 2778.)

The only other court that has interpreted the "such other provisions" language of [section 1342\(p\)\(3\)\(B\)\(iii\)](#) has reached a similar conclusion. (*Defenders of Wildlife, supra*, 191 F.3d at pp. 1166–1167.) In *Defenders of Wildlife*, environmental organizations brought an action against the EPA, challenging provisions in an NPDES permit requiring several Arizona localities to adhere to various best management practice controls without requiring numeric effluent limitations. (*Id.* at p. 1161.) The environmental organizations argued that [section 1342\(p\)](#) did not allow the EPA to issue NPDES permits

without requiring strict compliance with effluent limitations. (*Defenders of Wildlife, supra*, at p. 1161.) Rejecting this argument, the Ninth Circuit found [section 1342\(p\)\(3\)\(B\)\(iii\)](#)'s statutory language "unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly" with effluent limitations. (*Defenders of Wildlife, supra*, at p. 1164.)

But in a separate part of the opinion, the *Defenders of Wildlife* court additionally rejected the reverse argument made by the affected municipalities (who were the interveners in the action) that "the EPA may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise." (*Defenders of Wildlife, supra*, 191 F.3d at p. 1166.) The court stated: "Although Congress did not require ****143** municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], [§ 1342\(p\)\(3\)\(B\)\(iii\)](#) states that '[p]ermits for discharges from municipal storm sewers ... shall require ... such other provisions as the Administrator ... determines appropriate for the control of such pollutants.'" (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate.... [¶] Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards.... Under [33 U.S.C. § 1342\(p\)\(3\)\(B\)\(iii\)](#), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion. [Citations.]" (*Defenders of Wildlife, supra*, 191 F.3d at pp. 1166–1167, second italics added.) Although dicta, this ***887** conclusion reached by a federal court interpreting federal law is persuasive and is consistent with our independent analysis of the statutory language.¹³

To support its interpretation of [section 1342\(p\)\(3\)\(B\)\(iii\)](#), Building Industry additionally relies on the statutory provisions addressing nonpoint source runoff (a diffuse runoff not channeled through a particular source), which were also part of the 1987 amendments to the Clean Water Act. (§ 1329.) In particular, Building Industry cites to [section 1329\(a\)\(1\)\(C\)](#), which states, "The Governor of each State shall ... prepare and submit to the [EPA] Administrator for approval, a report which ... [¶] ... [¶] describes the process ... for identifying best management practices and measures to control each [identified] category ... of nonpoint sources and ... to reduce, to the maximum extent practicable, the level of pollution resulting from such category...." (Italics added.) Building Industry argues that because this "nonpoint source" statutory language expressly identifies only the maximum

extent practicable standard, we must necessarily conclude that Congress meant to similarly limit the storm sewer point source pollution regulations to the maximum extent practicable standard.

The logic underlying this analogy is flawed because the critical language in the two statutory provisions is different. In the nonpoint source statute, Congress chose to include only the maximum extent practicable standard (§ 1329(a)(1)(C)); whereas in the municipal storm sewer provisions, Congress elected to include the “and such other provisions” clause (§ 1342(p)(3)(B)(iii)). This difference leads to the reasonable inference that Congress had a different intent when it enacted the two statutory provisions. Moreover, because of a fundamental difference between point and nonpoint source pollution, Congress has historically treated the two types of pollution differently and has subjected each type to entirely different requirements. (See *Pronsolino v. Nastro* (9th Cir.2002) 291 F.3d 1123, 1126–1127.) Given this different treatment, it would be improper to presume Congress intended to apply the same standard in both statutes. Building Industry’s citation to comments during the 1987 congressional debates regarding nonpoint source regulation does **144 not support Building Industry’s contentions.

***888** 4. *Contention that it is “Impossible” for Municipalities to Meet Water Quality Standards*

We also reject Building Industry’s arguments woven throughout its appellate briefs, and emphasized during oral arguments, that the Water Quality Standards provisions violate federal law because compliance with those standards is “impossible.” The argument is not factually or legally supported.

[10] [11] First, there is no showing on the record before us that the applicable water quality standards are unattainable. The trial court specifically concluded that Building Industry failed to make a factual showing to support this contention, and Building Industry does not present a proper appellate challenge to this finding sufficient to warrant our reexamining the evidence. All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error. (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373, 110 P.2d 58.) A party challenging the sufficiency of evidence to support a judgment must summarize (and cite to) *all* of the material evidence, not just the evidence favorable to his or her appellate positions. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887–888, 160 Cal.Rptr. 516, 603 P.2d 881; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282, 188 Cal.Rptr. 123.) Building Industry has made

no attempt to comply with this well established appellate rule in its briefs.

In a supplemental brief, Building Industry attempted to overcome this deficiency by asserting that “[t]he record clearly establishes that [the Water Quality Standards provisions] are unattainable during the period the permit is in effect.” This statement, however, is not supported by the proffered citation or by the evidence viewed in the light most favorable to the respondents. Further, the fact that many of the Municipalities’ storm sewer discharges currently violate water quality standards does not mean that the Municipalities cannot comply with the standards during the five-year term of the Permit. Additionally, Building Industry’s assertions at oral argument that the trial court never reached the “impossibility” issue and/or that respondents’ counsel conceded the issue below are belied by the record, including the trial court’s rejection of Building Industry’s specific challenge to the proposed statement of decision on this very point.¹⁴

[12] We reject Building Industry’s related argument that it was respondents’ burden to affirmatively show it is feasible to satisfy each of the applicable Water Quality Standards provisions. The party challenging the scope of an administrative permit, such as an NPDES, has the burden of *889 showing the agency abused its discretion or its findings were unsupported by the facts. (See *Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 817, 85 Cal.Rptr.2d 696, 977 P.2d 693; *Huntington Park Redevelopment Agency v. Duncan* (1983) 142 Cal.App.3d 17, 25, 190 Cal.Rptr. 744.) Thus, it was not respondents’ burden to affirmatively demonstrate it was possible for the Municipalities to meet the Permit’s requirements.

Building Industry alternatively contends it was not required to challenge the facts underlying the trial court’s determination that the Permit requirements were feasible **145 because the court’s determination was wrong as a matter of law. Specifically, Building Industry asserts that a Permit requirement that is more stringent than a “maximum extent practicable” standard is, by definition, “not practicable” and therefore “technologically impossible” to achieve under any circumstances. Building Industry relies on a dictionary definition of “practicable,” which provides that the word means “‘something that can be done; feasible,’” citing the 1996 version of “Webster’s Encyclopedic Unabridged Dictionary.”

This argument is unpersuasive. The federal maximum extent practicable standard it is not defined in the Clean Water Act or applicable regulations, and thus the Regional Water Board properly included a detailed description of the term in the Permit’s definitions section.

(See *ante*, fn. 7.) As broadly defined in the Permit, the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. This definition conveys that the Permit's maximum extent practicable standard is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning. Further, the Permit's definitional section states that the maximum extent practicable standard "considers economics and is generally, but not necessarily, *less* stringent than BAT." (Italics added.) BAT is an acronym for "best available technology economically achievable," which is a technology-based standard for industrial storm water dischargers that focuses on reducing pollutants by treatment or by a combination of treatment and best management practices. (See *Texas Oil & Gas Ass'n v. U.S. E.P.A.* (5th Cir.1998) 161 F.3d 923, 928.) If the maximum extent practicable standard is generally "less stringent" than another Clean Water Act standard that relies on available technologies, it would be unreasonable to conclude that anything more stringent than the maximum extent practicable standard is necessarily impossible. In other contexts, courts have similarly recognized that the word "practicable" does not necessarily mean the most that can possibly be done. (See *Nat. Wildlife Federation v. Norton* (E.D.Cal.2004) 306 F.Supp.2d 920, 928, fn. 12 ["[w]hile the meaning of the term 'practicable' in the [Endangered Species Act] is not entirely clear, the term does not simply equate to 'possible' "]; *890 *Primavera Familienstiftung v. Askin* (S.D.N.Y.1998) 178 F.R.D. 405, 409 [noting that "impracticability does not mean impossibility, but rather difficulty or inconvenience"].)

We additionally question whether many of Building Industry's "impossibility" arguments are premature on the record before us. As we have explained, the record does not support that any required control is, or will be, impossible to implement. Further, the Permit allows the Regional Water Board to enforce water quality standards during the iterative process, but does not impose any obligation that the Board do so. Thus, we cannot determine with any degree of certainty whether this obligation would ever be imposed, particularly if it later turns out that it is not possible for a Municipality to achieve that standard.

Finally, we comment on Building Industry's repeated warnings that if we affirm the judgment, all affected Municipalities will be in immediate violation of the Permit because they are not now complying with applicable water quality standards, subjecting them to

immediate and substantial civil penalties, and leading to a potential "shut down" of public operations. These doomsday arguments are unsupported. The Permit makes clear that Municipalities **146 are required to adhere to numerous specific controls (none of which are challenged in this case) and to comply with water quality standards through "timely implementation of control measures" by engaging in a cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards in a written report and then incorporate approved modified best management practices. Although the Permit allows the regulatory agencies to enforce the water quality standards during this process, the Water Boards have made clear in this litigation that they envision the ongoing iterative process as the centerpiece to achieving water quality standards. Moreover, the regulations provide an affected party reasonable time to comply with new permit requirements under certain circumstances. (See 40 C.F.R. § 122.47.) There is nothing in this record to show the Municipalities will be subject to immediate penalties for violation of water quality standards.

We likewise find speculative Building Industry's predictions that immediately after we affirm the judgment, citizens groups will race to the courthouse to file lawsuits against the Municipalities and seek penalties for violation of the Water Quality Standards provisions.¹⁵ As noted, the applicable laws provide time for an affected entity to comply with new standards. Moreover, although we do not reach the enforcement issue in this case, we note the *891 Permit makes clear that the iterative process is to be used for violations of water quality standards, and gives the Regional Water Board the discretionary authority to enforce water quality standards during that process. Thus, it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process. (See § 1365(a)(1)(2).)

III.–VII.*

DISPOSITION

Judgment affirmed. Appellants to pay respondents' costs on appeal.

WE CONCUR: BENKE, Acting P.J., and AARON, J.

All Citations

Journal D.A.R. 14,492

124 Cal.App.4th 866, 22 Cal.Rptr.3d 128, 34 Env'tl. L. Rep. 20,149, 04 Cal. Daily Op. Serv. 10,694, 2004 Daily

Footnotes

- 1 Pursuant to [California Rules of Court, rule 976.1](#), this opinion is certified for publication with the exception of Discussion parts III, IV, V, VI and VII.
- * Baxter, J., and Brown, J., dissented.
- 2 Further statutory references are to title 33 of the United States Code, unless otherwise specified.
- 3 The systems that carry untreated urban water runoff to receiving water bodies are known as “[m]unicipal separate storm sewer” systems ([40 C.F.R. § 122.26\(b\)\(8\)](#)), and are often referred to as “MS4s” ([40 C.F.R. § 122.30](#)). For readability, we will identify these systems as municipal storm sewers. To avoid confusion in this case, we will generally use descriptive names, rather than initials or acronyms, when referring to parties and concepts.
- 4 The Clean Water Act defines a “point source” to be “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” (§ 1362(14).)
- 5 NPDES stands for National Pollution Discharge Elimination System.
- 6 Under the Clean Water Act, entities responsible for NPDES permit conditions pertaining to their own discharges are referred to as “copermittees.” ([40 C.F.R. § 122.26\(b\)\(1\)](#).) For clarity and readability, we shall refer to these entities as Municipalities.
- 7 The Permit does not precisely define this phrase, and instead, in its definition section, contains a lengthy discussion of the variable nature of the maximum extent practicable concept, referred to as MEP. A portion of this discussion is as follows: “[T]he definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their [local storm sewer plan]. Their total collective and individual activities conducted pursuant to the [plan] becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for municipal separate storm sewer maintenance). In the absence of a proposal acceptable to the [Regional Water Board], the [Regional Water Board] defines MEP.” The definition also identifies several factors that are “useful” in determining whether an entity has achieved the maximum extent practicable standard, including “Effectiveness,” “Regulatory Compliance,” “Public Acceptance,” “Cost,” and “Technical Feasibility.”
- 8 Several other parties were also named as petitioners: Building Industry Legal Defense Foundation, California Business Properties Association, Construction Industry Coalition for Water Quality, San Diego County Fire Districts Association, and the City of San Marcos. However, because these entities were not parties in the administrative challenge, the superior court properly found they were precluded by the administrative exhaustion doctrine from challenging the administrative agencies’ compliance with the federal and state water quality laws. Although these entities were named as appellants in the notice of appeal, they are barred by the exhaustion doctrine from asserting appellate contentions concerning compliance with federal and state water quality laws. However, as to any other claims (such as CEQA), these entities are proper appellants. For ease of reference and where appropriate, we refer to the appellants collectively as Building Industry.
- 9 We note that in determining the meaning of the Clean Water Act and its amendments, federal courts generally defer to the EPA’s statutory construction if the disputed portion of the statute is ambiguous. (See [Chevron U.S.A. v. Natural Res. Def. Council, Inc. \(1984\) 467 U.S. 837, 842–844, 104 S.Ct. 2778, 81 L.Ed.2d 694 \(Chevron\)](#).) However, the parties do not argue this same principle applies to a *state agency’s* interpretation of the Clean Water Act. Nonetheless, under governing state law principles, we do consider and give due deference to the Water Boards’ statutory interpretations in this case. (See [Yamaha Corp. of America v. State Bd. of Equalization, supra, 19 Cal.4th at pp. 7–8, 78 Cal.Rptr.2d 1, 960 P.2d 1031](#).)

- 10 These challenged Permit provisions state "Discharges from [storm sewers] which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited" (Permit, § A.2), and "Discharges from [storm sewers] that cause or contribute to the violation of water quality standards ... are prohibited" (Permit, § C.1).
- 11 We agree with Building Industry that the trial court's refusal to consider this legislative history on the basis that it was not presented to the administrative agencies was improper. However, this error was not prejudicial because we apply a de novo review standard in interpreting the relevant statutes.
- 12 In the cited remarks, Senator Durenberger in fact expressed his dissatisfaction with the EPA's prior attempts to regulate municipal storm sewers. He pointed out, for example, that "[r]unoff from municipal separate storm sewers and industrial sites contain significant values of both toxic and conventional pollutants," and that despite the Clean Water Act's "clear directive," the EPA "has failed to require most stormwater point sources to apply for permits which would control the pollutants in their discharge." (133 Cong. Rec. 1274, 1279–1280 (daily ed. Jan. 14, 1987).)
- 13 Building Industry's reliance on two other Ninth Circuit decisions to support a contrary statutory interpretation is misplaced. (See *Natural Res. Def. Council, Inc. v. U.S.E.P.A.*, *supra*, 966 F.2d at p. 1308; *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir.2003) 344 F.3d 832.) Neither of these decisions addressed the issue of the scope of a regulatory agency's authority to exceed the maximum extent practicable standard in issuing NPDES permits for municipal storm sewers.
- 14 Because we are not presented with a proper appellate challenge, we do not address the trial court's factual determinations in this case concerning whether it is possible or practical for a Municipality to achieve any specific Permit requirement.
- 15 The Clean Water Act allows a citizen to sue a discharger to enforce limits contained in NPDES permits, but requires the citizen to notify the alleged violator, the state, and the EPA of its intention to sue at least 60 days before filing suit, and limits the enforcement to nondiscretionary agency acts. (See § 1365(a)(1)(2).)
- * See footnote 1, *ante*.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

San Diego Regional Water Quality Control
Board Order No. R9-2007-0001
Permit CAS0108758
Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5),
D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5,
J.3.a.(3)(c)iv-viii & x-xv, and L.

Filed June 20, 2008, by the County of
San Diego, Cities of Carlsbad, Del Mar,
Imperial Beach, Lemon Grove, Poway,
San Marcos, Santee, Solana Beach, Chula
Vista, Coronado, Del Mar, El Cajon, Encinitas,
Escondido, Imperial Beach, La Mesa, Lemon
Grove, National City, Oceanside, San Diego,
and Vista, Claimants.

Case No.: 07-TC-09

*Discharge of Stormwater Runoff -
Order No. R9-2007-0001*

STATEMENT OF DECISION
PURSUANT TO GOVERNMENT CODE
SECTION 17500 ET SEQ.; TITLE 2,
CALIFORNIA CODE OF
REGULATIONS, DIVISION 2,
CHAPTER 2.5, ARTICLE 7.

(Adopted on March 26, 2010)

STATEMENT OF DECISION

The Commission on State Mandates (“Commission”) heard and decided this test claim during a regularly scheduled hearing on March 26, 2010. Tim Barry, John VanRhyn, Helen Peak, Shawn Hagerty and James Lough appeared on behalf of the claimants. Elizabeth Jennings appeared on behalf of the State Water Resources Control Board. Carla Shelton and Susan Geanacou appeared on behalf of the Department of Finance.

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 6-1.

Summary of Findings

The test claim, filed by the County of San Diego and several cities, alleges various activities related to reducing stormwater pollution in compliance with a permit issued by the San Diego Regional Water Quality Control Board, a state agency.

The Commission finds that the following activities in the permit (as further specified on pp. 122-132 below) are a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

*Discharge of Stormwater Runoff, 07-TC-09
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- street sweeping (permit part D.3.a(5));
- street sweeping reporting (part J.3.a.(3)(c) x-xv);
- conveyance system cleaning (part D.3.a.(3));
- conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii));
- educational component (part D.5.a.(1)-(2) & D.5.b.(1)(c)-(d) & D.5.(b)(3));
- watershed activities and collaboration in the Watershed Urban Runoff Management Program (part E.2.f & E.2.g);
- Regional Urban Runoff Management Program (parts F.1., F.2. & F.3);
- program effectiveness assessment (parts I.1 & I.2);
- long-term effectiveness assessment (part I.5) and
- all permittee collaboration (part L.1.a.(3)-(6)).

The Commission also finds that the following test claim activities are not reimbursable because the claimants¹ have fee authority sufficient (within the meaning of Gov. Code § 17556, subd. (d)) to pay for them: hydromodification management plan (part D.1.g) and low-impact development (parts D.1.d.(7) & D.1.d.(8)), as specified below.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

BACKGROUND

The claimants allege various activities for reducing stormwater pollution in compliance with a permit issued by the California Regional Water Quality Control Board, San Diego Region, (Regional Board), a state agency. Before discussing the specifics of the permit, an overview of the permit's purpose, and municipal stormwater pollution in general, puts the permit in context.

¹ In this analysis, claimants and the permit term “copermittees” are used interchangeably, even though two of the copermittees (the San Diego Unified Port District and San Diego County Regional Airport Authority) are not claimants. The following are the claimants and copermittees that are subject to the permit requirements: Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, Vista, County of San Diego.

Municipal Stormwater

The purpose of the permit is to specify “requirements necessary for the copermitees² to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP).” Each of the copermitees or dischargers “owns or operates a municipal separate storm sewer system (MS4),³ through which it discharges urban runoff into waters of the United States within the San Diego region.”

Stormwater⁴ runoff flowing untreated from urban streets directly into creeks, streams, rivers, lakes and the ocean, creates pollution, as the Ninth Circuit Court of Appeal has stated:

Storm water runoff is one of the most significant sources of water pollution in the nation, at times “comparable to, if not greater than, contamination from industrial and sewage sources.” [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.⁵

Because of these stormwater pollution problems described by the Ninth Circuit, both California and the federal government regulate stormwater runoff.

California Law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

² “Copermitees” are entities responsible for National Pollutant Discharge Elimination System (NPDES) permit conditions pertaining to their own discharges. (40 C.F.R. § 122.26 (b)(1).)

³ Municipal separate storm sewer system means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

⁴ Storm water means “storm water runoff, snow melt runoff, and surface runoff and drainage.” (40 C.F.R. § 122.26 (b)(13).)

⁵ *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is “to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise “the principal state agencies with primary responsibility for the coordination and control of water quality.” (§ 13001.)

Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards “formulate and adopt water quality control plans for all areas within [a] region” (§ 13240).⁶

In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits [national pollutant discharge elimination system] required by federal law. (§ 13374).⁷

As to waste discharge requirements, section 13377 of the California Water Code states:

Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

Much of what the Regional Board does, especially that pertains to permits like the one in this claim, is based in the federal Clean Water Act.

Federal Law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants⁸ from point sources⁹ to waters of the United States, since

⁶ *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

⁷ *Id.* at page 621. State and regional board permits allowing discharges into state waters are called “waste discharge requirements.” (Wat. Code, § 13263).

⁸ According to the federal regulations, “Discharge of a pollutant” means: (a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other

discharges of pollutants are illegal except under a permit.¹⁰ The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations¹¹ are not “less stringent” than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), “[t]he primary means” for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)¹²

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California’s permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a Regional Board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority

conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.” (40 C.F.R. § 122.2.)

⁹ A point source is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

¹⁰ 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

¹¹ *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of “pollutants” which are “discharged” from “point sources” into “waters of the United States,” the waters of the “contiguous zone,” or the ocean. (40 C.F.R. § 122.2.)

¹² *City of Burbank v. State Water Resources Control Bd., supra*, 35 Cal.4th 613, 621. State and regional board permits allowing discharges into state waters are called “waste discharge requirements” (Wat. Code, § 13263).

to “enforce any effluent limitation” that is not “*less stringent*” than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent* than required by federal law-from taking into account the economic effects of doing so.¹³

Actions that dischargers must implement as prescribed in permits are commonly called “best management practices” or BMPs.¹⁴

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), “Municipal and Industrial Stormwater Discharges.” Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges “associated with industrial activity,” discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.¹⁵

NPDES permits are required for “A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.”¹⁶ The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.¹⁷

¹³ *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th 613, 627-628.

¹⁴ Best management practices are “schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of “waters of the United States.” BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” (40 CFR § 122.2.)

¹⁵ *Environmental Defense Center, Inc. v. U.S. E.P.A.*, *supra*, 344 F.3d 832, 841-842.

¹⁶ 33 USCA section 1342 (p)(2)(C).

¹⁷ 33 USCA section 1342 (p)(3)(B).

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application. The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

[A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.¹⁸

General State-Wide Permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,¹⁹ as described in the permit as follows:

In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the Regional Board is responsible for enforcing the General Construction Activities Storm Water Permit, SWRCB Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, SWRCB Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit), and each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.

The State and Regional Boards have statutory fee authority to conduct inspections to enforce the general statewide permits.²⁰

The Regional Board Permit (Order No. R9-2007-001, Permit CAS0108758)

Under Part A, “Basis for the Order,” the permit states:

This Order Renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108758, which was first issued on July 16, 1990 (Order No. 90-42), and then renewed on February 21, 2001 (Order No. 2001-01). On August 25, 2005, in accordance with Order NO. 2001-01, the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit.

Attachment B of the permit (part 7(q)) states that “This Order expires five years after adoption.” Attachment B also says (part 7 (r)) that the terms and conditions of the permit “are automatically

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

¹⁹ A general permit means “an NPDES ‘permit’ issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area.” (40 CFR § 122.2.)

²⁰ Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of the expired permits (40 CFR 122.6) are complied with.”²¹

Part J.2.d. of the permit requires the Principal Permittee (County of San Diego) to “submit to the Regional Board, no later than 210 days in advance of the expiration of this order, a report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements.” The permit specifies the contents of the ROWD.

The permit is divided into 16 sections. It prohibits discharges from MS4s that contain pollutants that “have not been reduced to the maximum extent practicable” as well as discharges “that cause or contribute to the violation of water quality standards.” The permit also prohibits non-storm water discharges unless they are authorized by a separate NPDES permit, or fall within specified exemptions. The copermitttees are required to “establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means.” The copermitttees are also required to develop and implement an updated Jurisdictional Urban Runoff Management Program (JURMP) for their jurisdictions that meets the requirements specified in the permit as well as a Watershed Urban Runoff Management Program (watersheds are defined in the permit) and a Regional Urban Runoff Management Program, each of which are to be assessed annually and reported on. Annual fiscal analyses are also required of the copermitttees. The principal permittee has additional responsibilities, as specified.

The Regional Board prepared a 115-page Fact Sheet/Technical Report for this permit in which are listed, among other things, Regional Board findings, the federal law, and the reasons for the various permit requirements.

The 2001 version of the Regional Board’s permit (treated as prior law in this analysis) was challenged by the Building Industry Association of San Diego County, among others. They alleged that the permit provisions violate federal law because they prohibit the municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.²² The court held that the Clean Water Act’s “maximum extent practicable” standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.²³

Attached to the claimants’ February 2009 comments is a document entitled “Comparison Between the Requirement of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Stormwater Permit” that compares the 2001 permit with the 1990 and earlier permits. One of the document’s conclusions regarding the 2001 permit is: “40% of the requirements in Tentative Order 2001-01 which ‘exceed the federal regulations’ are based

²¹ California Code of Regulations, title 23, section 2235.4.

²² *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880.

²³ *Id.* at page 870.

almost exclusively on (1) guidance documents developed by USEPA and (2) SWRCB's [State Board's] orders describing statewide precedent setting decision on MS4 permits."

Claimants' Position

Claimants assert that various parts of the Regional Board's 2007 permit constitute a reimbursable state mandate within the meaning of article XIII B, section 6, and Government Code section 17514. The parts of the permit pled by claimants are quoted below:

I. Regional Requirements for Urban Runoff Management Programs

A. Copermittee collaboration

Parts F.2. and F.3. (F. Regional Urban Runoff Management Program) of the permit provide:

Each Copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program. The Regional Urban Runoff Management Program shall meet the requirements of section F of this Order, reduce the discharge of pollutants²⁴ from the MS4 to the MEP, and prevent urban runoff²⁵ discharges from the MS4 from causing or contributing to a violation of water quality standards.²⁶ The Regional Urban Runoff Management Program shall, at a minimum: [¶]...[¶]

2. Develop the standardized fiscal analysis method required in section G of this Order.²⁷

3. Facilitate the assessment of the effectiveness of jurisdictional, watershed,²⁸ and regional programs.

²⁴ Pollutant is defined in Attachment C of the permit as "Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated."

²⁵ Urban Runoff is defined in Attachment C of the permit as "All flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows).

²⁶ Water Quality Standards is defined in Attachment C of the permit as "The beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of water and the water quality objectives necessary to protect those uses.

²⁷ Section G requires the permittees to "collectively develop a standardized method and format for annually conducting and reporting fiscal analyses of their urban runoff management programs in their entirety (including jurisdictional, watershed, and regional activities)." Specific components of the method and time tables are specified in the permit (Permit parts G.2 & G.3).

²⁸ Watershed is defined in Attachment C of the permit as "That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as a drainage area, catchment, or river basin)."

Part L (All Copermittee Collaboration) of the Permit states:

1. Each Copermittee collaborate [sic] with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

a. Management structure – All Copermittees shall jointly execute and submit to the Regional Board no later than 180 days after adoption of this Order, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum:

- (1) Identifies and defines the responsibilities of the Principal Permittee²⁹ and Lead Watershed Permittees;³⁰
- (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
- (3) Establishes a management structure to promote consistency and develop and implement regional activities;
- (4) Establishes standards for conducting meetings, decision-making, and cost-sharing.
- (5) Provides guidelines for committee and workgroup structure and responsibilities;
- (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
- (7) Includes any and all other collaborative arrangements for compliance with this order.

Claimants stated that the Copermittees' costs to comply with this activity for fiscal year 2007-2008 was \$260,031.29.

B. Copermittee collaboration – Regional Residential Education Program Development and Implementation

Part F.1 of the Permit provides:

The Regional Urban Runoff Management Program shall, at a minimum:

1. Develop and implement a Regional Residential Education Program. The program shall include:
 - a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
 - b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

²⁹ The Principal Permittee is the County of San Diego.

³⁰ According to the permit: “Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area].”

Claimants stated that the Copermittees' costs to comply with this activity was \$131,250 in fiscal year 2007-2008.

C. Hydromodification³¹

Part D.1.g. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, g. Hydromodification – Limits on Increases of Runoff Discharge Rates and Durations) states:

g. HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS

Each Copermittee shall collaborate with the other Copermittees to develop and implement a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects,³²

³¹ Hydromodification is defined in Attachment C of the permit as “The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes.”

Hydromodification is also defined as changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat.” *Draft Hydromodification Management Plan for San Diego County*, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009 .

³² According to the permit, “Priority Development Projects” are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

[¶]...[¶] [Part D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This

where such increased rates and durations are likely to cause increased erosion³³ of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses³⁴ and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan]³⁵ and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for

category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

³³ Erosion is defined in Attachment C of the permit as "When land is diminished or worn away due to wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building and timber harvesting."

³⁴ Beneficial Uses is defined in Attachment C of the permit as "the uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. ... "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

³⁵ The Standard Urban Storm Water Mitigation Plan is defined in Attachment C of the permit as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations³⁶ shall not exceed pre-project runoff flow rates and durations,³⁷ where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow³⁸ that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

³⁶ Flow duration is defined in Attachment C of the permit as "The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). ... Flow duration within the range of geomorphologically significant flows is important for managing erosion.

³⁷ Attachment C of the permit defines "Pre-project or pre-development runoff conditions (discharge rates, durations, etc.) as "Runoff conditions that exist onsite immediately before the planned development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development."

³⁸ Critical channel flow, according to Attachment C of the permit, is "the channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Q_c [critical channel flow], it should be based on the weakest boundary material – either bed or bank."

- (d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.
 - (e) Include a review of pertinent literature.
 - (f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.
 - (g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.
 - (h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.
 - (i) Include technical information supporting any standards and criteria proposed.
 - (j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.
 - (k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.
 - (l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.
 - (m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.
- (2) The HMP may include implementation of planning measures (e.g., buffers and restoration activities, including revegetation, use of less-impacting facilities at the point(s) of discharge, etc.) to allow expected changes in stream channel cross sections, vegetation, and discharge rates, velocities, and/or durations without adverse impacts to channel beneficial uses. Such measures shall not include utilization of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc.
- (3) Section D.1.g.(1)(c) does not apply to Development Projects³⁹ where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g.,

³⁹ Development projects, according to Attachment C of the permit, are “New development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision.”

with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.⁴⁰

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

- (a) the project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean;

⁴⁰ Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(b) the project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) the project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

Claimants stated that the total cost of this activity is \$1.05 million, of which \$630,000 was spent in fiscal year 2007-2008, and the remaining \$420,000 will be spent in fiscal year 2008-2009.

D. Low-Impact Development⁴¹ (“LID”) and Standard Urban Storm Water Mitigation Plan (“SMUSP”)

Part D.1.d. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, d. Standard Urban Storm Water Mitigation Plans – Approval Process Criteria and Requirements for Priority Development Projects), paragraphs (7) and (8) state as follows:

(7) Update of SUSMP BMP Requirements

The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP⁴² requirements that meet or exceed the requirements of sections D.1.d.(4)⁴³ and D.1.d.(5),⁴⁴ and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs.⁴⁵ In addition, the update shall

⁴¹ Low Impact Development (LID) is defined in Attachment C of the permit as “A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions.”

⁴² Source Control BMPs are defined in Attachment C of the permit as “Land use or site planning practices, or structural or nonstructural measures that aim to prevent urban runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and urban runoff.”

⁴³ Part D.1.d.(4) of the permit includes LID BMP requirements: “Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:” The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects “where applicable and feasible.”

⁴⁴ Part D.1.d.(5), regarding “Source control BMP Requirements” requires permittees to require each Priority Development Project to implement source control BMPs that must “Minimize storm water pollutants of concern in urban runoff” and include five other specific criteria.

⁴⁵ A treatment control BMP, according to Attachment C of the permit, is “Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants,

include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

- i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.
- ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.
- iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.
- iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.
- v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.
- vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.
- vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either

(1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

filtration, biological uptake, media absorption or any other physical, biological, or chemical process.”

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermitttee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermitttee's updated local SUSMP shall include the following:

- i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a) to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
- ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

Claimants stated that the total cost of this activity is \$52,200 to be spent in fiscal year 2007-2008.

E. Long Term Effectiveness Assessment

Part I.5 (I. Program Effectiveness Assessment) of the permit states:

5. Long-term Effectiveness Assessment

- a. Each Copermitttee shall collaborate with the other Copermitttees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermitttees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.
- b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6) of this Order, and to serve as a basis for the Copermitttees' Report of Waste Discharge for the next permit cycle.
- c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).⁴⁶
- d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.
- e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The claimants state that this activity is budgeted to cost \$210,000.

⁴⁶ See footnote 50, page 21.

II. Jurisdictional Urban Runoff Management Program

A. Street Sweeping

Part D.3.a.(5) of the Permit (D.3 Existing Development Component, a. Municipal) provides:

(5) Sweeping of Municipal Areas

Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:

(a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.

(b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.

(c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Part J.3.a.(3)(c)x-xv (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.

xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.

xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.

xiii. Identification of the total distance of curb-miles swept.

xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.

xv. Amount of material (tons) collected from street and parking lot sweeping.

Claimants state the following costs for this activity: in fiscal year 2007-2008: Equipment: \$2,080,245, Staffing: \$1,014,321, Contract costs: \$382,624; for 2008-2009: Equipment: \$3,566,139 (for 2008-2012), Staffing \$1,054,893 (4% increase), Contract costs: \$382,624.

B. Conveyance System Cleaning

Part D.3.a.(3) of the Permit (D.3. Existing Development Component, a. Municipal) provides:

(3) Operation and Maintenance of Municipal Separate Storm Sewer System and Structural Controls

(a) Each Copermitttee shall implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.

(b) Each Copermitttee shall implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:

i. Inspection at least once a year between May 1 and September 30 of each year⁴⁷ for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.

ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.

iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter⁴⁸ in a timely manner.

iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.

v. Proper disposal of waste removed pursuant to applicable laws.

vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

Part J.3.a.(3)(c) iv-viii (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

⁴⁷ According to Attachment C of the permit, May 1 through September 30 is the dry season.

⁴⁸ Attachment C of the permit defines “anthropogenic litter” as “trash generated from human activities, not including sediment.”

- vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
- vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
- viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

The claimants state that this activity costs \$3,456,087 in fiscal year 2007-2008, and increases 4% in subsequent years.

C. Program Effectiveness Assessment

Part I.1 and I.2 of the permit states:

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge⁴⁹ Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6⁵⁰ to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

⁴⁹ Illicit discharge, as defined in Attachment C of the permit, is “any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)].”

⁵⁰ Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,⁵¹ Water Quality Assessment,⁵² and Integrated Assessment,⁵³ where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff

Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

⁵¹ Implementation Assessment is defined in Attachment C of the permit as an “Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed.”

⁵² Water Quality Assessment is defined in Attachment C of the permit as an “Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges.”

⁵³ Integrated Assessment is defined in Attachment C of the permit as an “Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality.”

Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)⁵⁴ shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

- (a) Each Watershed Water Quality Activity implemented;
- (b) Each Watershed Education Activity implemented; and
- (c) Implementation of the Watershed Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as

⁵⁴ Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists the hydrologic units and major receiving water bodies.

necessary to achieve compliance with section A of this Order.⁵⁵ The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Claimants state that this activity in I.1. and I.2 costs \$392,363 in fiscal year 2007-2008, is expected to increase to \$862,293 in fiscal year 2008-2009, and is expected to increase 4% annually thereafter.

D. Educational Surveys and Tests

Part D.5 of the permit (under D. Jurisdictional Urban Runoff Management Program) states:

5. Education Component

Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

- Municipal Departments and Personnel
- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children

a. GENERAL REQUIREMENTS

(1) Each Copermittee shall educate each target community on the following topics where appropriate:

⁵⁵ Section A is “Prohibitions and Receiving Water Limitations.”

Table 3. Education

Laws, Regulations, Permits, & Requirements	Best Management Practices
<ul style="list-style-type: none"> • Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board’s General NPDES Permit for Ground Water Dewatering • Regional Board’s 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits) 	<ul style="list-style-type: none"> • Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	Other Topics
<ul style="list-style-type: none"> • Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections 	<ul style="list-style-type: none"> • Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation • Alternative materials and designs to maintain peak runoff values • Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

- i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
- ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
- iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
- iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

- [1] Storm water management plan development and review;
- [2] Methods to control downstream erosion impacts;
- [3] Identification of pollutants of concern;
- [4] LID BMP techniques;
- [5] Source control BMPs; and
- [6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

- i. Federal, state, and local water quality laws and regulations applicable to construction and grading⁵⁶ activities.
- ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
- iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
- iv. The Copermittee’s inspection, plan review, and enforcement policies and procedures to verify consistent application.
- v. Current advancements in BMP technologies.
- vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

⁵⁶ Attachment C of the permit defines grading as “the cutting and/or filling of the land surface to a desired slope or elevation.”

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

Claimants state that this activity in D.5 will cost \$62,617 in fiscal year 2007-2008, and is expected to increase to \$171,319 in fiscal year 2008-2009, and rise 4% annually thereafter.

III. Watershed Urban Runoff Management Program

A. Copermittee Collaboration

Parts E.2.f and E.2.g of the permit state:

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 below to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]...[¶]

f. Watershed Activities⁵⁷

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;

(b) A time schedule for implementation of the activity, including key milestones;

(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;

(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

(e) A description of how the activity is consistent with the collective watershed strategy;

(f) A description of the expected benefits of implementing the activity; and

(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source

⁵⁷ In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

Claimants state that the copermittees' staffing costs for watershed program implementation in fiscal year 2007-2008 is \$1,033,219 and is expected to increase to \$1,401,765 in fiscal year 2008-2009, and are expected to increase four percent annually. For consultant services, the costs are \$599,674 in fiscal year 2007-2008 and are expected to be \$657,101 in 2008-2009, and are expected to rise five percent annually. For Watershed Urban Runoff Management Program implementation, claimants allege that the cost in fiscal year 2008-2009 is \$1,053,880.

Claimants filed a 60-page rebuttal to Finance's and the State Board's comments on February 9, 2009, which is addressed in the analysis below.

Claimant County of San Diego filed comments on the draft staff analysis in January 2010 that disagrees with the findings regarding fee authority for certain permit activities involving development. These arguments are discussed further below.

State Agency Positions

Department of Finance: In comments filed November 16, 2008, Finance alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because the permit conditions are required by federal laws so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that the State and Regional Water Boards "act on behalf of the federal government to develop, administer, and enforce the NPDES program in compliance with Section 402 of the CWA." Finance also states that more activities were included in the 2007 permit than the prior permit because "it appears ... they were necessary to comply with federal law."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The copermittees elected to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies proposed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,⁵⁸ which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

⁵⁸ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727.

As to the claimants' identifying NPDES permits approved by other states to show the permit exceeds federal law, Finance states that this "demonstrates the variation envisioned by the federal authority in granting the administering agencies flexibility to address specific regional needs in the most practical manner."

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance commented on the draft staff analysis in February 2010, echoing the comments of the State Board, which are summarized and addressed below.

State Water Resources Control Board: The State Board and Regional Board filed joint comments on the test claim on October 27, 2008, alleging that the permit is mandated on the local agencies by federal law, and that it is not unique to government because NPDES permits apply to private dischargers also. The State Board also states that the requirements are consistent with the minimum requirements of federal law, but even if the permit is interpreted as going beyond federal law, any additional state requirements are de minimis. In addition, the State Board alleges that the costs are not subject to reimbursement because most of the programs were proposed by the cities and County themselves, and because the claimants may comply with the permit requirements by charging fees and are not required to raise taxes.

The State Board further comments that the 2007 permit mirrors or is identical to the requirements in the 2001 permit, only providing more detail to the requirements already in existence and to implement the MEP performance standard. Like earlier permits, the 2007 permit implements the federal standard of reducing pollutants from the MS4 to the MEP (maximum extent practicable), but according to the State Board, "what *has* changed in successive permits is the level of specificity included in the permit to define what constitutes MEP." [Emphasis in original.] The State Board asserts that this level of specificity does not make the permit a state mandate, but that even if it is, the additional requirements are de minimis. The State Board also states that the local agencies have fee authority to pay for the permit requirements.

The State Board also addresses specific allegations in the test claim, as discussed below.

The State Board submitted comments on the draft staff analysis in January 2010, arguing that the test claim should not be reimbursable because (1) federal law requires local agencies to obtain NPDES permits from California Water Boards; (2) federal law mandates the permit that was issued, which is less stringent than permits for private industry; (3) the draft staff analysis incorrectly applies the *Hayes* case because the state did not shift the cost of the federal mandate to the local agencies; rather the federal mandate was imposed directly on local agencies and not on the state; (4) the permit provisions are not in addition to, but are required by federal law; (5) even though municipalities are singled out in the federal storm water law, the law is one of general application; and (6) potential limitations on the exercise of fee authority due to Proposition 218 do not invalidate claimants' fee authority because Government Code section 17556, subdivision (d), does not require unlimited or unilateral fee authority. These arguments are addressed below.

Interested Party Comments

Bay Area Stormwater Management Agencies Association (BASMAA): In comments submitted February 4, 2009, BASMAA speaks generally about California’s municipal stormwater permitting program, stating that “increased requirements entail both new programs and higher levels of service.” BASMAA also states:

[T]he State essentially asserts that the federal minimum for stormwater permitting is anything one of its Water Boards says it is. Likewise, the State’s assertion that its ‘discretion to exceed MEP [the maximum extent practicable standard] originates in federal law’ and ‘requires [it], as a matter of law, to include other such permit provisions as it deems appropriate’ is nothing more than an oxymoron that begs the question of what the federal Clean Water Act actually mandates rather than allows a delegated state permit writer to require as a matter of discretion. [Emphasis in original.]

BASMAA emphasizes that the water boards have wide discretion in determining the content of a municipal stormwater permit beyond the federal minimum requirements, and says that the boards need to work “proactively and collaboratively” with local governments in “prioritizing and phasing in actions that realistically can be implemented given existing and projected local revenues.”

League of California Cities (League) and California State Association of Counties (CSAC):

The League and CSAC filed joint comments on the draft staff analysis on January 26, 2010, expressing support for it “and its recognition of the constraints placed on cities and counties with respect to adopting new or increased property-related fees.”

The League and CSAC disagree, however, with the finding that the hydromodification management plan (HMP, part D.1.g.), the requirement to include low impact development (LID) in the Standard Urban Stormwater Mitigation Plans (SUSMPs) (part D.1.d.(7)-(8)), and parts of the education component (part D.5) are not reimbursable because the claimants have fee authority (under Gov. Code, § 66000 et seq., The Mitigation Fee Act) sufficient to pay for them. The League and CSAC point out examples where a city or county constructs a priority development project for which no third party is available upon whom to assess a fee. They also assert that for these city or county projects, a nexus requirement cannot be demonstrated “because no private development impact have generated the need for the projects.”

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution⁵⁹ recognizes the state constitutional restrictions on the powers of local government to tax and spend.⁶⁰ “Its

⁵⁹ Article XIII B, section 6, subdivision (a), provides:

- (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”⁶¹ A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.⁶²

In addition, the required activity or task must be new, constituting a “new program,” or it must create a “higher level of service” over the previously required level of service.⁶³

The courts have defined a “program” subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.⁶⁴ To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.⁶⁵ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”⁶⁶

Finally, the newly required activity or increased level of service must impose costs mandated by the state.⁶⁷

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.⁶⁸ In making its

crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

⁶⁰ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 735.

⁶¹ *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

⁶² *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

⁶³ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

⁶⁴ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.)

⁶⁵ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

⁶⁶ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

⁶⁷ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”⁶⁹

The permit provisions in the test claim are discussed separately to determine whether they are reimbursable state-mandates.

Issue 1: Is the permit subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, whether they constitute a program, and whether they are a federal mandate or a state-mandated new program or higher level of service.

A. Is the permit an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which describes “executive order” for purposes of state mandates, as “any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) Any agency, department, board, or commission of state government.”⁷⁰

The California Regional Water Board, San Diego Region, is a state agency.⁷¹ The permit it issued is a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Is the permit the result of claimants’ discretion?

The permit requires claimants to undertake various activities to reduce stormwater pollution in compliance with a permit issued by the Regional Board.

The Department of Finance, in comments submitted November 6, 2008, asserts that the claimants “had the option to use best management practices that would identify alternative practices to reduce pollution in water to the maximum extent practicable” Finance asserts that the claimants proposed permit requirements when they submitted the application for the permit,

⁶⁸ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

⁶⁹ *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

⁷⁰ Section 17516 also states: ““Executive order” does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code.” The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra*, 150 Cal.App.4th 898, 904.

⁷¹ Water Code section 13200 et seq.

and that increased costs due to downstream activities of an underlying discretionary activity are not reimbursable.

Similarly, the State Board, in its October 27, 2008 comments, states that the copermitees proposed the concepts that were incorporated into and form the basis of the permit provisions for which they now seek reimbursement.

In rebuttal comments submitted February 9, 2009, claimants dispute that the Report of Waste Discharge (ROWD, or permit application) “represents a copermitee proposal for 2007 Permit content or that the adopted 2007 Permit is ‘based on the ROWD.’” According to claimants, the 2007 permit provisions “were not taken directly from, nor are they generally consistent with the intent of, most of the specific ROWD content upon which the state contends they are based.”

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

[A]ctivities undertaken at the option or discretion of a local government entity ... do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.⁷²

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants are required by law to submit the NPDES permit application in the form of a Report of Waste Discharge.⁷³ Submitting it is not discretionary, as shown in the following federal regulation:

a) *Duty to apply.* (1) Any person⁷⁴ who discharges or proposes to discharge pollutants ... and who does not have an effective permit ... must submit a complete application to the Director in accordance with this section and part 124 of this chapter.⁷⁵

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: “Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state ... shall file a report of the discharge in compliance with the procedures set forth in Section 13260 ...”⁷⁶ Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

⁷² *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

⁷³ The Report of Waste Discharge is attachment 36 of the State Water Resources Control Board comments submitted October 2008.

⁷⁴ *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

⁷⁵ 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

⁷⁶ Water Code section 13376.

In addition to federal and state law, the 2001 permit required submission of the ROWD. The 2007 permit, under Part A “Basis for the Order,” states: “On August 25, 2005, in accordance with Order No. 2001-01 [the 2001 Permit], the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit.”⁷⁷

And although the ROWD provides a basis for some (but not all) of the 2007 permit provisions at issue in this test claim, there is a substantial difference between what was included in the claimants’ ROWD and the specific requirements the Regional Board adopted (e.g., copermittee collaboration, parts F.2., F.3 & L, Regional Residential Education Program Development, part F.1., Low Impact Development, part D.1.d(7)-(8), long-term effectiveness assessment, part I.5, program effectiveness assessment, parts I.1 & I.2, educational surveys and tests, part D.5, and the Watershed Urban Runoff Management Program, parts E.2.f & E.2.g). Other permit activities were not proposed in the ROWD (e.g., hydromodification, part D.1.g., street sweeping, parts D.2.a(5) & J.3.a(3)(c)x-xv, conveyance system cleaning, part D.3.a(3) & J.3.a(3)(c)iv-viii).

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which are not the result of the claimants’ discretion.

C. Does the permit constitute a program within the meaning of article XIII B, section 6 of the California Constitution?

As to whether the permit provisions in the test claim constitute a “program,” courts have defined a “program” for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.⁷⁸

The State Board, in its October 2008 comments, argues that the NPDES program is not a program because the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government in that industrial and construction facilities must also obtain NPDES stormwater permits.

The State Board reiterates this argument in its January 2010 comments, asserting that the draft analysis “fails to consider that private entities, as well as certain state . . . and . . . federal agencies also receive NPDES permits for storm water discharges.” The State Board and Finance also cite *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, for the proposition that “where municipalities have separate but not more stringent requirements than private entities, there is no program subject to reimbursement.” Finance, in its February 2010 comments, asserts that “the requirements within the test claim permit apply generally to state and private dischargers.”

⁷⁷ The 2001 Permit is attached to the State Water Resources Control Board, comments submitted October 2008, Attachment 25.

⁷⁸ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d 46, 56; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.)

Claimants, in their February 2009 rebuttal comments, disagree with the State Board and assert that an MS4 permit is unique to government and subject to unique regulations. Claimants cite the definition of an MS4 in 40 C.F.R. § 122.26(b)(8) as “a conveyance or system of conveyances ... owned or operated by a State, city, town, borough, county, parish, district, association, or other public body” Claimants argue that prohibiting “non-stormwater discharges into the storm sewers”⁷⁹ is a uniquely government function that provides for the health, safety, and welfare of the citizens in a community. Claimants also point out that the federal regulations for MS4 permits are in 40 C.F.R. § 122.26(d), while the regulations pertaining to private industrial dischargers are in 40 C.F.R. § 122.26(c), different regulations that apply the Best Available Technology standard rather than the Maximum Extent Practicable standard imposed on MS4s.

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. In *County of Los Angeles v. Commission on State Mandates*, the State Board argued that an NPDES permit⁸⁰ issued by the Los Angeles Regional Water Quality Control Board does not constitute a “program.” The court dismissed this argument, stating: “[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6.”⁸¹ In other words, whether the law regarding NPDES permits generally constitute a “program” within the meaning of article XIII B, section 6 is not relevant. The only issue before the Commission is whether the permit in this test claim constitutes a program.

The permit activities in this claim (order no. R9-2007-001, NPDES no. CAS0108758) are limited to the local governmental entities specified in the permit. The permit defines the “permittees” as the County of San Diego and 18 incorporated cities, along with the San Diego Unified Port District and San Diego County Regional Airport Authority.⁸² No private entities are regulated under this permit, so it is not a law (or executive order) of general application. That fact distinguishes this claim from the *City of Richmond* case cited by Finance and the State Board, in which the workers’ compensation law was found to be one of general application. The same cannot be said of the permit in this claim (order no. R9-2007-001, NPDES no. CAS0108758) because no private entities are regulated by it.

Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in San Diego County. As stated in the permit: “This order specifies requirements necessary for the Copermitees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable.”

⁷⁹ 33 U.S.C. § 1342(p)(3).

⁸⁰ Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001. The Commission issued a decision on parts 4C2a, 4C2b, 4E and 4Fc3 of this permit (test claims 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21) at its July 31, 2009 hearing.

⁸¹ *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

⁸² The cities are Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

Thus, the permit carries out the governmental function of providing public services, and also imposes unique requirements on local agencies in San Diego County to implement a state policy that does not apply generally to all residents and entities in the state. Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

D. Are the permit provisions in the test claim a federal mandate or a state-mandated new program or higher level of service?

The next issue is whether the parts of the permit alleged in the test claim are a state mandate, or federally mandated, as asserted by the State Board and the Department of Finance. If so, the permit would not constitute a state mandate. The California Supreme Court has stated that “article XIII B, section 6, and the implementing statutes ... by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs.”⁸³

Also discussed is whether the permit is a new program or higher level of service. To determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption, in this case, the 2001 permit.⁸⁴

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that “[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies’ taxing and spending limitations” under article XIII B.⁸⁵ When federal law imposes a mandate on the state, however, and the state “freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.”⁸⁶

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find “costs mandated by the state” if “[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.”

In *Long Beach Unified School Dist. v. State of California*,⁸⁷ the court considered whether a state executive order involving school desegregation constituted a state mandate. The regulations required, for example, conducting mandatory biennial racial and ethnic surveys, developing a reasonably feasible plan every four years to alleviate and prevent segregation to include specifics

⁸³ *San Diego Unified School Dist. v. Commission on State Mandates*, *supra*, 33 Cal.4th 859, 879-880, emphasis in original.

⁸⁴ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

⁸⁵ *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

⁸⁶ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1594.

⁸⁷ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

elements, and taking mandatory steps to involve the community including public hearings. The state argued that its Executive Order did not mandate a new program because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. The court held that the executive order did require school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements imposed on school districts.⁸⁸ The court stated:

A review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. ...[T]he executive Order and guidelines require specific actions ... [that were] required acts. These requirements constitute a higher level of service.⁸⁹

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not “less stringent” than those set out in the Clean Water Act.⁹⁰ The federal Clean Water Act allows for more stringent state-imposed measures, as follows:

Permits for discharges from municipal storm sewers [¶]...[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the ... State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.⁹¹

California in the NPDES program: Under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, which describes the NPDES program (and subdivision (p), which describes the requirements for the municipal stormwater system permits) states in part:

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

[S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and

⁸⁸ *Id.* at 173.

⁸⁹ *Ibid.*

⁹⁰ 33 U.S.C. section 1370.

⁹¹ *City of Burbank v. State Water Resources Control Board, supra*, 35 Cal.4th 613, 618, 628.

system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is not required to have its own NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program⁹² to comply with the Federal Water Pollution Control Act of 1972, stated the following findings and declaration in Water Code section 13370:

- (a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants ... to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.
- (b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.
- (c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this statute, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen⁹³ to effect the stormwater permit program. Further discussion in this analysis of federal “requirements” should be construed in the context of California’s choice to participate in the federal regulatory NPDES program.

Finance, in its February 2010 comments on the draft staff analysis, states:

The state’s role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. ...[N]o state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.

Similarly, the State Board’s January 2010 comments argue that the *Hayes* case is distinguishable from this test claim because NPDES permits do not impose a federal mandate on the state. Rather, federal law requires municipalities to comply with the permit. The State Board also states:

⁹² Water Code section 13374 states: “The term ‘waste discharge requirements’ as referred to in this division is the equivalent of the term ‘permits’ as used in the Federal water Pollution Control Act, as amended.”

⁹³ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

This [draft staff analysis'] approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. ... The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not indicate that requirements extend beyond federal law, as in *Long Beach*, or convert the federal mandate into a state mandate.⁹⁴

The Commission disagrees. As discussed above, the federal Clean Water Act⁹⁵ authorizes states to impose more stringent measures than required by federal law. The California Supreme Court has also recognized that permits may include state-imposed, in addition to federally required measures.⁹⁶ Those state measures that may constitute a state mandate if they "exceed the mandate in ... federal law."⁹⁷ Thus, although California opted into the NPDES program, further analysis is needed to determine whether the state requirements exceed the federal requirements imposed on local agencies.

The permit provisions are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402 (p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26. The federal stormwater statute states:

Permits for discharges from municipal storm sewers--

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator⁹⁸ or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)).

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.

⁹⁴ State Board comments submitted January 2010.

⁹⁵ 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

⁹⁶ *City of Burbank v. State Water Resources Control Board*, *supra*, 35 Cal.4th 613, 618, 628.

⁹⁷ Government Code section 17556, subdivision (b). *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155, 173.

⁹⁸ Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

I. Jurisdictional Urban Runoff Management Program and Reporting (Parts D & J)

Part D of the permit describes the Jurisdictional Urban Runoff Management Program (JURMP) of which each copermitee “shall develop and implement” an updated version (p.15). Part J of the permit (“Reporting”) requires the JURMP to be updated and revised to include specified information. The test claim includes parts D.1.g (hydromodification management plan), D.1.d.(7)-(8) (low-impact development or LID), D3a(5) (street sweeping) and J.3.a(3)x-xv (reporting on street sweeping), D.3.a.(3) (conveyance system cleaning) and J.3.a.(3)(c)(iv)-(viii) (reporting on conveyance system cleaning), and D.5 (educational surveys and tests).

Hydromodification (part D.1.g.): Part D.1 of the permit is entitled “Development Planning.” Part D.1.g. requires developing and implementing, in collaboration with other copermitees, a hydromodification management plan (HMP) “to manage increases in runoff discharge rates and durations from all Priority Development Projects.”⁹⁹ Priority development projects can include both private projects, and municipal (city or county) projects. The purpose of the HMP is:

⁹⁹ According to the permit, Priority Development Projects are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)..

[¶]...[¶] [Section D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment

[T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

Hydromodification is defined in Attachment C of the permit as “The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes.”¹⁰⁰

As detailed in the permit and on pages 12-17 above, the HMP must have specified content, including “a description of how the copermitees will incorporate the HMP requirements into their local approval processes.” Also required is collaborative reporting on the HMP and implementation 180 days after the HMP is approved by the Regional Water Board, with earlier implementation encouraged.

According to the State Board’s comments submitted in October 2008 the requirement to develop and implement a HMP is necessary to meet the minimum federal MEP standard. The Board states that “broad federal legal authority is contained in CWA sections 402(p)(3)(B)(ii)-(iii), CWA section 402(a), and in 40 C.F.R. sections 122.26 (d)(2)(i)(B)-(C), (E), and (F), 131.12, and 122.26(d)(2)(iv)(A)(2), which states:

will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. “Directly adjacent” means situated within 200 feet of the ESA. “Discharging directly to” means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

¹⁰⁰ It is also defined as “changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat.” Draft Hydromodification Management Plan for San Diego County, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009.

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator¹⁰¹ of a discharge¹⁰² from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. . . . Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) *Part 2.* Part 2 of the application shall consist of: [¶]...[¶]

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]...[¶]

¹⁰¹ “*Owner or operator* means the owner or operator of any “facility or activity” subject to regulation under the NPDES program.” (40 CFR § 122.2)

¹⁰² “*Discharge* when used without qualification means the “discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.” (40 CFR § 122.2.)

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. ...

The State Board also cited the U.S. Supreme Court decision, *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700, for the state's authority to regulate flow under the federal Clean Water Act in order to protect water quality standards.

In response, the claimants' February 2009 comments state that the permit's Fact Sheet did not cite any federal authorities to justify the HMP portion of the permit, and that none exists. Claimants also assert that no other jurisdiction in the United States that was surveyed for the claim has a permit that requires a HMP. Claimants call the HMP requirement a flood control measure that is not a requirement in any other permit outside of California, and that the HMP exceeds the federal requirements and constitutes a state mandate. Claimants also point to the language in section 122.26(d)(2)(iv)(A)(2) that they say is:

[A]imed directly at controlling pollutant discharges from an MS4 that originate in areas of new development. [The regulation] does not mention the need to include controls to reduce the *volume* of storm water discharged from these areas. ... controls designed only to limit volume are not expressly required.

As to the *P.U.D. No. 1 v. Washington Department of Ecology* decision cited by the State Board, the claimants distinguish it as being decided under section 401 of the Clean Water Act, wherein the permit was issued under section 402. Claimants state that the *P.U.D.* case recognized state authority under the Clean Water Act rather than a federal mandate.

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

Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation."¹⁰³ As in *Long Beach Unified School Dist. v. State of California*,¹⁰⁴ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹⁰⁵ to

¹⁰³ Government Code section 17556, subdivision (c).

¹⁰⁴ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

¹⁰⁵ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1593-1594.

impose these requirements. Thus, the Commission finds that part D.1.g. of the permit is not a federal mandate.

All of part D.1.g. of the permit requires the HMP to have specified contents except part D.1.g.(2), which states that the HMP “*may* include implementation of planning measures ...” as specified. As the plain language of this part does not require the implementation of planning measures, the Commission finds that part D.1.g.(2) of the permit is not a state mandate.

The Commission also finds that HMP is not a state mandate for municipal (city or county) projects that are priority development projects, such as a hospital, laboratory or other medical facility, recreational facility, airfield, parking lot, street, road, highway, and freeway, a project over an acre, and a project located in an environmentally sensitive area.¹⁰⁶ Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.¹⁰⁷ Thus, municipal projects are built by cities or counties voluntarily, and their decision triggers the requirements to comply with the HMP. In *Kern High School Dist.*,¹⁰⁸ the California Supreme Court decided whether the state must reimburse the costs of school site councils and advisory committees complying with the Brown (Open Meetings) Act for schools who participate in various school-related education programs. The court determined that participation in the underlying school site council program was not legally compelled and so mandate reimbursement was not required for the downstream compliance with the Brown Act. The court said:

Activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.¹⁰⁹

As with the voluntary programs in *Kern*, there is no requirement for municipalities to undertake any of the priority development projects described in the permit. Thus, the Commission finds that the costs of complying with the HMP in part D.1.g., is not a state mandate for priority development projects undertaken by a city or county.

Based on the mandatory language of the remainder of part D.1.g. of the permit (except part D.1.g.(2) and except for municipal projects), the Commission finds that it is a state mandate on the claimants to do the following:

¹⁰⁶ The County of San Diego, in its January 2010 comments on the draft staff analysis, raises the issue of its fee authority for municipal projects. The League of California Cities, in its January 2010 comments on the draft staff analysis, also discusses municipal projects, citing examples “where a city or county constructs a Priority Development Project for which no third party is available to assess a fee against.”

¹⁰⁷ California Constitution, article XI, section 7. “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”

¹⁰⁸ *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

¹⁰⁹ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

- (e) Include a review of pertinent literature.
- (f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.
- (g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.
- (h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.
- (i) Include technical information supporting any standards and criteria proposed.
- (j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.
- (k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.
- (l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.
- (m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

¶...¶

(3) Section D.1.g.(1)(c) does not apply to Development Projects where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.¹¹⁰

¹¹⁰ Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

- (a) The project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;
- (b) The project would discharge into underground storm drains discharging directly to bays or the ocean; or
- (c) The project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

As to whether part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service, the claimants, in their February 2009 comments, assert that it is.

The 2001 Permit only included general statements regarding the need to control downstream erosion with post construction BMPs. The 2007 Permit increased these requirements by requiring the copermittees to, among other things, draft and implement interim and long-term hydromodification plans, and impose specific, strict post construction BMPs on new development projects within their jurisdiction.

The State Board, in its October 2008 comments, argues that part D.1 “expands upon and makes more specific the hydromodification requirements in the 2001 Permit.”

Finance argues, in its February 2010 comments on the draft staff analysis, that the entire permit is not a new program or higher level of service because additional activities, beyond those

required by the 2001 permit, are necessary for the claimants to continue to comply with the federal Clean Water Act and reduce pollutants to the Maximum Extent Practicable.

The Commission disagrees with Finance. This analysis measures the 2007 permit against the 2001 permit to determine which provisions are a new program or higher level of service. Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly. In *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.¹¹¹

The Regional Board prepared a Fact Sheet/Technical Report¹¹² for the permit that lists the federal authority and reasons the permit provisions were adopted. Regarding part D.1.g. of the permit, the Fact Sheet/Technical Report does not expressly mention the 2001 permit, but states:

This section of the Order expands the requirements for control of hydromodification caused by changes in runoff resulting from development and urbanization. Expansion of these requirements is needed due to the current lack of a clear standard for controlling hydromodification resulting from modification. While the Model SUSMP¹¹³ [adopted in 2002] developed by the Copermittees requires project proponents to control hydromodification, it provides no standard or performance criteria for how this is to be achieved.

The Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) with respect to private priority development projects is a new program or higher level of service. The Fact Sheet/Technical Report describes the section as an "expansion" of hydromodification control requirements. The 2001 permit (in part F.1.b.(2)(j)) included only the following on hydromodification:

Downstream Erosion – As part of the model SUSMP [Standard Urban Storm Water Mitigation Plan] and the local SUSMPs, the Copermittees shall develop criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, criteria shall be developed to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Storm water discharge volumes and durations should also be considered.

The requirements in the 2007 permit, however, are much more expansive and detailed, requiring development and implementation of a hydromodification management plan (HMP) to be approved by the Regional Board. And while the 2001 permit contained a broad description of

¹¹¹ *Building Industry Assoc. of San Diego County v. State Water Resources Control Board*, *supra*, 124 Cal.App.4th 866, 870.

¹¹² The Fact Sheet/Technical Report was attached to the test claim.

¹¹³ According to the Fact Sheet/Technical Report, the Model SUSMP was completed and adopted in 2002.

the criteria required, part D.1.g. of the 2007 permit contains a detailed description of the contents of the HMP, including identifying standards for channel segments, using continuous simulation of the entire rainfall record to identify runoff flows, requiring priority development projects to implement hydrologic control measures, including other performance criteria for priority development projects to prevent urban runoff from the projects, and 9 other components to include in the HMP. Therefore, the Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service over the 2001 permit.

In sum, the Commission finds that part D.1.(g) of the permit (except for D.1.g.(2)) is a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the HMP for municipal priority development projects.

B. Low Impact Development (LID) and Standard Urban Storm Water Mitigation Plan (part D.1.d.): Also under part D.1 “Development Planning” is part D.1.d, which requires the copermittees to review and update their SUSMPs (Standard Urban Storm Water Mitigation Plans)¹¹⁴ and (in paragraphs 7 and 8) add low impact development (LID) and source control BMP requirements for each priority development project, and to implement the updated SUSMP, as specified on pages 17-19 above. The purpose of LID is to “collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects.” LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces (*Id.*)

According to the State Board’s comments submitted in October 2008, the requirement in part D.1.d. is necessary to meet the minimum federal MEP standard, and is supported by 40 C.F.R. section 122.26 (d)(2)(iv)(A)-(D), part of which is quoted in the discussion of hydromodification above. Part (d)(2)(iv)(A)(2) of the regulation requires part of the permit application to include:

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

The State Board asserts that these regulations “require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial and municipal land uses or activities.” The Board cites a decision of the Washington Pollution Control Hearings Board that found that permit provisions to promote but not require low impact development “failed to satisfy the federal MEP standard and Washington state law because it ... did not require LID at the parcel and subdivision level.”

In their February 2009 rebuttal comments, the claimants assert: “while federal regulations require the large MS4 permits to include programs to reduce the discharge of pollutants from the

¹¹⁴ The Permit defines the Standard Urban Storm Water Mitigation Plan as “A plan developed to mitigate the impacts of urban runoff from Priority Development Projects.”

MS4 that originate in areas of new development, federal regulations do not require or even mention LID or LID principles.” And “while requiring post-construction controls that limit pollutant discharges originating in areas of new development is clearly within the requirements of Section 122.26(d)(2)(iv)(A), the 2007 Permit’s specific LID requirements are not.” Claimants also address the Washington State Pollution Control Board decision by noting that the Board’s decision “explicitly recognized that LID requirements are not federally mandated.” The claimants also point out EPA-issued NPDES permits in Washington, D.C. and Albuquerque, New Mexico that make no reference to LID.

The Commission finds nothing in the federal regulation (40 C.F.R. § 122.26) that requires local agencies to collectively review and update the BMP requirements listed in their SUSMPs, or to develop, submit and implement “an updated Model SUSMP” that defines minimum LID and other BMP requirements for incorporation into the SUSMPs. Thus, the LID requirements in the permit “exceed the mandate in that federal law or regulation.”¹¹⁵ As in *Long Beach Unified School Dist. v. State of California*,¹¹⁶ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹¹⁷ to impose these requirements. Thus, the Commission finds that part D.1.d. of the permit is not a federal mandate.

The Commission further finds that the LID requirements are not a state-mandated program for municipal projects for the same reason as discussed in the HMP discussion above: there is no requirement for cities or counties to build priority development projects, which would trigger the downstream requirement to comply with parts D.1.d.(7) and D.1.d.(8) of the permit, the LID portions of the permit.

As to non-municipal projects, however, because of the mandatory language on the face of the permit, the Commission finds that part D.1.d. of the permit is a state mandate for the claimants to do all of the following:

(7) Update of SUSMP BMP Requirements

The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP requirements that meet or exceed the requirements of sections D.1.d.(4) and D.1.d.(5), and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update shall include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

¹¹⁵ Government Code section 17556, subdivision (c).

¹¹⁶ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹¹⁷ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

- i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.¹¹⁸
- ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.¹¹⁹
- iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.¹²⁰
- iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.
- v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.
- vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.
- vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

¹¹⁸ Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

¹¹⁹ Part D.1.d.(5) of the permit lists source control BMP requirements.

¹²⁰ Part D.1.d.(6) of the permit lists treatment control BMP requirements.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either (1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

- i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a) to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
- ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

The State Board, in its October 2008 comments on the test claim, argues that the requirements in part D.1.d.(7) of the permit are not a new program or higher level of service because they “merely add definition to the scope of the local SUSMP already required in the 2001 Permit (see Section F.1.b.(2)).” As to part D.1.d.(8), the State Board asserts that it:

[P]rovides a framework for the Copermittees to develop criteria to be used in the application of LID requirements to Priority Development Projects. The Copermittees must develop their LID programs through an update to the Model SUSMP, the document that guides (and guided the 2001 Permit cycle) post-construction BMP implementation at Priority Development Projects.

According to the State Board, these parts of the permit are not a new program or higher level of service because they merely add additional detail in implementing the same minimum federal MEP standard and add specificity to already existing BMPs.

The claimants, in their February 2009 comments, assert that by adding requirements and increasing the specificity of existing requirements, the 2007 LID permit requirements are a new program or higher level of service.

The Commission finds that part D.1.d.(7) is a new program or higher level of service because it calls for a collective review and update of BMP requirements listed in the claimants' SUSMPs (presumably those drafted under the 2001 permit) that was not required under the 2001 permit.

The Commission also finds that part D.1.d.(8) is a new program or higher level of service because it requires developing, submitting, and implementing “an updated Model SUSMP” that defines minimum LID and other BMP requirements for incorporation into the copermittees SUSMPs. Although the 2001 permit required adopting a Model SUSMP and local SUSMP, it

did not require developing and submitting an updated Model SUSMP with the specified LID BMP requirements.

In sum, the Commission finds that parts D.1.d.(7) and D.1.d.(8) of the 2007 permit constitute a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the LID requirements for municipal priority development projects.

C. Street sweeping and reporting (parts D.3.a.(5) & J.3.a(3)x-xv): Part D.3 is entitled “Existing Development.” Part D.3.a.(5) requires regular street sweeping based on the amount of trash generated on the road, street, highway, or parking facility. Those identified as generating the highest volumes of trash are to be swept at least two times per month, those generating moderate volumes of trash are to be swept at least monthly, and those generating low volumes of trash are to be swept as necessary, but not less than once per year. The copermittees determine what constitutes high, moderate, and low trash generation.

In addition, section J.3.a.(3)(c) x-xv requires the copermittees, as part of their annual reporting, to identify the total distance of curb-miles of improved roads in each priority category, the total distance of curb-miles swept, the number of municipal parking lots and the number swept, the frequency of sweeping, and the tons of material collected from street and parking lot sweeping.

The State Board, in its comments submitted in October 2008, states that requiring minimum sweeping frequencies for streets determined by the copermittees to have high volumes of trash or debris is necessary to meet the minimum federal MEP standard. The State Board cites C.F.R. section 122.26(d)(2)(i)(B)-(C), (E) and (F) and 40 C.F.R. section 122.26(d)(2)(iv), and more specifically, section 122.26(d)(2)(iv)(A)(1), which states that the proposed management program include “[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers.” Also, section 122.26(d)(2)(iv)(A)(6) provides that the proposed management program include:

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

The State Board also cites section 122.44(d)(1)(i), which states as follows regarding NPDES permits: “limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State Water quality standard, including narrative criteria for water quality.” And section 122.26(d)(2)(iv)(A)(3) states that the proposed management program include “A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities.”

In their February 2009 rebuttal comments, the claimants point out that street sweeping as a BMP to control “floatables” is not required by federal law in that none of the federal regulations

specifically require street sweeping. The claimants quote the following from *Hayes v. Commission on State Mandates*:¹²¹ “if the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate.”

The Commission agrees with claimants. The permit requires activities that fall within the federal regulations to include: “[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers.”¹²² And they also require: “A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems...”¹²³

Yet the more specific requirements in the permit include variable street sweeping schedules for areas impacted by different amounts of trash. They also require reporting on the amount of trash collected, which is not required by the federal regulations. These activities “exceed the mandate in that federal law or regulation.”¹²⁴ As in *Long Beach Unified School Dist. v. State of California*,¹²⁵ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹²⁶ to impose these requirements. Therefore, the Commission finds that parts D.3.a.(5) and J.3.a.(3)(c)x-xv of the permit are not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission also finds part D.3.a(5) of the permit is a state mandate for the claimants to do all of the following:

(5) Sweeping of Municipal Areas

Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:

(a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.

(b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.

(c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

¹²¹ *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564.

¹²² 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

¹²³ 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

¹²⁴ Government Code section 17556, subdivision (c).

¹²⁵ *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

¹²⁶ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1593-1594.

And as stated in part J.3.a(3)(c)x-xv (on p. 68) of the permit, the claimants report annually on:

- x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
- xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
- xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
- xiii. Identification of the total distance of curb-miles swept.
- xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
- xv. Amount of material (tons) collected from street and parking lot sweeping.

The State Board, in its October 2008 comments, argues that requiring minimum street sweeping frequencies does not result in a new program or higher level of service. According to the State Board:

The 2001 Permit required Copermittees to perform street sweeping, but did not specify minimum frequencies. While the minimum frequencies may exceed some Copermittees' existing programs, the Claimants acknowledge that many Copermittees meet or exceed the mandatory requirements on a voluntary basis. To the extent the frequencies are already being met and the Permit imposes the same MEP standard as its predecessor ... the 2007 Permit does not impose a higher level of service.

In their February 2009 rebuttal comments, the claimants cite Government Code section 17565 to argue that whether or not they were sweeping streets at frequencies equal or more than the permit requires is not relevant. Government Code section 17565 states: "If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate." The claimants also state that the 2001 permit did not in fact require street sweeping, "[a]t best it only included general statements regarding the need to control pollutants in streets and other impervious areas and, in any event, minimum frequencies were not required."

The Regional Board's Fact Sheet/Technical Report on part D.3.a.(5) of the 2007 permit states that street sweeping "has been added to ensure that the Copermittees are implementing this effective BMP at all appropriate areas."

The Commission finds that the street sweeping provision (part D.3.a.(5)) in the permit is a new program or higher level of service. The Commission agrees that Government Code section 17565 makes it irrelevant (for purposes of mandate reimbursement) whether or not claimants

were performing the activity prior to the permit, since voluntary activities do not affect reimbursement of an activity that is subsequently mandated by the state.

The 2001 permit, in part F.3.a.(3) and (4) stated:

(a) To establish priorities for oversight of municipal areas and activities required under this Order, each Copermittee shall prioritize each watershed inventory in F.3.a.2. above by threat to water quality and update annually. Each municipal area and activity shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality, each Copermittee shall consider (1) type of municipal area or activity; (2) materials used (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility or area; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; and (9) any other relevant factors.

(b) At a minimum, the high priority municipal areas and activities shall include the following:

(i) Roads, Streets, Highways, and Parking Facilities. [¶]...[¶]

F.3.a.(4) BMP Implementation (Municipal)

(a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality municipal areas and activities (as determined under section F.3.a.(3)). The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific as appropriate.

Street sweeping is not expressly required in this 2001 permit provision, nor does it specify any frequencies or required reporting. Thus, the Commission finds that part D.3.a.(5) of the 2007 permit that requires street sweeping, as specified, is a new program or higher level of service, as well as part J.3.a(3)x-xv that requires reporting on street-sweeping activities.

D. Conveyance system cleaning and reporting (parts D.3.a.(3) & J.3.a.(3)(c)(iv)-(viii)): Also under part D.3 “Existing Development,” part D.3.a.(3) requires conveyance system cleaning, including the following:

- Verifying proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from the MS4s and related drainage structures.
- Cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Cleaning open channels of observed anthropogenic litter in a timely manner.

In J.3.a.(3)(c)(iv)-(viii), as part of the annual reporting requirements, copermittees shall provide a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned. In addition, copermittees must report by category tons of waste and litter removed from the facilities.

The State Board, in its comments submitted in October 2008, disagrees that the requirements exceed federal law, saying that “the same broad authorities applicable to the street sweeping requirement also apply to the conveyance system cleaning requirements.” According to the State Board, specificity in inspection and cleaning requirements is consistent with and supported by U.S. EPA guidance. Also, to the extent that permit requirements are more specific than the federal regulations, the State Board asserts that the requirements are an appropriate exercise of the San Diego Water Board’s discretion to define the MEP standard.

The claimants, in their February 2009 comments, state that “the requirements to inspect and perform maintenance to insure compliance with these standards is not limited by the ‘regular schedule of maintenance’ obligation but rather must be done as frequently as is necessary to comply with these specific standards.” Also, claimants note that the content and detail in the reporting is more than required by the 2001 permit. As to the MEP standard required by the federal regulations, claimants assert that the U.S. EPA documents cited by the State Board provide guidance, not mandates, and the permit Fact Sheet does not specifically set forth mandatory annual inspection and maintenance requirements. According to the claimants, the only mandatory requirement is that a maintenance program exist, and that the applicant provide an inspection schedule if maintenance depends on the results of inspections or occurs infrequently. Yet the 2007 permit includes “very specific requirements that go beyond the U.S. EPA guidance and are not included within the federal regulations.” Finally, claimants note that the State Board has acknowledged that the 2007 permit requirements are more specific than federal regulations, and cites the *Long Beach Unified School District* case to conclude that the specificity makes the requirements state mandates.

The Commission agrees with claimants. Like street sweeping, the permit requires conveyance system cleaning activities that fall within the federal regulations to include: “[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers.”¹²⁷ And they also require: “A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems...”¹²⁸

Yet the permit requirements are more specific. Part D.3.a.(3) requires verifying proper operation of all municipal structural treatment controls, cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner, cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately, and cleaning open channels of observed anthropogenic litter in a timely manner. In addition, the reporting in part J requires a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned, and reporting by category tons of waste and litter removed from the facilities. These activities, “exceed[s] the mandate in that federal law or regulation.”¹²⁹ As in *Long Beach*

¹²⁷ 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

¹²⁸ 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

¹²⁹ Government Code section 17556, subdivision (c).

Unified School Dist. v. State of California,¹³⁰ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹³¹ to impose these requirements. Therefore, the Commission finds that parts D.3.a.(3) and J.3.a.(3)(c)iv-viii of the permit are not a federal mandate.

Rather, the Commission finds that part D.3.a.(3) of the 2007 permit is a state mandate on the claimants to do the following:

- (a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
- (b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
 - i. Inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
 - ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
 - iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.
 - iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
 - v. Proper disposal of waste removed pursuant to applicable laws.
 - vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission also finds that part J.3.a.(3)(c) iv-viii is a state mandate to report the following information in the JURMP annual report:

- iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
- v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

¹³⁰ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹³¹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

- vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
- vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
- viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

As to whether these provisions are a new program or higher level of service, the State Board, in its October 2008 comments, states that the 2001 permit contained “*more* frequent inspection and removal requirements than required in the 2007 Permit. It also contained record keeping requirements to document the facilities cleaned and the quantities of waste removed.” [Emphasis in original.]

Claimants, in their February 2009 comments, argue that the 2001 permit, in part F.3.a.(5) required each copermittee to ‘implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges. By contrast, the 2007 permit requires each copermittee to ‘implement a schedule of **inspection and maintenance**’ and to ‘**verify proper operation of all municipal** structural controls....’ [Emphasis in original.] Claimants also point out that the 2007 permit requires copermittees to:

- Clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Clean any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Clean open channels of observed anthropogenic litter in a timely manner.

According to claimants, these requirements were not included in the 2001 permit. Claimants also state that the requirement to inspect and perform maintenance “is not limited by the ‘regular schedule of maintenance’ obligation but rather must be done as frequently as is necessary to comply with these specific standards.”

As to reporting, claimants state that the language in part D.3.a.(3)(b)(iv),(v) and (vi) of the 2007 permit and part F.3.a.(5)(c)(iii), (iv) and (v) of the 2001 permit track each other, but part J.3.a.(3)(c) iv through viii detail the information that the reports must now contain that was not in the 2001 permit, such as identifying the number of catch basins and inlets, the number inspected, the number found with accumulated waste exceeding the cleaning criteria, the distance of the MS4 cleaned, and other detail.

In analyzing whether parts D.3.a.(3) and J.3.a.(3)(c)(iv) – (viii) are a new program or higher level of service, we compare those provisions to the prior permit and look at the Regional Board’s Fact Sheet/Technical Report, which states why Part D.3.a.(3) was added:

Section D.3.a.(3) ... requires the Copermittees to inspect and remove waste from their MS4s prior to the rainy season. Additional wording has been added to clarify the intent of the requirements. The Copermittees will be required to inspect all storm drain inlets and catch basins. This change will assist the Copermittees in determining which basins/inlets need to be cleaned and at what

priority. Removal of trash has been identified by the copermittees as a priority issue in their long-term effectiveness assessment. To address this issue, wording has been added to require the Copermittees, at a minimum, inspect [sic] and remove trash from all their open channels at least once a year.

The 2001 permit contained the following in part F.3.a.(5)(b) and (c):

- (b) Each Copermittee shall implement a schedule of maintenance activities for the municipal separate storm sewer system.
- (c) The maintenance activities must, at a minimum, include:
 - i. Inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year;
 - ii. Additional cleaning as necessary between October 1 and April 30 of each year;
 - iii. Record keeping of cleaning and the overall quantity of waste removed;
 - iv. Proper disposal of waste removed pursuant to applicable laws;
 - v. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission finds that some provisions in the 2007 permit are the same as in the 2001 permit. Specifically, part D.3.a(3)(a) is not a new program or higher level of service because the 2001 permit also required maintenance and inspection in part F.3.a.(5)(b) and (c). The Commission also finds that part D.3.a.(3)(b)(i),(iv)- (vi) of the 2007 permit is the same as part F.3.a.(5)(c)(i)(iii) - (v) in the 2001 permit, both of which require:

- Annual inspection of MS4 facilities (D.3.a(3)(b)(i));
- Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a(3)(b)(iv));
- Proper disposal of waste removed pursuant to applicable laws (D.3.a(3)(b)(v)); and
- Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a(3)(b)(vi)).

Therefore, the Commission finds that these provisions are not a new program or higher level of service.

The Commission also finds that part D.3.a.(3)(b)(ii) is not a new program or higher level of service. It gives the claimants the flexibility, after two years of inspections, to inspect MS4 facilities that require inspection and cleaning less than annually, but not less than every other year. Part F.3.a.(5)(c)(i) of the 2001 permit stated: “The maintenance activities must, at a minimum, include: i. inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year.” Potentially less frequent inspections under the 2007 permit is not a new program or higher level of service.

The Commission finds that part D.3.a.(3)(b)(iii) of the 2007 permit is a new program or higher level of service on claimants to clean in a timely manner “Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity.... Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely

manner.” This part contains specificity, e.g., a standard of accumulation greater than 33% of design capacity, which was not in the 2001 permit.

Further, the Commission finds that the reporting in part J.3.a.(3)(c) (iv) – (viii) is a new program or higher level of service. The 2001 permit did not require this information in the content of the annual reports.

E. Educational component (part D.5): Part D.5 requires the copermittees to perform the activities on pages 25-28 above, which can be summarized as:

- Implement an educational program so that copermittees’ planning and development review staffs (and planning board/elected officials, if applicable) understand certain laws and regulations related to water quality.
- Implement an educational program that includes annual training before the rainy season so that the copermittees’ construction, building, code enforcement, and grading review staffs, inspectors, and others will understand certain specified topics.
- At least annually, train staff responsible for conducting stormwater compliance inspections and enforcement of industrial and commercial facilities on specified topics.
- Implement an education program so that municipal personnel and contractors performing activities that generate pollutants understand the activity specific BMPs for each activity to be performed.
- Implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and others relating to specified topics.

The State Board, in its October 2008 comments on the test claim, states that federal regulations authorize the inclusion of an education component, in that the proposed management program must “include a description of appropriate educational and training measures for construction site operations” (40 C.F.R. § 122.26(d)(2)(iv)(D)(4)) and a “description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors...” (40 C.F.R. § 122.26(d)(2)(iv)(A)(6)). The federal regulations also require a “description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers” (40 C.F.R. § 122.26(d)(2)(iv)(B)(5)) and a “description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials.” (40 C.F.R. § 122.26(d)(2)(iv)(B)(6)). The State Board also says that according to the U.S. EPA’s Phase II stormwater regulations, the MEP standard requires the copermittees to implement public education programs. According to the State Board, the regulations apply to copermittees with less developed storm water programs, and require the programs to include a public education and outreach program (40 C.F.R. § 122.34(b)(1)) and a public involvement/participation program (40 C.F.R. § 122.26(b)(2)). To the extent the permit requirements are more specific than federal law, the State Board calls them an appropriate use of the Regional Board’s discretion “to require more specificity in establishing the MEP standard.”

Claimants, in their February 2009 comments, characterize the federal regulations as only requiring them “to describe educational, public information, and other appropriate activities associated with their jurisdictional, watershed or stormwater management programs.” By contrast, under the permit claimants argue that they are required to “implement specific educational and training programs that achieve measurable increases in specific target community knowledge and to ensure a measurable change in the behavior of such target communities rather than simply report on the ... educational programs on an annual basis.” Claimants state that they are required to perform testing and surveys and “new program elements to secure the measureable changes in knowledge and behavior.”

The Commission agrees with claimants. As quoted in the State Board’s comments, the federal regulations require nonspecific descriptions of educational programs, for example, requiring the permit application to “include appropriate educational and training measures for construction site operations” and “controls such as educational activities.” The permit, on the other hand, requires implementation of an educational program with target communities and specified topics. These requirements “exceed the mandate in that federal law or regulation.”¹³² As in *Long Beach Unified School Dist. v. State of California*,¹³³ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹³⁴ to impose these requirements. Thus, the Commission finds that part D.5 of the permit is not federally mandated.

Based on the mandatory language on the face of the permit, the Commission finds that part D.5 of the permit constitutes a state mandate on the copermittees to do all of the following:

Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

- Municipal Departments and Personnel
- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children

a. GENERAL REQUIREMENTS

(1) Each Copermittee shall educate each target community on the following topics where appropriate:

¹³² Government Code section 17556, subdivision (c).

¹³³ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹³⁴ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

Table 3. Education

Laws, Regulations, Permits, & Requirements	Best Management Practices
<ul style="list-style-type: none"> • Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board’s General NPDES Permit for Ground Water Dewatering • Regional Board’s 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits) 	<ul style="list-style-type: none"> • Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	Other Topics
<ul style="list-style-type: none"> • Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections 	<ul style="list-style-type: none"> • Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation • Alternative materials and designs to maintain peak runoff values • Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

- i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
- ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
- iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
- iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
 - [1] Storm water management plan development and review;
 - [2] Methods to control downstream erosion impacts;
 - [3] Identification of pollutants of concern;
 - [4] LID BMP techniques;
 - [5] Source control BMPs; and
 - [6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

- i. Federal, state, and local water quality laws and regulations applicable to construction and grading¹³⁵ activities.
- ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
- iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
- iv. The Copermittee’s inspection, plan review, and enforcement policies and procedures to verify consistent application.
- v. Current advancements in BMP technologies.
- vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

¹³⁵ Attachment C of the permit defines grading as “the cutting and/or filling of the land surface to a desired slope or elevation.”

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The State Board, in its October 2008 comments, states that the education requirement in part D.5. does not amount to a new program or higher level of service because the 2007 permit “includes education topics from the 2001 permit with minor wording and formatting changes. Additionally, the requirements were adopted to implement the same federal MEP standard as established in the CWA and in the 2001 Permit.”

In their February 2009 comments, the claimants state that the 2001 permit did not require:

- Implementation of an education program so that the copermittee’s planning and development review staff (and Planning Boards and Elected Officials, if applicable) understand certain specified laws and regulations related to water quality. (D.5.b.(1)(a).)
- Implementation of an education program that includes annual training prior to the rainy season so that the copermittee’s construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of certain specified topics. (D.5.b.(1)(b).)
- Training of staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year relating to certain specified topics (D.5.b.(1)(c).)

- Implementation of an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed. (D.5.b.(1)(d).)
- Implementation of a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties relating to certain specified topics. (D.5.b.(2).)

This analysis of whether the permit is a new program or higher level of service is in the order presented in the permit. The Commission finds that nearly all of the educational topics in part D.5.a. are the same as those in the 2001 permit (part F.4). Both the 2001 and 2007 permits require the claimants to “educate” each specified target community on the following topics (Table 3 in the 2007 permit):

Laws, Regulations, Permits, & Requirements: Federal, state, and local water quality laws and regulations; Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction); Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities; Regional Board’s General NPDES Permit for Ground Water Dewatering; Regional Board’s 401 Water Quality Certification Program; Statewide General NPDES Utility Vault Permit; Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits).

Best Management Practices: Pollution prevention and safe alternatives; Good housekeeping (e.g., sweeping impervious surfaces instead of hosing); Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste); Non-storm water disposal alternatives (e.g., all wash waters); Methods to minimize the impact of land development and construction; Methods to reduce the impact of residential and charity car-washing; Preventive Maintenance; Equipment/vehicle maintenance and repair; Spill response, containment, and recovery; Recycling; BMP maintenance.

General Urban Runoff Concepts: Impacts of urban runoff on receiving waters; Distinction between MS4s and sanitary sewers; Short-and long-term water , quality impacts associated with urbanization (e.g., land-use decisions, development, construction); How to conduct a storm water inspection.

Other Topics: Public reporting mechanisms; Water quality awareness for Emergency/ First Responders; Illicit Discharge Detection and Elimination observations and follow-up during daily work activities; Potable water discharges to the MS4; Dechlorination techniques; Hydrostatic testing; Integrated pest management; Benefits of native vegetation; Water conservation; Alternative materials and designs to maintain peak runoff values; Traffic reduction, alternative fuel use.

Because the requirement to educate the target communities on these topics was in the 2001 permit, as well as the 2007 permit, the Commission finds that doing so, as required by part D.5.a(1), table 3, is not a new program or higher level of service.

Under the 2007 permit, the copermittees are required to “educate each target community” on the following educational topics that were not in the 2001 permit: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID [low-impact development], source control, and treatment control. Thus, the Commission finds that the part D.5.a.(1) is a new program or higher level of service to educate each target community on only the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control.

Part D.5.a.(2) states: “(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and ‘allowable’ behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.” This provision was not in the 2001 permit, so the Commission finds that part D.5.a.(2) is a new program or higher level of service.

In part D.5.b.(1)(a) (Municipal Development Planning) the permit requires implementing an education program for “municipal planning and development review staffs (and Planning Board and Elected Officials, if applicable)” on specified topics. The 2001 permit required implementing an educational program for “Municipal Departments and Personnel” that would include planning and development review staffs, but not planning boards and elected officials. So the Commission finds that part D.5.b.(1)(a)(i) and (ii) is a new program or higher level of service for planning boards and elected officials.

Certain topics in part D.5.b.(1)(a) are a new program or higher level of service for both planning and development review staffs as well as planning boards and elected officials. Under both part F.4.a. of the 2001 permit, and D.5.b.(1)(a) of the 2007 permit, the copermittees are required to implement an educational program on the following topics:

- i. Federal, state, and local water quality laws and regulations applicable to Development Projects; [The 2001 permit, in F.4.a. (p. 35) says: “Federal, state and local water quality regulations that affect development projects.”]
- ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); [The 2001 permit, in F.4.a (p. 35) calls this “Waters Quality Impacts associated with land development.”]

Thus the Commission finds that implementing an educational program on these topics is not a new program or higher level of service for municipal departments, but is for planning boards and elected officials.

The following topics were not listed in the 2001 permit, so the Commission finds that part D.5.b.(1)(a) is a new program or higher level of service to implement these in an educational program for all target communities:

- (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements;
- (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and

[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

Part D.5.b.(1)(b) (Municipal Construction Activities) of the permit requires implementing an educational program for municipal “construction, building, code enforcement, and grading review staffs.” Again, this is not a new program or higher level of service for those topics in which the 2001 permit also required an education program for “Municipal Departments and Personnel,” such as:

- i. Federal, state, and local water quality laws and regulations applicable to construction and grading activities. [The 2001 permit, in F.4.a. (p. 35) says: “Federal, state and local water quality regulations that affect development projects.”]
- ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment. [The 2001 permit, in F.4.a (p. 35) calls this “Water Quality Impacts associated with land development.”]

The timing of the educational program specified in D.5.b.(1)(b) requires it to be implemented “prior to the rainy season.” There is no evidence in the record, however, that this timing requirement is a new program or higher level of service compared with the 2001 permit. Thus the Commission finds that part D.5.b.(1)(b)(i) and (ii) are not a new program or higher level of service.

Municipal construction activity education topics were added to the 2007 permit, however, that were not in the 2001 permit, in paragraphs (iii) to (vi) as follows:

- (b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:
[¶]... [¶] iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee’s inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

Thus, the Commission finds that part D.5.b.(1)(b)(iii) - (vi) of the 2007 permit is a new program or higher level of service.

Part D.5.b.(1)(c) of the 2007 permit (Municipal Industrial/Commercial Activities) requires the following:

- (c) Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

The 2001 permit included (in F.4.b.) the topic “How to conduct a stormwater inspection” but did not specify that the training was to be annual, and did not require the training to cover inspection and enforcement procedures, BMP Implementation, or reviewing monitoring data. Thus, the Commission finds that part D.5.(b)(1)(c) is a new program or higher level of service.

Part D.5.b.(1)(d) of the 2007 permit requires the following:

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

Regarding part D.5.b.(1)(d), the 2007 Fact Sheet/Technical Report states:

A new requirement has also been added for education of activity specific BMPs for municipal personnel and contractors performing activities that generate pollutants. Education is required at all levels of municipal staff and contractors. Education is especially important for the staff in the field performing activities which might result in discharges of pollutants if proper BMPs are not used.

Because part D.5.b.(1)(d) was not in the 2001 permit, and because the Regional Board called it a “new requirement” the Commission finds that part D.5.(b)(1)(d) of the 2007 permit is a new program or higher level of service.

Part D.5.(b)(2) of the 2007 permit requires an education program for “project applicants, developers, contractors, property owners, community planning groups, and other responsible parties.” Parts F.4.a and F.4.b. of the 2001 permit required a similar education program for “construction site owners and developers.” The Fact Sheet/Technical Report for the 2007 permit states:

Different levels of training will be needed for planning groups, owners, developers, contractors, and construction workers, but everyone should get a general education of stormwater requirements. Education of all construction workers can prevent unintentional discharges, such as discharges by workers who are not aware that they are not allowed to wash things down the storm drains. Training for BMP installation workers is imperative because the BMPs will not fail if not properly installed and maintained. Training for field level workers can be formal or informal tail-gate format.

Thus, the Commission finds that part D.5.(b)(2) of the 2007 permit is a new program or higher level of service for project applicants, contractors, or community planning groups who are not developers or construction site owners.

The final part of the education programs in the 2007 permit is D.5.(b)(3) regarding “Residential, General Public, and School Children.”

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers,

door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The 2001 permit (part F.4.c.) stated the following:

In addition to the topics listed in F.4.a. above, the Residential, General Public, and School Children communities shall be educated on the following topics where applicable:

- Public reporting information resources
- Residential and charity car-washing
- Community activities (e.g., “Adopt a Storm Drain, Watershed, or Highway” Programs, citizen monitoring, creek/beach cleanups, environmental protection organization activities, etc..

The 2001 permit did not require claimants to “collaboratively conduct or participate in development ... of a plan to educate residential, general public, and school children target communities.” The 2001 permit also did not require the plan to “evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.” Thus, the Commission finds that part D.5.(b)(3) of the 2007 permit is a new program or higher level of service.

In sum, as to part D.5 of the 2007 permit that requires implementing educational programs, the Commission finds that the following subparts are new programs or higher levels of service:

- D.5.a.(1): Each copermittee shall educate each target community, as specified, on the following topics: erosion prevention, nonstorm waters discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control.
- D.5.a.(2): Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.
- D.5.b.(1)(a): Implement an education program so that planning boards and elected officials, if applicable, have an understanding of: (i) Federal, state, and local water quality laws and regulations applicable to Development Projects; (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization).
- D.5.b.(1)(a): Implement an education program so that planning and development review staffs as well as planning boards and elected officials have an understanding of: (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements; (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and [6] Selection of the most effective treatment control BMPs for the pollutants of concern.”
- D.5.b.(1)(b)(iii) - (vi): Implement an education program that includes annual training prior to the rainy season for its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an

understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

- iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
 - iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
 - v. Current advancements in BMP technologies.
 - vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.
- D.5.(b)(1)(c) and (d) as follows:
 - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.
 - Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.
 - D.5.(b)(2), As early in the planning and development process as possible and all through the permitting and construction process, to implement a program to educate project applicants, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) [Municipal Development Planning] and D.5.b.(1)(b) [Municipal construction Activities] above, as appropriate for the audience being educated. The education program shall also educate project applicants, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.
 - D.5.(b)(3), Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (Part E)

Part E of the permit is the Watershed Urban Runoff Management Program (WURMP). The permit (Table 4) divides the copermittees into nine watershed management areas (WMAs) by “major receiving water bodies.” The 2001 permit also had a WURMP component (in part J).

A. Watershed Urban Runoff Management Program copermittee collaboration (parts E.2.f & E.2.g): These provisions require the copermittees to do the activities on pages 28-29 above, including the following:

- Collaborating with other copermittees within their watershed management areas (WMAs) to develop and implement an updated Watershed Urban Runoff Management Program for each watershed that prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards which at a minimum includes:
 - Identifying and implementing watershed activities that address the high priority water quality problems in the watershed management areas that include both watershed water quality activities¹³⁶ and watershed education activities.¹³⁷
 - Creating a watershed activities list that includes certain specified information to be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter.
 - Implementing identified watershed activities within established schedules.
 - Collaborating to develop and implement the Watershed Urban Runoff Management Program, including frequent regularly scheduled meetings.¹³⁸

In its October 2008 comments, the State Board asserts that the Watershed Urban Runoff Management Program activities are necessary to meet the minimum federal MEP standard. The State Board quotes the following federal regulations: “The Director may ... issue distinct permits for appropriate categories of discharges ... including, but not limited to ... all discharges within a system that discharge to the same watershed...” (40 C.F.R. 122.26(a)(3)(ii).) The State Board also quotes more specific federal regulations:

Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system. (40 C.F.R. § 122.26 (a)(3)(v).)

The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, a

¹³⁶ Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed’s high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of the permit (Part E.2.f).

¹³⁷ Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA (Part E.2.f).

¹³⁸ In their February 2009 comments, the claimants also list the following activities: (1) Annual review of WURMPs to identify needed modifications and improvements (part E.2.i); (2) Develop and periodically update watershed maps (part E.2.b); (3) Develop and implement a program for encouraging collaborative watershed-based land-use planning (part E.2.d); (4) Develop and implement a collective watershed strategy (part E.2.e). These parts of the permit, however, were not pled in the test claim so the Commission makes no findings on them.

jurisdiction-wide basis, watershed basis, or other appropriate basis;” (40 C.F.R. § 122.26 (a)(5).)

Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. (40 C.F.R. § 122.26 (d)(2)(iv).)

The State Board argues that the regional board “determined that the inclusion of the requirement to formalize the Watershed Water Qualities Activities List was appropriate to further the goal of the WURMPS in achieving compliance with federal law.” Based on some reports it received, the Regional Board determined that “many of the watershed water quality activities had no clear connection to the high priority water quality problems in the area of implementation.” The Board determined it was therefore necessary and appropriate to require development of an implementation strategy to maximize WURMP effectiveness.

Claimants, in their February 2009 comments, point out that while cooperative agreements may be required by 40 C.F.R. § 122.26(d)(2)(i)(D), “each copermittee is only responsible for their own systems.” Claimants quote another federal regulation: “Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate.” (40 C.F.R. § 122.26(a)(3)(vi).) Claimants argue that the 2007 permit:

[R]equires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year.

Claimants also state that the permit “mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order.” (part E.2.f(1)(a).) According to what the claimants call these “dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work.”

The Commission finds that the permit requirements in sections E.2.f and E.2.g. are not federal mandates. As with the other requirements in the permit, the federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed or other basis. These requirements “exceed the mandate in that federal law or regulation.”¹³⁹ As in *Long Beach Unified School Dist. v. State of California*,¹⁴⁰ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹⁴¹ to impose these requirements.

Based on the mandatory language in the permit, the Commission finds that the following in part E are a state mandate on the copermittees:

¹³⁹ Government Code section 17556, subdivision (c).

¹⁴⁰ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁴¹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) as in Table 4 [of the permit] to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below:

☐...☐

f. Watershed Activities¹⁴²

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;

(b) A time schedule for implementation of the activity, including key milestones;

(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;

(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

¹⁴² In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

(e) A description of how the activity is consistent with the collective watershed strategy;

(f) A description of the expected benefits of implementing the activity; and

(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

As to the issue of new program or higher level of service, the State Board, in its October 2008 comments, states:

Although Section E.2.f. requires development and implementation of a list of Watershed Water Qualities Activities for potential implementation that was not specifically required in the 2001 Permit, the Copermittees were previously required to identify priority water quality issues and identify recommended activities to address the priority water quality problems (See 2001 Permit, section J.1 and J.2.d.)

The State Board asserts that Copermittees were already required to collaborate with other Copermittees, and that "Section E.2.g. merely adds effectiveness strategies to the collaboration requirements." ... Other requirements challenged by the Claimants exist in the 2001 Permit, but with minor wording changes (e.g., the requirement to update watershed maps, which exists in both permits).

Claimants, in their February 2009 comments, assert that parts E.2.f. and E.2.g do impose a new program or higher level of service. According to the claimants:

Under the 2001 Permit the watershed requirements were essentially limited to mapping, assessment and identification of short and long term issues. Collaboration included mapping (J.2.a.), assessment of receiving waters (J.2.b); identification and prioritization of water quality problems (J.2.c); implementation of time schedules (J.2.d) and identification of copermittee responsibilities for each recommended activity including a time schedule.

[¶]...[¶]

The 2007 Permit imposes standards far beyond those listed in ... the 2001 Permit The 2007 Permit now requires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year. The two-activity watershed requirement is a condition of all copermittees regardless of whether the activity is within their jurisdictional authority or not.

In addition, while the 2007 Permit states that activities can be implemented at a regional, watershed or jurisdictional level, it mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order. By reason of the dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work.

The Commission finds that E.2.f. and E.2.g of the permit are a new program or higher level of service.

As to watershed education in part E.2.f, the 2001 permit (in part J.2.g.) stated that the WURMP shall contain “A watershed based education program.” The 2007 permit states that the WURMP shall include “watershed education activities” defined as “outreach and training activities that address high priority water quality problems in the WMA [Watershed Management Area(s)].” Moreover, in part E.f.(4), the 2007 permit states: “A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.” Because of this increased requirement for implementation of watershed education, the Commission finds that watershed education activities, as defined in part E.2.f, is a new program or higher level of service.

Additionally, the Commission finds that the rest of part E.2.f. is a new program or higher level of service because it includes elements not in the 2001 permit, such as:

- A definition of watershed water quality activities (part E.2.f.(1)(a)).
- Submission of a watershed activities list, with specified contents (part E.2.f.(2)).
- A detailed description of each activity on the watershed activities list, with seven specific components (part E.2.f.(3)).
- Implementation of watershed activities pursuant to established schedules, including definitions of when activities are in an active implementation phase (part E.2.f.(4)).

As to part E.2.g., although the 2001 (in parts J.1. & J.2.) and 2007 permits both require copermittee collaboration in developing and implementing the Watershed Urban Runoff Management Plan, copermittee collaboration is a new program or higher level of service because the WURMP is greatly expanded over the 2001 permit in part E.2.f as discussed above. This means that new collaboration is required to develop and implement the watershed activities in part E.2.f.

The 2007 permit (in part E.2.g) also states that “Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.” This requirement for meetings was not in the 2001 permit. The Fact Sheet/Technical Report states:

The requirement for regularly scheduled meetings has been added based on Regional Board findings that watershed groups which hold regularly scheduled meetings (such as for San Diego Bay) typically produced better programs and work products than watershed groups that went for extended periods of time without scheduled meetings.¹⁴³

Therefore, the Commission finds that part E.2.g. of the 2007 permit is a new program or higher level of service.

Regarding watershed water quality activities in part E.2.f, the Fact Sheet/Technical Report the Regional Board stated:

This requirement developed over time while working with the Copermittees on their WURMP implementation under Order No. 2001-01. In October 2004 letters, the Regional Board recommended the Copermittees develop a list of Watershed Water Quality Activities for potential implementation. Following receipt of the Regional Board letters, the Copermittees created the Watershed Water Quality Activity lists. Although the Copermittees' lists needed improvement, the Regional Board found the lists to be useful planning tools that can be evaluated to identify effective and efficient Watershed Water Quality Activities. Because the lists are useful and have become a part of the WURMP implementation process, a requirement for their development has been written into the Order.

Thus, the Commission finds that part E.2.f. of the permit is a new program or higher level of service, in that it requires the following not required in the 2001 permit:

- Identification and implementation of watershed activities that address the high priority water quality problems in the WMA (Watershed Management Area), as specified (part E.2.f.(1)).
- Submission of a watershed activities list with each updated WURMP and updated annually thereafter, as specified (part E.2.f.(2)-(3)).
- Implementation of watershed activities pursuant to established schedules: no less than two watershed water quality activities and two watershed education activities in active implementation phase, as defined, per permit year (part E.2.f.(4)).

III. Regional Urban Runoff Management Program (Part F)

Part F of the permit describes the Regional Urban Runoff Management Program (RURMP). It was included because “some aspects of urban runoff management can be effectively addressed at a regional level. ... However, significant flexibility has been provided to the Copermittees for new regional requirements.”¹⁴⁴

¹⁴³ For an inexplicable reason, the Fact Sheet/Technical Report lists this collaboration activity under Section E.2.m of the permit rather than E.2.g.. The permit at issue has no section E.2.m.

¹⁴⁴ San Diego Regional Water Quality Control Board, “Fact Sheet/Technical Report for Order No. R9-2007-0001.”

A. Copermittee collaboration – Regional Residential Education Program Development and Implementation (part F.1): Part F.1 requires the copermittees to develop and implement a Regional Residential Education Program, with specified contents (see p. 12 above). In the test claim the claimants discuss hiring a consultant to develop the educational program that “will generally educate residents on: 1) the difference between stormwater conveyance systems and sanitary sewer systems; 2) the connection of storm drains to local waterways; and 3) common residential sources of urban run-off.” Claimants allege activities to comply with section F.1 of the permit that include, but are not limited to: “development of materials/branding, a regional website, regional outreach events, regional advertising and mass media, partnership development, and the development of marketing and research tools, including regional surveys to be conducted in FY 2008-09 and again in FY 2011-12.”

In comments submitted in October 2008, the State Board asserts that the permit condition in section F.1. is necessary to meet the minimum federal MEP standard and that the requirement is supported by the Clean Water Act statutes and regulations. The State Board cites the following federal regulations:

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.¹⁴⁵ [¶]...[¶]

(5) The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.¹⁴⁶ [¶]...[¶]

(2) *Part 2.* Part 2 of the application shall consist of:

(i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;¹⁴⁷

(iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. ...¹⁴⁸

In response, the claimants’ February 2009 comments state that the Regional Residential Education Program is not necessary to meet the minimum federal MEP standard. The regional nature of the education program, according to the claimants, is duplicative because it imposes the

¹⁴⁵ 40 Code of Federal Regulations section 122.26 (a)(3)(v).

¹⁴⁶ 40 Code of Federal Regulations section 122.26 (a)(5).

¹⁴⁷ 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

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

education requirements at the regional and jurisdictional levels concurrently, and it exceeds federal law.

The Commission finds that the requirements in part F.1 of the permit do not constitute a federal mandate. There is no federal requirement to provide a regional educational program, so the education program, “exceed[s] the mandate in that federal law or regulation.”¹⁴⁹ As in *Long Beach Unified School Dist. v. State of California*, the permit “requires specific actions ... [that are] required acts.”¹⁵⁰ In adopting part F.1, the state has freely chosen¹⁵¹ to impose these requirements. Thus, the Commission finds that part F.1. of the permit does not constitute a federal mandate.

Based on the mandatory language on the face of the permit, the Commission finds that the permit constitutes a state mandate on the claimants to do all the following in part F.1 of the permit:

The Regional Urban Runoff Management Program shall, at a minimum:

1. Develop and implement a Regional Residential Education Program. The program shall include:
 - a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
 - b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a (p. 50.)

As to whether this is a new program or higher level of service, the State Board, in its October 2008 comments, states that it is not because the claimants were already implementing a residential education program at a regional level before the permit was adopted.

In claimants’ February 2009 rebuttal comments, they assert that it is irrelevant whether or not the copermittees voluntarily met or exceeded the now mandatory requirements imposed by the 2007 permit because Government Code section 17565 states: “If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate.”

The Commission finds that part F.1 of the permit is a new program or higher level of service. The 2001 permit required an educational component as part of the Jurisdictional Urban Runoff Management Program (part F.4) that contained a residential component, but not a Regional Residential Education Program, so the activities in this program are new. Also, the Commission agrees that whether or not claimants were engaged in an educational program is not relevant due to Government Code section 17565. The Regional Board, in requiring the regional educational program, leaves the local agencies with no choice but to comply.

¹⁴⁹ Government Code section 17556, subdivision (c).

¹⁵⁰ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155, 173.

¹⁵¹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

B. Copermittee collaboration (parts F.2 & F.3): Parts F.2 and F.3 (quoted on p. 11 above) require the copermittees to collaborate to develop, implement, and update as necessary a Regional Urban Runoff Management Program, to include developing the standardized fiscal analysis method required in permit part G (part F.2) and facilitating the assessment of the effectiveness of jurisdictional, watershed, and regional programs (part F.3).

In comments submitted in October 2008, the State Board asserts that the permit conditions in sections F.2 and F.3 are necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

(2) *Part 2.* Part 2 of the application shall consist of:

(i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;¹⁵²

The State Board also quotes section 122.26 (a)(3)(v) of the federal regulations as follows:

(v) Permits for all or a portion of all discharges from large¹⁵³ or medium¹⁵⁴ municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different

¹⁵² 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

¹⁵³ “(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ...” [40 CFR § 122.26 (b)(4).]

¹⁵⁴ “(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ...” [40 CFR § 122.26 (b)(7).]

management programs for different drainage areas which contribute storm water to the system.

The State Board also asserts:

To the extent the Clean Water Act and federal regulations do not identify all of the specificity required in Sections F.2, F.3 . . . , the San Diego Water Board properly exercised its discretion under federal law to include specificity so that the federal MEP standard can be achieved. The San Diego Water Board exercised this duty under federal law and therefore the provisions of the 2007 Permit were adopted as federal requirements.

In the claimants' rebuttal comments submitted in February 2009, they state that "all of the authorities cited by the State merely acknowledge the State's authority to go beyond the federal regulations."

The Commission finds that the requirements in parts F.2 and F.3. of the permit do not constitute a federal mandate. There is no federal requirement to collaborate on, develop, or implement a Regional Urban Runoff Management Program (RURMP). The Commission finds that these RURMP activities "exceed the mandate in that federal law or regulation."¹⁵⁵ As in *Long Beach Unified School Dist. v. State of California*,¹⁵⁶ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹⁵⁷ to impose these requirements. Thus, the Commission finds that parts F.2 and F.3 of the permit do not constitute federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts F.2 and F.3 of the permit constitutes a state mandate on the claimants to do all the following:

Collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]...[¶]

(2) Develop the standardized fiscal analysis method required in section G of the permit, and,

(3) Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

As to whether these activities are a new program or higher level of service, the claimants state in the test claim:

"[W]hile the 2001 Permit required the copermittees to collaborate to address common issues and promote consistency among JURMPs and WURMPs and to

¹⁵⁵ Government Code section 17556, subdivision (c).

¹⁵⁶ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁵⁷ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

establish a management structure for this purpose, it lacked the detail, specificity and level of effort now mandated by the 2007 Permit.”

In their February 2009 rebuttal comments, claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

The State Board, in its October 2008 comments, states that the 2001 permit required that “the Copermittees enter into a formal agreement to provide, at a minimum, a management structure for designating joint responsibilities, decision making, watershed management, information management of data and reports” and other collaborative arrangements to comply with the permit.

According to the State Board, parts F.2 and F.3 are not a new program or higher level of service because the copermittees “were already conducting multiple efforts on a regional level under the 2001 permit. The inclusion of the RURMP is designed to organize these efforts into one framework to improve Copermittee and Regional Board tracking of regional efforts.” The State Board also asserts that the requirements were intended to reduce redundant reporting and improve efficiency and streamline regional program implementation. The State Board describes the 2007 permit as merely elaborating on and refining the 2001 requirements.

The permit itself states: “This Order contains new or modified requirements that are necessary to improve Copermittees’ efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards.” [Emphasis added.] The permit also describes the Regional Urban Runoff Management Plan as new.

While the 2001 permit contained requirements for a fiscal analysis (part F.8) and an assessment of effectiveness (part F.7), it did so only as components of a Jurisdictional Urban Runoff Management Program. The Regional Urban Runoff Management Program, required in part F.2 of the 2007 permit, is new. The fiscal analysis in part G is incorporated by reference into part F.2, and the effectiveness assessment is incorporated into part F.3. Thus, the Commission finds that the requirements in parts F.2 and F.3 are a new program or higher level of service.

IV. Program Effectiveness Assessment (Part I)

Part I of the permit is called “Program Effectiveness Assessment” and includes subparts for Jurisdictional (I.1), Watershed (I.2) and Regional (I.3) assessment, in addition to a Long Term Effectiveness Assessment (I.5). Of these, claimants pled subparts I.1, I.2 and I.5.

A. Jurisdictional and Watershed Program effectiveness assessment (parts I.1 & I.2): As more specifically stated on pages 22-24 above, the permit requires the copermittees to do the following:

- Annually assess the effectiveness of the Jurisdictional Urban Runoff Management Program (JURMP) that includes specifically assessing the effectiveness of specified components of the JURMP and the effectiveness of the JURMP as a whole.
- Identify measureable targeted outcomes, assessment measures, and assessment methods for each jurisdictional activity/BMP implemented, each major JURMP component, and the JURMP as a whole.

- Development and implement a plan and schedule to address the identified modifications and improvements.
- Annually report on the effectiveness assessment as implemented under each of the specified requirements.
- As a watershed group of copermittees, annually assess the effectiveness of the Watershed Urban Runoff Management Program (WURMP) implementation, including each water quality activity and watershed education activity, and the program as a whole.
- Determine source load reductions resulting from WURMP implementation and utilize water quality monitoring results and data to determine whether implementation is resulting in changes to water quality.
- As with the JURMP, annually review WURMP jurisdictional activities or BMPs to identify modifications and improvements needed to maximize the program's effectiveness, develop and implement a plan and schedule to address the identified modifications and improvements to the programs, and annually report on the program's effectiveness assessment as implemented under each of the requirements.

Regarding parts I.1.a. and I.2.a. of the permit, the Fact Sheet/Technical Report states: "The section requires both specific activities and broader programs to be assessed since the effectiveness of jurisdictional [or watershed] efforts may be evident only when considered at different scales."¹⁵⁸

The State Board, in its comments submitted in October 2008, cites section 402(p)(3(B)(ii)-(iii) of the Clean Water Act, as well as 40 C.F.R. sections 122.26(d)(2)(i)(B)-(C), (E) and (F) and subdivision (d)(2)(iv) of the same section to show the "broad federal authorities relied upon by the San Diego Water Board to support Section I ... [that] ... support inclusion of the JURMP and WURMP effectiveness assessments under federal law." The State Board also quotes section 122.26(d)(2)(v) that the copermittees must include in part 2 of their application for a permit:

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

The State Board also says that "under 40 C.F.R. section 122.42(c), applicants must provide annual reports on the progress of their storm water management programs. The federal law behind the JURMP and WURMP effectiveness assessment requirements were discussed at great length in the 2001 Permit Fact Sheet."¹⁵⁹ The State Board quotes a lengthy portion of the 2001

¹⁵⁸ Fact Sheet/Technical Report for Order No. R9-2007-0001, Parts I.1.a. and I.2.a.. Two identical paragraphs describe the JURMP on page 319 and the WURMP on page 320.

¹⁵⁹ 40 C.F.R. section 122.42(c) states:

Municipal separate storm sewer systems. The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must

Fact Sheet, which states that the U.S. EPA requires applicants to submit estimated reductions in pollutant loads expected to result from implemented controls and describe known impacts of storm water controls on groundwater. The 2001 Fact Sheet also includes “Throughout the permit term, the municipality must submit refinements to its assessment or additional direct measurements of program effectiveness in its annual report.” It also lists a number of U.S. EPA suggestions, recommendations, and encouraged actions.

The State Board also quotes at length from the 2007 Permit Fact Sheet/Technical Report regarding why the effectiveness assessments are required under the permit, including the need for them and the benefits of including them. According to the State Board, the federal authorities support including the effectiveness assessments, and the Regional Board appropriately exercised discretion under federal law to include them, finding them necessary to implement the MEP standard. Thus, the State Board asserts that sections I.1 and I.2 do not exceed federal law.

The claimants, in their February 2009 comments, state that neither the broad nor the specific legal authority cited in the permit Fact Sheet “contains the above-referenced mandates required under the 2007 Permit.” Claimants characterize the federal regulations as only requiring “program descriptions, estimated reductions, known impacts, and an annual report on progress. Federal law does not mandate the specific activities mandated by the 2007 Permit.” Claimants also argue that the permit requirements are not necessary to meet the federal MEP standard, and point out that the 2001 Permit Fact Sheet cited by the State Board describes actions recommended or encouraged by the U.S. EPA, but not required. As claimant says: “they simply authorize applicants to go beyond minimum federal requirements.” Claimants also quote the State Board’s comment on “the need for and benefits of assessment requirements,” noting that needs and benefits “constitute an insufficient basis for the imposition of a mandated requirement without subvention.”

Although the federal regulations require assessment of controls and annual reports, they do not require the detailed assessment in the 2007 permit. The regulations do not require, for example, assessments of the effectiveness of each significant jurisdictional activity/BMP or watershed

submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:

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

quality activity, or of the implementation of each major component of the JURMP or WURMP, or identification of modifications and improvements to maximize the JURMP or WURMP effectiveness. These requirements, “exceed the mandate in that federal law or regulation.”¹⁶⁰ As in *Long Beach Unified School Dist. v. State of California*,¹⁶¹ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹⁶² to impose these requirements. Thus, the Commission finds that parts I.1 and I.2 of the permit are not federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts I.1 and I.2 of the permit are a state mandate on the copermittes to do all of the following:

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittes shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge¹⁶³ Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6¹⁶⁴ to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,¹⁶⁵ Water Quality Assessment,¹⁶⁶ and Integrated Assessment,¹⁶⁷ where applicable and feasible.

¹⁶⁰ Government Code section 17556, subdivision (c).

¹⁶¹ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁶² *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹⁶³ Illicit discharge, as defined in Attachment C of the permit, is “any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)].”

¹⁶⁴ See footnote 50, page 21.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)¹⁶⁸ shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

- (a) Each Watershed Water Quality Activity implemented;
- (b) Each Watershed Education Activity implemented; and
- (c) Implementation of the Watershed Urban Runoff Management Program as a whole.

¹⁶⁵ Implementation Assessment is defined in Attachment C of the permit as an “Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed.”

¹⁶⁶ Water Quality Assessment is defined in Attachment C of the permit as an “Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges.”

¹⁶⁷ Integrated Assessment is defined in Attachment C of the permit as an “Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality.”

¹⁶⁸ Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

- (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.
- (3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.
- (4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.
- (5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.
- (6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.
- (7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.¹⁶⁹ The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

¹⁶⁹ Section A is “Prohibitions and Receiving Water Limitations.”

The State Board, in its October 2008 comments, states that the program effectiveness assessment is not a new program or higher level of service because the 2001 permit included a JURMP (in part F.7) and WURMP (in part J) effectiveness assessment requirements.

The claimants, in their February 2009 comments, state as follows:

The 2001 Permit only required the copermittees to develop a long term strategy for assessing the effectiveness of their individual JURMP using specific and indirect measurements to track the long term progress of their individual JURMPs towards achieving water quality. [part F.7.a. of the 2001 permit.] The 2001 Permit also only mandated that the long term strategy developed by the copermittees include an assessment of the effectiveness of their JURMP in an annual report using the direct and indirect assessment measurements and methods developed in the long-term strategy. [part F.7. of the 2001 permit.]

Part F.7 of the 2001 permit required developing the following on the topic of “Assessment of Jurisdictional URMP Effectiveness Component.”

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

b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

The 2007 permit requires more detail in its assessments than the 2001 permit. The 2007 permit requires annual assessments and using outcome levels, among other things, to assess the effectiveness of (a) each significant jurisdictional activity/BMP, (b) implementation of each major component of the JURMP, and (c) implementation of the JURMP as a whole. The 2001 permit did not require assessments at these three levels. And for example, outcome level 4 in the 2007 permit is required for measuring load reductions.¹⁷⁰ This is a higher level of service than “pollutant loading estimations” to be used as an effectiveness strategy in the 2001 permit.¹⁷¹ Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

¹⁷⁰ There are six Effectiveness Assessments incorporated into part I.1.a.(3) of the permit and are defined in Attachment C. One of them is “Effectiveness Assessment Level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed.”

¹⁷¹ See Fact Sheet/Technical Report for Order No. R9-2007-0001.

The assessment provisions of the Watershed Urban Runoff Management Program are in part J.2 of the 2001 permit, which requires each copermittee to develop and implement a Watershed URMP that contains, among other things:

b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual watershed water quality monitoring that satisfies the watershed monitoring requirements of Attachment B.

¶¶...¶¶

i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that will track the long-term progress of the Watershed URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

As with the JURMP, the 2001 permit required a “long-term strategy for assessing the effectiveness of the Watershed URMP” whereas the 2007 permit requires the annual assessment of more specific criteria: (a) each Watershed Water Quality Activity implemented; (b) Each Watershed Education Activity implemented; and (c) Implementation of the Watershed Urban Runoff Management program as a whole. And the 2007 permit requires assessing these activities using the same six effectiveness outcome levels as for the JURMP (defined in Attachment C), that were not in the 2001 permit.¹⁷²

¹⁷² Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

Therefore, the Commission finds that section I.2. of the permit (the Watershed URMP effectiveness assessment) is a new program or higher level of service.

B. Long Term Effectiveness Assessment (part I.5): As stated on pages 19-20 above, part I.5 requires the copermitees to collaborate to develop a Long Term Effectiveness Assessment (LTEA) that evaluates the copermitee programs on a jurisdictional, watershed, and regional level, and that emphasizes watershed assessment. The LTEA must build on the results of the August 2005 Baseline LTEA, and must be submitted to the Regional Board no later than 210 days before the permit expires. The LTEA must address the Regional objectives listed in part I.3 of the permit, as well as assess the effectiveness of the Receiving Waters Monitoring Program, and address outcome levels 1-6 as specified in attachment C of the permit.

In its October 2008 comments on the test claim, the State Board says that the LTEA requirement was imposed “so that the San Diego Water Board could properly evaluate the Copermitees’ storm water program during the reapplication process.” The State Board asserts that the LTEA provision is a federal mandate, citing 40 C.F.R. section 122.26, subdivisions (d)(2)(iv) and (v), in which (v) states that a permit application must include:

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

According to the State Board, “Even if the requirements to develop an LTEA are not specifically required by the federal regulations, the general discussion of the federal MEP standard is applicable here and supports the San Diego Water Board’s determination that the region-wide LTEAs are necessary to meet the federal MEP standard.”

In their February 2009 rebuttal comments, the claimants state:

The program effectiveness component of the 2007 Permit mandates Jurisdictional (I.1), Watershed (I.2), Regional (I.3), Total Maximum Daily Loads (“TMDL”) and BMP Implementation (I.4) and Long-term Effectiveness Assessment (I.5) requirements. This Section mandates multiple layers of program assessment, review and reporting. Such duplicative and collaborative efforts were not required under the 2001 Permit and are not required by federal law.

Claimants assert that there is no federal authority that states that the regional, jurisdictional and watershed program effectiveness training requirements are required to meet the minimum federal MEP standards. Claimants also state that permits in other jurisdictions do not have LTEA requirements. According to the claimants, “while portions of the federal regulations cited by the State permit region-wide or watershed-wide cooperation, there is no mandatory requirement for multiple layers of program effectiveness assessment.”

Although the federal regulations require assessment of controls, they do not require the detailed assessment in the 2007 permit. They do not require, for example, collaboration with other copermitees, addressing specified objectives or outcome levels, or addressing jurisdictional, watershed, and regional programs. These requirements “exceed the mandate in that federal law

or regulation.”¹⁷³ As in *Long Beach Unified School Dist. v. State of California*,¹⁷⁴ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹⁷⁵ to impose these requirements. Thus, the Commission finds that part I.5 of the permit is not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission finds that part I.5 of the permit is a state mandate for the claimants to do all of the following:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees’ August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)¹⁷⁶ of this Order, and to serve as a basis for the Copermittees’ Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of

¹⁷³ Government Code section 17556, subdivision (c).

¹⁷⁴ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁷⁵ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹⁷⁶ Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees’ jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The next issue is whether the LTEA (part I.5) is a new program or higher level of service. The State Board, in its October 2008 comments, state as follows:

The LTEA does not impose a new program or higher level of service. Rather, it requires the Copermittees to conduct a long term effectiveness assessment prior to submitting an application for reissuance of the Order in the next permit term and is necessary to support proposed changes to the Copermittees' programs."

The claimants, in their February 2009 comments, argue that the LTEA requirement in part I.5 does impose a new program or higher level of service. According to the claimants:

Section F.7 of the 2001 Permit only required individual copermittees to develop long term effectiveness assessments for their Jurisdictional Urban Runoff Management Plan ("JURMP"). ... The 2001 Permit did not require the copermittees to collaborate to develop an overarching LTEA for regional, jurisdictional and watershed programs, and did not require the submission of a LTEA by a date certain in advance of the Permit expiration.

The Commission finds that the LTEA is a new program or higher level of service. The 2001 permit required JURMP assessment (in part F.7) and WURMP (in part J.2) as quoted above in the discussion on parts I.1 and I.2., but not an LTEA. The Fact Sheet/Technical Report for the 2007 permit states:

Section I.5 (Long-Term Effectiveness Assessment) requires the Copermittees to conduct a Long-Term Effectiveness Assessment prior to their submittal of an application for reissuance of the Order. The Long-Term Effectiveness Assessment is necessary to provide support for the Copermittees' proposed changes to their programs in their ROWD. It can also serve as the basis for changes to the Order's requirements.

The Commission finds that the LTEA (part I.5) is a new program or higher level of service for three reasons. First, the scope of the assessment in the 2001 permit addresses only the JURMP and WURMP rather than "jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment" as in the 2007 permit (see the analysis of I.1 and I.2 above). Second, the 2001 permit did not require collaborating with all other copermittees on assessment. Third, the 2001 permit contains much less detail on what to include in the assessment, such as, for example, the eight regional objectives listed in I.3.a.(6), incorporated by reference in part I.5. Also, the LTEA must assess the "effectiveness of the Receiving Waters Monitoring Program ... [and] shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods." These methods were not required under the 2001 permit.

V. All Copermittee Collaboration (Part L)

Part L, labeled "All Permittee Collaboration," requires the copermittees to collaborate to address common issues and plan and coordinate activities, including developing a Memorandum of

Understanding (MOU), as specified. The Copermittees entered into an MOU effective in January 2008, which is attached to the test claim. The Copermittees allege activities involved with working body support and working body participation.

In comments submitted in October 2008, the State Board asserts that the permit condition in part L is necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

(2) *Part 2.* Part 2 of the application shall consist of:

(i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;¹⁷⁷

The Commission finds that there is no federal mandate to develop a management structure (memorandum of understanding, or MOU) as required in part L of the 2007 permit. The federal regulation most on point requires an applicant (claimant) to demonstrate adequate legal authority “which authorizes or enables the applicant at a minimum to: [¶]...[¶] (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;”¹⁷⁸ All the federal regulations address is authority to establish an interagency agreement or memorandum of understanding, but do not require it to be implemented or specify its contents beyond “controlling ... the contribution of pollutants from one portion of the municipal system to another portion of the municipal system.”

By contrast, part L of the permit requires the copermittees to collaborate, promote consistency among JURMP and WURMP and plan and coordinate activities required under the permit. It also requires joint execution and submission to the Regional Board an MOU with a minimum of seven specified requirements.

Thus, this permit activity “exceed[s] the mandate in that federal law or regulation.”¹⁷⁹ As in *Long Beach Unified School Dist. v. State of California*,¹⁸⁰ the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen¹⁸¹ to impose these requirements. Thus, the Commission finds that part L of the permit does not impose a federal mandate.

Based on the mandatory language in the permit, the Commission finds that part L of the permit is a state mandate on the claimants to do the following:

¹⁷⁷ 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

¹⁷⁸ 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

¹⁷⁹ Government Code section 17556, subdivision (c).

¹⁸⁰ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁸¹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

1. Collaborate with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

(a) Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum:

- (1) Identifies and defines the responsibilities of the Principal Permittee¹⁸² and Lead Watershed Permittees;¹⁸³
- (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
- (3) Establishes a management structure to promote consistency and develop and implement regional activities;
- (4) Establishes standards for conducting meetings, decisions-making, and cost-sharing;
- (5) Provides guidelines for committee and workgroup structure and responsibilities;
- (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
- (7) Includes any and all other collaborative arrangements for compliance with this order.

The State Board, in its October 2008 comments, asserts that the management structure framework in part L of the 2007 permit is not a new program or higher level of service because:

The 2001 permit required significant collaboration to address common issues and promote consistency across management programs [and] development of a management structure through execution of a formal agreement, meeting minimum specifications. It also required standardized reporting, including fiscal analysis.

The State Board also argues there is “minimal substantive difference” between the 2001 and 2007 permits in their requirements to establish “a formal cooperative arrangement and to implement regional urban runoff management activities. The 2007 Permit merely elaborates on and refines the 2001 requirements.”

In its February 2009 rebuttal comments, the claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

¹⁸² The Principal Permittee is the County of San Diego.

¹⁸³ According to the permit: “Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area].”

Part L.1 of the 2007 permit, the first paragraph in L requiring collaboration, is identical to part N of the 2001 permit. The Commission finds, however, that the collaboration is a new program or higher level of service because it now applies to all the activities that are found to be a new program or higher level of service in the analysis above (i.e, not in the 2001 permit) including the Regional Urban Runoff Management Program.

Part L.1.a, regarding the MOU or formal agreement, is similar but not identical to part N of the 2001 permit. Both permits require adoption of a “Memorandum of Understanding [MOU], Joint Powers Authority, or other instrument of formal agreement.” The 2001 permit, in part N.1.a, required the MOU to provide a management structure with the following contents: “designation of joint responsibilities, decision making, watershed activities, information management of data and reports, including the requirements under this Order; and any and all other collaborative arrangements for compliance with this Order.”

By contrast, the 2007 permit, requires the MOU to be submitted to the Regional Board within 180 days after adoption of the permit and requires that the MOU, at a minimum:

- (1) Identifies and defines the responsibilities of the principal Permittee and Lead Watershed Permittees;
- (2) Identifies Copermittees and defines their individual and joint responsibilities;
- (3) Establishes a management structure to promote consistency and develop and implement regional activities;
- (4) Establishes standards for conducting meetings, decision-making, and cost-sharing;
- (5) Provides guidelines for committee and workgroup structure and responsibilities;
- (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement; and
- (7) Includes any and all other collaborative arrangements for compliance with this order.

The contents of the MOU specified in the 2001 permit, although stated with less specificity, are the same as those in the 2007 permit for numbers (1)-(2) and (7) above. Both permits require the MOU to contain “designation of joint responsibilities” and “collaborative arrangements for compliance with this order.” Thus, the Commission finds that jointly executing and submitting those parts of the MOU to the Regional Board is not a new program or higher level of service.

The Commission finds that part L.1.a of the permit is a new program or higher level of service for all copermittees to do the following:

- Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum: (3) Establishes a management structure to promote consistency and develop and implement regional activities; (4) Establishes standards for conducting meetings, decision-making, and cost-sharing; (5) Provides guidelines for

committee and workgroup structure and responsibilities; and (6) Lays out a process for addressing copermittee non-compliance with the formal agreement.

Summary of Issue 1: The Commission finds that the following parts of the 2007 permit are a state-mandated, new program or higher level of service.

I. Jurisdictional Urban Runoff Management Program and Reporting (Parts D & J)

- Collaborate with other copermittees to develop and implement a hydromodification management plan, as specified (D.1.g.), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Develop and submit an updated Model SUSMP that defines minimum Low-impact Development and other BMPs as specified (D.1.d.(7)-(8)), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Street sweeping (D.3.a.(5)) and reporting on street sweeping (J.3.a(3)x-xv);
- Conveyance system cleaning (D.3.a.(3)(b)(iii)) and reporting on conveyance system cleaning (J.3.a.(3)(c)(iv)-(viii));
- Educational component (D.5).
 - Educate each specified target community on the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control (D.5.a.(1));
 - Educational programs shall emphasize underserved target audiences, high-risk behaviors, and ‘allowable’ behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources (D.5.a.(2));
 - Implement an education program that includes annual training only for planning boards and elected officials, if applicable, to have an understanding of the topics in (i) and (ii) (D.5.b.(1)(a)(i) & (ii));
 - Implement an education program so that its planning and development review staffs (and Planning Boards and Election Officials, if applicable) have an understanding of the topics in (iii) and (iv) as specified (D.5.b.(1)(a)(iii) & (iv));
 - Implement an education program that includes annual training prior to the rainy season so that [the Copermittee’s] construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: the topics in (iii) to (vi), as specified (D.5.b.(1)(b)(iii) & (iv));
 - Municipal Industrial/Commercial Activities (D.5.b.(1)(c));
 - Municipal Other Activities (D.5.b.(1)(d));
 - New Development and Construction Education (D.5.(b)(2));
 - Residential, General Public, and School Children Education (D.5.(b)(3)).

II. Watershed Urban Runoff Management Program (Parts E.2.f & E.2.g.)

- Identify and implement the Watershed activities as specified (E.2.f.).
- Collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings. (E.2.g.)

III. Regional Urban Runoff Management Program (Parts F.1, F.2 & F.3)

- Include developing and implementing a Regional Residential Education Program development and implementation in the RURMP, as specified (F.1.).
- Include developing the standardized fiscal analysis method required in permit part G in the RURMP (F.2.).
- Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs in the RURMP (F.3.).

IV. Program Effectiveness Assessment (Parts I.1, I.2 & I.5)

- Annually assess the effectiveness of each copermittee's JURMP, as specified (I.1.).
- Annually assess the effectiveness of each watershed group's WURMP (I.2.).
- Collaborate with the other copermittees to develop a Long-term Effectiveness Assessment, as specified, and submit it to the Regional Board as specified (I.5.).

V. All Permittee Collaboration (Part L)

- Collaborate with all other copermittees to address common issues, promote consistency among the JURMP and WURMP, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement as specified (L.1.a. (3)-(5)).

Any further reference to the test claim activities is limited to these parts of the permit found to be a new program or higher level of service.

Issue 2: Do the test claim activities impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the permit provisions impose costs mandated by the state,¹⁸⁴ and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "cost mandated by the state" as follows:

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

¹⁸⁴ *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

Government Code section 17564 requires reimbursement claims to exceed \$1000 to be eligible for reimbursement. In the test claim, the County of San Diego itemized the costs of complying with the permit conditions as follows:

Activity	Cost FY 2007-08
Regional Urban Runoff Management Program -Copermittee collaboration (F.2, F.3, L)	\$260,031.09
Copermittee collaboration, Regional Residential Education, Program Development and Implementation (F.1)	\$131,250.00
Jurisdictional Urban Runoff Management Program (JURMP) -hydromodification (D.1.g)	\$630,000.00
JURMP Standard Urban Storm Water Mitigation Plans -low impact development (D.1.d)	\$52,200.00
Long Term Effectiveness Assessment (I.5)	\$210,000.00
Street Sweeping (D.3.a.(5) Equipment, Staffing, Contract	\$3,477,190.00
Conveyance System Cleaning (D.3.a.(3)) and Reporting (J.2.a.(3)(c) iv – vii.	\$3,456,087.00
Program Effectiveness Assessment (I.1 & I.2)	\$392,363.00
Educational Surveys and Tests (D.5)	\$62,617.00
Watershed Urban Runoff Management Program -Copermittee collaboration (E.2.f., E.2.g)	\$1,632,893.00
Total	\$10,304,631.09

Claimants submitted documentation in February 2010 that show the 2008-2009 cost for the permit activities is \$18,014,213. These figures, along with those in the test-claim narrative and declarations submitted by the San Diego County and 18 cities,¹⁸⁵ illustrate that the costs to comply with the permit activities exceed \$1,000. The Commission, however, cannot find “costs mandated by the state” within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Claimants did not request the test claim activities within the meaning of Government Code section 17556, subdivision (a).

The first issue is whether the claimants requested or proposed the activities in the permit. The Department of Finance and the State Board both assert that claimants did so in their Report of

¹⁸⁵ The County and city declarations are attached to the test claim.

Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.¹⁸⁶

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

(a) The claim is submitted by a local agency ... that requested legislative authority for that local agency ... to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency ... that requests authorization for that local agency ... to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request “legislative authority” to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Claimants have fee authority under Government Code section 17556, subdivision (d), for the test claim activities that do not require voter approval under Proposition 218

Government Code section 17556, subdivision (d), states:

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ... if, after a hearing, the commission finds any one of the following: [¶]...[¶] (d) The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California*.¹⁸⁷ The court, in holding that the term “costs” in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly

¹⁸⁶ Water Code section 13376; 40 Code of Federal Regulations, section 122.21 (a). The Federal regulation applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state-program provision) by reference. Also see the 2007 permit, page 2, part A.

¹⁸⁷ *County of Fresno v. State of California, supra*, 53 Cal.3d 482.

declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.

In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that “The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that” the local government “has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” Considered within its context, the section effectively construes the term “costs” in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.¹⁸⁸

In another case about subdivision (d) of section 17556, *Connell v. Superior Court*,¹⁸⁹ the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked “sufficient” fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program.” The court rejected the districts’ argument that “authority” as used in the statute should be construed as a “practical ability in light of surrounding economic circumstances” because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the districts to levy fees “sufficient” to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.¹⁹⁰

¹⁸⁸ *County of Fresno v. State of California*, *supra*, 53 Cal.3d 482, 487. Emphasis in original.

¹⁸⁹ *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

¹⁹⁰ *Connell v. Superior Court*, *supra*, 59 Cal.App.4th 382, 398-402.

1. Claimants' have regulatory fee authority (within the meaning of Gov. Code, § 17556, subd. (d)) under the police power sufficient to pay for the mandated activities that do not require voter approval under Proposition 218: the hydromodification plan and low-impact development.

In its October 2008 comments, the State Board asserted that the claimants have fee authority to pay for the permit activities. Although the Board recognizes “limitations on assessing fees and surcharges under California law ... [concerning] the percentage of voters who must approve the assessment” the Board points to examples of local agencies (Cities of Los Angeles, San Clemente, and Palo Alto) that have successfully adopted an assessment. The State Board also argues that the cities’ trash collection responsibilities may also include street sweeping and conveyance system cleaning for which the city could charge fees, and that developer fees could be charged for hydromodification and low impact development.

Claimants, in comments submitted in February 2009, state that they cannot unilaterally impose a fee to recover the cost to comply with the 2007 permit on water or sewer bills sent to residents because of *Howard Jarvis Taxpayer Assoc. v. City of Salinas*,¹⁹¹ in which the court invalidated a stormwater management utility fee imposed by the city on all owners of developed parcels in the city. The court held that article XIII D (Proposition 218) of the California Constitution “required the city to subject the proposed storm drainage fee to a vote of the property owners or the voting residents of the affected area.”¹⁹² As to the argument that claimants can put the fee to a vote in their jurisdictions, claimants state as follows:

Articles XIII C and XIII D, which were added to the Constitution by Proposition 218, regulate the imposition of general and special taxes as well as the imposition of special assessments and property related fees. In each of these cases the question of whether to impose a tax, special assessment or a property related fee must be submitted to and approved by the voters. And, in the case of a special tax, and in certain instances the imposition of a fee or charge, the tax or fee must be approved by a two-thirds vote of the resident voters. The State fails to cite any authority that requires the copermittees to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. Such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The issue of local fee authority for municipal stormwater permit activities in this permit cannot be answered without discussing regulatory fee authority under the police power and the limitations on that authority via the voter-approval requirement in article XIII D of the California Constitution (Proposition 218).

Case law has recognized three general categories of local agency fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.¹⁹³ The regulatory and development fees are discussed below in the context of

¹⁹¹ *Howard Jarvis Taxpayers Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

¹⁹² *Id.* at page 1358-1359.

¹⁹³ *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874.

XIII D (Proposition 218) that would allow the claimants to impose fees for the activities in the test claim related to development.

Regulatory fee authority under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Article XI, section 7, includes the authority to impose fees, and courts have held that “the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution.”¹⁹⁴

Water pollution prevention is also a valid exercise of government police power.¹⁹⁵

In *Sinclair Paint v. State Board of Equalization*,¹⁹⁶ the California Supreme Court upheld a fee on manufacturers of paint that funded a child lead-poisoning program that provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The program was entirely supported by fees assessed on manufacturers or other persons contributing to environmental lead contamination. In upholding the fee, the court ruled that it was a regulatory fee imposed under the police power and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution. The court stated:

From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less “regulatory” in nature than the initial permit or licensing programs that allowed them to operate.

Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.¹⁹⁷ [Emphasis added.]

Regulatory fees also help to prevent or mitigate pollution, as the Court said: “imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products.”¹⁹⁸ The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.¹⁹⁹

¹⁹⁴ *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662, in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors.

¹⁹⁵ *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

¹⁹⁶ *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

¹⁹⁷ *Sinclair Paint v. State Board of Equalization*, *supra*, 15 Cal.4th 866, 877.

¹⁹⁸ *Sinclair Paint v. State Board of Equalization*, *supra*, 15 Cal.4th 866, 875-877.

¹⁹⁹ *Id.* at page 875.

Although the holding in *Sinclair Paint* applied to a state-wide fee, the court’s language (treating “ordinances” the same as “statutes”) recognizes that local agencies also have police power to impose regulatory fees, and it relied on local government police power cases in its analysis.²⁰⁰

Other cases have defined a regulatory fee as an imposition that funds a regulatory program²⁰¹ or that distributes the collective cost of a regulation²⁰² and is “enacted for purposes broader than the privilege to use a service or to obtain a permit. . . .the regulatory program is for the protection of the health and safety of the public.”²⁰³ Courts will uphold regulatory fees if they do not exceed the reasonable cost of providing services necessary to the activity on which the fee is based and are not levied for an unrelated revenue purpose.

In upholding regulatory fees for environmental review by the California Department of Fish and Game, the court of appeal summarized the following rules on regulatory fees:

A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. [Citations omitted.] Such costs . . . include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement. [Citations omitted.] Regulatory fees are valid despite the absence of any perceived “benefit” accruing to the fee payers. [Citations omitted.] Legislators “need only apply sound judgment and consider ‘probabilities according to the best honest viewpoint of informed officials’ in determining the amount of the regulatory fee.”²⁰⁴ [Emphasis added.]

In *Tahoe Keys Property Owner’s Assoc. v. State Water Resources Control Board*,²⁰⁵ the court refused to issue a preliminary injunction against collecting a pollution mitigation fee of \$4000 for each lot developed in the Tahoe Keys subdivision of Lake Tahoe. The fees were to be used for mitigation projects designed to achieve a net reduction in nutrients generated by the Tahoe Keys development. The court said: “on the face of the regulation, there appears to be a sufficient

²⁰⁰ *Sinclair Paint v. State Board of Equalization*, *supra*, 15 Cal.4th 866, 873. The Court stated: “Because of the close, ‘interlocking’ relationship between the various sections of article XIII A (Citation omitted) we believe these “special tax” cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, “special taxes” under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases.”

²⁰¹ *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

²⁰² *Id.* at 952.

²⁰³ *Ibid.*

²⁰⁴ *California Assn. of Prof. Scientists v. Dept. of Fish and Game*, *supra*, 79 Cal.App.4th 935, 945.

²⁰⁵ *Tahoe Keys Property Owner’s Assoc. v. State Water Resources Control Board* (1993) 23 Cal.App.4th 1459.

nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme [mitigation of pollution in Lake Tahoe].”²⁰⁶

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,²⁰⁷ art in public places,²⁰⁸ remedying substandard housing,²⁰⁹ recycling,²¹⁰ administrative hearings under a rent-control ordinance,²¹¹ signage,²¹² air pollution mitigation,²¹³ and replacing converted residential hotel units.²¹⁴ Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.²¹⁵

Given the variety of examples where regulatory fees have been upheld, and the broad range of costs to which they may be applied (including those for ‘administration’), the claimants have fee authority under the police power to impose fees for the permit activities that are a state-mandated new program or higher level of service. But a determination as to whether the claimants’ fee authority is sufficient, within the meaning of Government Code section 17556, subdivision (d), to pay for the mandated activities and deny the test claim, cannot be made without analysis of the limitations on the fee authority imposed by Proposition 218.

Regulatory fee authority is limited by voter approval under Proposition 218: With some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996. Article XIII D defines a fee as “any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service.” It defines an assessment as “any levy or charge upon real property by an agency for a special benefit conferred upon the real property [and] includes, but is not limited to, ‘special assessment,’ ‘benefit assessment,’ ‘maintenance assessment,’ and ‘special assessment tax.’”

Among other procedures, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (art. XIII D, § 6, subd. (c)). Assessments must also be approved by owners of the affected parcels (art. XIII D, § 4, subd.(d)). Expressly exempt from voter

²⁰⁶ *Id.* at page 1480.

²⁰⁷ *Mills v. County of Trinity, supra*, 108 Cal.App.3d 656, 662.

²⁰⁸ *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886.

²⁰⁹ *Apartment Assoc. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830.

²¹⁰ *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264.

²¹¹ *Pennell v. City of San Jose* (1986) 42 Cal.3d 365.

²¹² *United Business Communications v. City of San Diego* (1979) 91 Cal.App.3d 156.

²¹³ *California Building Industry Ass’n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120.

²¹⁴ *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892.

²¹⁵ *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018.

approval, however, are property-related fees for sewer, water, or refuse collection services (art. XIII D, § 6, subd. (c)).

In 2002, an appellate court in *Howard Jarvis Taxpayers Association v. City of Salinas*, *supra*, 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to charge stormwater fees if they are imposed "as an incident of property ownership."

The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556, subdivision (d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) is one of first impression for the Commission.

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

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."²¹⁶

In its January 2010 comments on the draft staff analysis, the State Board disagrees that "the requirement to subject new or increased fees to these voting or protest requirements strips the claimants of 'fee authority' within the meaning of Government Code section 17556, subdivision (d)." The State Board cites *Connell v. Superior Court*,²¹⁷ in which the water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."²¹⁸ The State Board equates the Proposition 218 voting requirement with the economic impracticability faced by the water districts in *Connell*.

The claimants disagree, citing a lack of authority that requires them to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. According

²¹⁶ *County of San Diego*, *supra*, 15 Cal.4th 68, 81.

²¹⁷ *Connell v. Superior Court*, *supra*, 59 Cal.App.4th 382.

²¹⁸ *Id.* at page 401.

to the claimants, such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The Commission disagrees with the State Board. The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the “authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program.”²¹⁹

In fact, the fee at issue in the *Connell* case (Wat. Code, § 35470) was amended by the Legislature in 2007 to conform to Proposition 218. Specifically, the Water Code statute now requires compliance with “the “notice, protest, and hearing procedures in Section 53753 of the Government Code.”²²⁰ This Government Code statute implements Proposition 218.

For these reasons, the Commission finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities that would condition the fee or assessment on voter or property-owner approval under Proposition 218 (article XIII D). The Commission finds that Proposition 218 applies to all the activities in this test claim (except for the hydromodification and LID activities that are related to priority development projects discussed below) so that they impose “costs mandated by the state” (within the meaning of Gov. Code, § 17556, subd. (d)). To the extent that property-owner or voter-approved fees or assessments are imposed to pay for any of the permit activities found above to be a state-mandated new program or higher level of service, the fee or assessment would be identified as offsetting revenue in the parameters and guidelines to offset the claimant’s costs in performing those activities.

Fees imposed for two of the test-claim activities, however, i.e., for the hydromodification management plan and low-impact development, would not be subject to voter approval under Proposition 218, as discussed below.

Fees as a condition of property development are not subject to Proposition 218: Proposition 218 does not apply to development fees, including those imposed on activities in part D of the permit. Article XIII D expressly states that it shall not be construed to “affect existing laws relating to the imposition of fees or charges as a condition of property development.”²²¹

Moreover, the California Supreme Court has ruled that fees imposed “as an incident to property ownership” are subject to Proposition 218, but fees that result from the owner’s voluntary

²¹⁹ *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, 401.

²²⁰ Water Code section 35470, as amended by Statutes 2007, chapter 27. Section 53753 of the Government Code requires compliance with “the procedures and approval process set forth in Section 4 of Article XIII D of the California Constitution” for assessments.

²²¹ California Constitution, article XIII D, section 1, subdivision (b).

decision to seek a government benefit are not.²²² Thus, fees imposed as a result of the owner's voluntary decision to undertake a development project are not subject to Proposition 218, because they are not merely incident to property ownership.²²³

The final issue, therefore, is whether claimants may impose fees that are sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the activities in the permit related to development: the hydromodification management plan (part D.1.g), and low-impact development (part D.1.d.(7)&(8)). The Commission finds claimants have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d), and that these activities do not impose costs mandated by the state and are not reimbursable.

Hydromodification management plan: Part D.1 of the permit describes the development planning component of the JURMP. Part D.1.g. requires each copermitttee to collaborate with other copermitttees to develop and implement and report on developing a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, as specified. As discussed above, the HMP is a state-mandated new program or higher level of service for only private priority development projects. The purpose of the HMP is:

[T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

According to the permit, priority development projects are:

- a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

²²² In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, the court held that water service fees were subject to Proposition 218, but that water connection fees were not. In *Apartment Assoc. of Los Angeles County v. City of Los Angeles*, *supra*, 24 Cal.4th 830, 839-840, the court held that apartment inspection fees were not subject to Proposition 218 because they were not imposed on property owners as such, but in their capacity as landlords.

²²³ A recent report by the Office of the Legislative Analyst concurs with this conclusion: "Local governments finance stormwater clean-up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two-thirds of the voters, or a majority of property owners. Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two-thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56. [Emphasis added.] See: <http://www.lao.ca.gov/2008/rsrc/water_primer/water_primer_102208.pdf> as of October 22, 2008.

The priority development project categories listed in part D.1.d.(2) are:

- (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments.
- (b) Commercial developments greater than one acre. [as specified]
- (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.).
- (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.
- (e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except ... hydromodification requirement D.1.g.
- (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.
- (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.
- (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.
- (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.
- (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

The Commission finds that claimants have authority to impose fees for complying with the HMP activities in permit part D.1.g. for priority development projects, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that the fee would not be subject to Proposition 218 voter approval. These activities involve collaborating with other copermittees to develop and implement a hydromodification management plan, and reporting on it. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on these priority development projects to pay for the costs of HMP, the Commission finds that permit part D.1.g. does not impose costs mandated by the state.

Low impact development: Low impact development is defined in Attachment C of the permit as a “storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions.” The purpose of LID is to “collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects.” LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces.

Part D.1.d.(7) requires updating the Standard Urban Storm Water Mitigation Plans (SUSMP) to include low impact development requirements, as specified, including BMP requirements that meet or exceed the requirements of sections D.1.d.(4)²²⁴ and D.1.d.(5).²²⁵ Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

Part D.1.d.(8) requires permittees to develop and submit an updated model SUSMP that defines minimum low impact development and other BMP requirements to incorporate into the permittees local SUSMPs for application to priority development projects.

The Commission finds that claimants have authority to impose fees for complying with the LID activities in parts D.1.d.(7) and D.1.d.(8) of the permit, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that they are not subject to Proposition 218 voter approval. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on the priority development projects to pay for the costs associated with LID, the Commission finds that permit parts D.1.d.(7) and D.1.d.(8) do not impose costs mandated by the state.

²²⁴ Part D.1.d.(4) of the permit includes LID BMP requirements: “Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects.” The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects “where applicable and feasible.”

²²⁵ Part D.1.d.(5), regarding “Source control BMP Requirements” requires permittees to require each Priority Development Project to implement source control BMPs that must “Minimize storm water pollutants of concern in urban runoff” and include five other specific criteria.

2. Claimants also have fee authority regulated by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d)) to pay for the hydromodification and low-impact development permit activities.

Development fees are also an exercise of the local police power under article XI, section 7 of the California Constitution.²²⁶ A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development's probable costs to the community and benefits to the developer.²²⁷ Development fees are not restricted by Proposition 218 as discussed above.

Fees on developers as conditions of permit approval are governed by the Mitigation Fee Act (Gov. Code, §§ 66000-66025) which defines a "fee" as:

[A] monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include ... fees for processing applications for governmental regulatory actions or approvals²²⁸ [Emphasis added.]

Public facilities are defined in the Act as "public improvements, public services, and community amenities."²²⁹

When a local agency imposes or increases a fee as a condition of development approval, it must do all of the following: (1) Identify the purpose of the fee; (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and, (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project upon which the fee is imposed. (Gov. Code, § 66001, subd. (a),)

The city or county must also determine whether there is a reasonable relationship between the specific amount of the fee and the costs of building, expanding, or upgrading public facilities. These determinations, known as nexus studies, are in writing and must be updated whenever new fees are imposed or existing fees are increased.²³⁰ A fee imposed "as a condition of approval of

²²⁶ *California Building Industry Assoc. v. Governing Board* (1988) 206 Cal.App.3d 212, 234.

²²⁷ *Sinclair Paint, supra*, 15 Cal.4th at page 875.

²²⁸ Government Code section 66000, subdivision (b).

²²⁹ Government Code section 66000, subdivision (d).

²³⁰ Government Code section 66001, subdivision (b). The Act also requires cities to segregate fee revenues from other municipal funds and to refund them if they are not spent within five years. Any person may request an audit to determine whether any fee or charge levied by the city or county exceeds the amount reasonably necessary to cover the cost of the service provided (Gov. Code, §66006, subd. (d)). Under Government Code section 66014, fees charged for zoning changes, use permits, building permits, and similar processing fees are subject to the same nexus requirements as development fees. Lastly, under California Government Code

a proposed development or development project” is limited to the estimated reasonable cost of providing the service or facility.²³¹ This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.²³²

The Mitigation Fee Act defines a “development project” as “any project undertaken for the purpose of development ... includ[ing] a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate.” (Gov. Code, § 66000, subd. (a).)

A fee does not become a development fee simply because it is made in connection with a development project. Approval of the development must be conditioned on the payment of the fee. The Mitigation Fee Act is limited to situations where the fee or exaction is imposed as a condition of approval of a development project.²³³

Because local agencies may make development of priority development projects conditional on the payment of a fee, the Commission finds that the claimants have fee authority, governed by the Mitigation Fee Act, that is sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the hydromodification management plan and low-impact development activities. As discussed below, HMP and LID are “public facilities,” which the Mitigation Fee Act defines as “public improvements, public services, and community amenities.”²³⁴

The County of San Diego, in its January 2010 comments on the draft staff analysis, disagrees that it can impose a fee for the hydromodification plan (HMP) activities in the permit, stating that development and implementation of the HMP does not constitute a “public facility.”

The Commission disagrees. The purpose of the permit is to prevent or abate pollution in waterways and beaches in San Diego County. More specifically, the purpose of the HMP is:

[T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

All these stated purposes of the HMP provide public services or improvements, or community amenities within the meaning of the Act.²³⁵ Moreover, the California Supreme Court stated that the Act “concerns itself with development fees; that is, fees imposed on development projects in

section 66020, agencies collecting fees must provide project applicants with a statement of the amounts and purposes of all fees at the time of fee imposition or project approval.

²³¹ Government Code section 66005, subdivision (a).

²³² *Sinclair Paint, supra*, 15 Cal.4th at page 875.

²³³ *California Building Industry Ass’n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th, 130, 131.

²³⁴ Government Code section 66000, subdivision (d).

²³⁵ Government Code section 66000, subdivision (d).

order to finance public improvements or programs that bear a ‘reasonable relationship’ to the development at issue.”²³⁶ The HMP is such a program.

Similarly, the purposes of LID are to “collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects” and to reduce stormwater runoff from priority development projects. These activities are public services or improvements that fall within the Act’s definition of public facility.

The County also argues that under the Mitigation Fee Act, the local agency must determine that there is “a reasonable relationship between the fee’s use and the type of development project on which the fee is imposed.” The County argues that there is no reasonable relationship between the costs incurred by claimants to develop and implement the HMP and a particular development project on which the fee might be imposed.

Again, the Commission disagrees. Every time a developer proposes a project that falls within one of the “priority development project” categories listed above, and the developer has “not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences,” the local agency may impose a fee subject to the Mitigation Fee Act. The fee would be for the costs of developing and implementing the HMP to “manage increases in runoff discharge rates and durations from all Priority Development Projects [that] cause ... impacts to beneficial uses and stream habitat due to increased erosive force.” The local agency may also impose a fee on priority development projects to comply with LID, the purpose of which is to “collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects” and to reduce stormwater runoff.

Finally, the County argues that assessing fees on a private developer who submits a project for approval to recover the costs of reviewing and approving a particular project is “specifically excluded from the definition of ‘fee’ under the Act.” The definition of fee in the Act states that it “does not include ... fees for processing applications for governmental regulatory actions or approvals” (Gov. Code, § 66000, subd. (b).)

The Commission disagrees that an HMP fee would be for “processing applications for governmental regulatory actions or approvals.” Rather, it would be for permit approval of priority development projects, and used to implement the HMP and LID requirements. In *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 698, the California Supreme Court distinguished between regulatory fees that implement state and local building safety standards under the Health and Safety Code and developer fees subject to the Mitigation Fee Act by stating: “These regulatory fees fund a program that supervises how, not whether, a developer may build.” Thus, the Commission finds that the developer fees may be imposed for permit approval for priority development projects if the permit is conditional on payment of the fee, and the fee is used for HMP and LID compliance.

In sum, the Commission finds that the claimants have fee authority governed by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d), to pay for the following parts of the permit that are related to development: the hydromodification management plan (part D.1.g) and updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (part D.1.d.(7)&(8)).

²³⁶ *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191.

3. Claimants’ fee authority under Public Resources Code section 40059, or via benefit assessments, is not sufficient to pay for street sweeping, and Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping.

Street sweeping is one test claim activity that is typically funded by local agency fees or assessments. Fees and assessments are both governed by Proposition 218.

The permit (in part D.3.a.5) requires a program to sweep “improved (possessing a curb and gutter) municipal roads, streets, highways, and paring facilities” at intervals depending on whether they are identified as consistently generating the highest volumes, moderate volumes, or low volumes of trash and/or debris. Reporting on street sweeping, such as curb-miles swept and tons of material collected, is also required (part J.3.a.(3)(c)x-xv).

Some local agencies collect fees for street sweeping for their refuse fund, such as the City of Pasadena.²³⁷ Other local agencies, e.g., the County of Fresno²³⁸ and the City of La Quinta,²³⁹ collect an assessment for street sweeping as a street maintenance activity. Both approaches are discussed below in light of the procedural requirements under Proposition 218.

Fees for street sweeping as refuse collection/solid waste handling: Article XI, section 7 of the California Constitution states: “A county or city may make and enforce within its limits all local, police, sanitary or other ordinances and regulations not in conflict with general laws.” Local agency fees for refuse collection are authorized by Public Resources Code section 40059, which states:

(a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:

(1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services. [Emphasis added.]

“Solid waste” is defined in Public Resources Code section 40191 as:

[A]ll putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge

²³⁷ City of Pasadena, Agenda Report, Resolution Nos. 8942 and 8943, April 27, 2009, “Public Hearing: Amendment to the General Fee Schedule to Increase the Residential Refuse Collection Fees and Solid Waste Franchise Fees.” One of the findings in the resolution is: “Whereas, street sweeping is a refuse collection service involving solely the collection, removal and disposal of solid waste from public rights of way, and is, therefore, properly allocated to the Refuse Fund.”

²³⁸ County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

²³⁹ City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.²⁴⁰

“Solid waste handling” is defined in Public Resources Code section 40195 as “the collection, transportation, storage, transfer, or processing of solid wastes.” Given the nature of material swept from city streets, street sweeping falls under the rubric of ‘solid waste handling.’

Under Proposition 218, “refuse collection” is expressly exempted from the voter-approval requirement (article XIII D, § 6, subd. (c)). Although “refuse collection” has no definition in article XIII D, the plain meaning of refuse²⁴¹ collection is the same as solid waste handling, as the dictionary definition of “refuse” and the statutory definition of “solid waste” both refer to rubbish and trash as synonyms. Refuse is collected via solid waste handling.

To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)). In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property-related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner (article XIII D, § 6, subd. (b)).

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes “costs mandated by the state” if “The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.

Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to “to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”²⁴²

Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.

²⁴⁰ This definition also excludes hazardous waste, radioactive waste and medical waste, as defined.

²⁴¹ “Refuse” is defined as “ Items or material discarded or rejected as useless or worthless; trash or rubbish.” <<http://dictionary.reference.com/browse/refuse>> as of November 23, 2009.

²⁴² *County of San Diego, supra*, 15 Cal.4th 68, 81.

Any proposed fees that are not blocked by a majority of parcel owners for street sweeping must be identified as offsetting revenue in the parameters and guidelines.

Fees for street sweeping reports: Proposition 218 does not contain an express exemption on voter approval for reporting on street sweeping, only for “refuse collection.” Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: “No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question.” The permit does not require the street sweeping reports be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping, so that part J.3.a.(3)(c)x-xv of the permit imposes costs mandated by the state and is reimbursable.

Assessments for street operation and maintenance: As mentioned above, some local agencies collect an assessment for street sweeping, e.g., the County of Fresno²⁴³ and the City of La Quinta.²⁴⁴ Assessments are defined as “any levy or charge upon real property by an agency for a special benefit conferred upon the real property. ‘Assessment’ includes, but is not limited to, ‘special assessment,’ ‘benefit assessment,’ ‘maintenance assessment’ and ‘special assessment tax.’” (article XIII D, § 2, subd. (b).) The terms “maintenance and operation” of “streets” and “drainage systems,” although used in article XIII D, are not defined in it. The plain meaning of maintenance of streets and drainage systems, however, would include street sweeping because “maintenance” means “the work of keeping something in proper condition; upkeep.”²⁴⁵ Clean streets are used not only for transportation, but for conveying storm water to storm drains.

The Supreme Court defined special assessments as follows:

A special assessment is a “compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein....” [Citation.] [Citation.] In this regard, a special assessment is ‘levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.’ [Citation.] ‘The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.’²⁴⁶

The Supreme Court summarized the constitutional procedures for creating an assessment district.

Under Proposition 218's procedures, local agencies must give the record owners of all assessed parcels written notice of the proposed assessment, a voting ballot, and a statement disclosing that a majority protest will prevent the assessment's

²⁴³ County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

²⁴⁴ City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

²⁴⁵ <<http://dictionary.reference.com/browse/maintenance>> as of December 7, 2009.

²⁴⁶ *Silicon Valley Taxpayers Ass’n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 442.

passage. (Art. XIII D, § 4, subds. (c), (d).) The proposed assessment must be “supported by a detailed engineer's report.” (Art. XIII D, § 4, subd. (b).) At a noticed public hearing, the agencies must consider all protests, and they “shall not impose an assessment if there is a majority protest.” (Art. XIII D, § 4, subd. (e).) Voting must be weighted “according to the proportional financial obligation of the affected property.” (*Ibid.*)²⁴⁷

Proposition 218 dictated that as of July 1, 1997, existing assessments were to comply with its procedural requirements, but an exception was created for “any 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.” (art. XIII D, § 5, subd. (a), emphasis added.) This means that the procedural requirements of Proposition 218 apply only to increases in assessments for street sweeping that were imposed after Proposition 218 was enacted.²⁴⁸

Absent any evidence in the record that assessments imposed before July 1, 1997 for street sweeping are sufficient to pay for the street sweeping specified in part D.3.a. of the permit, the Commission cannot find that assessments imposed before that date would pay for the costs mandated by the state for street sweeping within the meaning of Government Code section 17556, subdivision (d).

Should a local agency determine that its existing assessments are not sufficient to pay for the mandated street sweeping, it can raise assessments by following the article XIII D (Proposition 218) procedures detailed above. Those procedures, however, include an election and a protest, both of which were found above to extinguish local fee authority sufficient to pay for the mandate and to block the application of Government Code section 17556, subdivision (d).

Thus, to the extent that the claimants impose or increase assessments to pay for the street sweeping, they would be identified as offsetting revenue in the parameters and guidelines.

4. Claimants’ fee or assessment authority under Health and Safety Code section 5471 is not sufficient to pay for conveyance-system cleaning, and Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning

Conveyance-system cleaning for operation and maintenance of the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.) is required in the permit (part D.3.a.(3)). Specifically, claimants are required to clean in a timely manner “Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity.... Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.” Claimants are also required to report on the number of catch basins and inlets inspected and cleaned (J.3.a.(3)(c)iv-viii).

²⁴⁷ *Silicon Valley Taxpayers Ass’n v. Santa Clara Open Space Authority*, *supra*, 44 Cal.4th 431, 438.

²⁴⁸ See also *Howard Jarvis Taxpayers Ass’n. v. City of Riverside* (1999) 73 Cal.App.4th, 679, holding that a preexisting streetlighting assessment is ‘exempt under Proposition 218.’

Local agencies have fee authority under Health and Safety Code section 5471 to charge fees for storm drainage maintenance and operation as follows:

[A]ny entity²⁴⁹ shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. ... Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities [Emphasis added.]

This plain meaning of this statutory fee for storm drain operation and maintenance would include conveyance-system cleaning as required in the permit (part D.3.a.(3)(iii)), which the permit specifies as cleaning “catch basins or storm drain inlets.” This cleaning is within the operation and maintenance of the storm drains.

The statutory fee, adopted in 1953, is now subject to the procedural requirements of Proposition 218. As it states in subdivision (d) of Health and Safety Code section 5471:

If the procedures set forth in this section as it read at the time a standby charge was established were followed, the entity may, by ordinance adopted by a two-thirds vote of the members of the legislative body thereof, continue the charge pursuant to this section in successive years at the same rate. If new, increased, or extended assessments are proposed, the entity shall comply with the notice, protest, and hearing procedures in Section 53753 of the Government Code [the codification of the Proposition 218 procedural requirements].

Proposition 218 does not exempt from voting requirements fees for storm drain maintenance like it does for “water, sewer, and refuse collection” in section 6 (c) of article XIII D. In fact, in *Howard Jarvis Taxpayers Ass’n. v. City of Salinas* (2002) 98 Cal.App.4th 1351, the court invalidated a local storm drain fee and held that the exemption from an election for sewer fees does not include storm drainage fees. As to new or increased assessments imposed for storm drainage operation and maintenance, they would be subject to the same election requirement of Proposition 218 (art. XIII D, § 4, subd. (e)) as for other assessments.

Therefore, the Commission finds that local agencies do not have sufficient authority under section 5471 of the Health and Safety Code to impose fees or assessments (under Gov. Code § 17556, subd. (d)) for conveyance system cleaning as required by part D.3.a.(3)(iii) of the permit or reporting as required by part J.3.a.(3)(c)iv-viii of the permit.

Fees or assessments for conveyance-system reports: The Commission also finds that local agencies do not have fee or assessment authority for reporting on conveyance-system (in part J.3.a.(3)(c)iv-viii) on the number of catch basins and inlets inspected and cleaned. Fees or

²⁴⁹ Entity is defined to include “counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems.” Health and Safety Code section 5470, subdivision (e).

assessments imposed for this reporting would be subject to a vote of parcel owners. Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: “No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question.” The permit does not require the reports on conveyance- system cleaning be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning, and that part J.3.a.(3)(c)iv-viii of the permit imposes costs mandated by the state within the meaning of Government Code section 17556, subdivision (d), and is reimbursable.

Any revenue from existing assessments, or assessments obtained after voter approval, for conveyance system cleaning would be included in the parameters and guidelines as offsets to reimbursement.

C. Claimants have potential fee authority and offsetting revenue if they comply with the requirements of Senate Bill 310 (Stats. 2009, ch. 577)

Effective January 2010, Senate Bill 310 (Stats. 2009, ch. 577) was enacted to add Water Code provisions authorizing local agencies to adopt watershed improvement plans.

SB 310 is intended to establish multiple watershed-based pilot programs.²⁵⁰ The bill creates the California Watershed Improvement Act of 2009 (commencing with Wat. Code, § 16000). Pursuant to Water Code section 16101, each county, city, or special district that is a copermitttee under a NPDES permit *may* develop either individually or jointly a watershed improvement plan. The process for developing a watershed improvement plan is to be conducted consistent with all applicable open meeting laws. Each county, city, or special district, or combination thereof, is to notify the appropriate Regional Board of its intention to develop a watershed improvement plan.

The watershed improvement plan is voluntary – it is not necessarily the same watershed activities required by the permit in the test claim.

SB 310 includes the following local agency fee authority:

16103. (a) In addition to making use of other financing mechanisms that are available to local agencies to fund watershed improvement plans and plan measures and facilities, a county, city, special district, or combination thereof may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:

- (1) The Regional Board has approved the watershed improvement plan.
- (2) The entity or entities that develop the watershed improvement plan make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the feepayer. "Activities," for the purposes of this paragraph,

²⁵⁰ Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 310 (2009-2010 Reg. Sess.) as amended August 31, 2009, page 4.

means the operations and existing structures and improvements subject to regulation under an NPDES permit for municipal separate storm sewer systems.

(3) The fee is not imposed solely as an incident of property ownership.

(b) A county, city, special district, or combination thereof may plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality, including controls and facilities related to the infiltration, retention and reuse, diversion, interception, filtration, or collection of surface runoff, including urban runoff, stormwater, and other forms of runoff, the treatment of pollutants in runoff or other waters subject to water quality regulatory requirements, the return of diverted and treated waters to receiving water bodies, the enhancement of beneficial uses of waters of the state, or the beneficial use or reuse of diverted waters.

(c) The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.

However, Water Code section 16102, subdivision (d), states: “A regional board may, if it deems appropriate, utilize provisions of the approved watershed improvement plan (approved under this new act) to promote compliance with one of more of the regional board’s regulatory plans or programs.” Subdivision (e) states “Unless a regional board incorporates the provisions of the watershed improvement plan into waste discharge requirements issued to a permittee, the implementation of a watershed improvement plan by a permittee shall not be deemed to be in compliance with those waste discharge requirements.”

Therefore, the Commission finds that Water Code section 16103 may only provide offsetting revenue for this test claim to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

D. The holding in *San Diego Unified School Dist. v. Commission on State Mandates* does not apply to the test claim activities.

The State Board’s January 2010 comments on the draft staff analysis cite *San Diego Unified v. Commission on States Mandates*,²⁵¹ arguing that the permit in this test claim, like the pupil expulsion hearings, are intended to implement a federal law, and has costs that are, in context, de minimis. In *San Diego Unified School District*, the California Supreme Court held costs for hearing procedures and notice are not reimbursable for pupil expulsions that are discretionary under state law. The court found that these hearing procedures are incidental to federal due process requirements and the costs are de minimis, and thus not reimbursable.

The Commission disagrees. The permit in this case does not meet the criteria in the *San Diego Unified School District* case. Unlike the discretionary expulsions in *San Diego Unified School District*, the permit imposes state-mandated activities. And although the permit is intended to implement the federal Clean Water Act, there is no evidence or indication that its costs are de minimis. Claimants submitted declarations of costs totaling over \$10 million for fiscal year

²⁵¹ *San Diego Unified School Dist., supra*, 33 Cal.4th 859.

2007-2008 alone.²⁵² Claimants further submitted documentation of 2008-2009 costs of over \$18 million. The State Board offers no evidence or argument to refute these cost declarations, so the Commission finds that permit activities (except for LID and HMP discussed above) impose costs mandated by the state that are not de minimis.

Summary: To recap fee authority under issue 2, the Commission finds that, due to the fee authority under the police power generally, and as governed by the Mitigation Fee Act, there are no “costs mandated by the state” within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants’ fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

²⁵² The County and city declarations are attached to the test claim.

CONCLUSION

For the reasons discussed above, the Commission finds that parts of 2007 permit issued by the California Regional Quality Control Board, San Diego Region (Order No. R9-2007-001, NPDES No. CAS0108758), are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the claimants to perform the following activities.

The term of the permit is from January 24, 2007 – January 23, 2012.²⁵³ The permit terms and conditions are automatically continued, however, pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits are complied with.²⁵⁴

I. Jurisdictional Urban Runoff Management Program and Reporting (parts D & J)

Street sweeping (part D.3.a.(5)): Sweeping of Municipal Areas

Each Copermitttee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:

- (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
- (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
- (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Street sweeping reporting (J.3.a.(3)(c)x-xv): Report annually on the following:

²⁵³ According to attachment B of the permit: “*Effective Date*. This Order shall become effective on the date of its adoption provided the USEPA has no objection....” “(q) *Expiration*. This Order expires five years after adoption.”

²⁵⁴ According to attachment B of the permit: “(r) *Continuation of Expired Order* [23 CCR 2235.4]. After this Order expires, the terms and conditions of this Order are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with.”

- x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
- xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
- xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
- xiii. Identification of the total distance of curb-miles swept.
- xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
- xv. Amount of material (tons) collected from street and parking lot sweeping.

Conveyance system cleaning (D.3.a.(3)):

- (a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
- (b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include: [¶]...[¶]
- iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.

Conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii)): Update and revise the permittees' JURMPs to contain:

- iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
- v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.
- vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
- vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

Educational component (part D.5): To implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

- Municipal Departments and Personnel
- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children

a.(1) Each Copermittee shall educate each target community on the following topics where appropriate: (i) Erosion prevention, (ii) Non storm water discharge prohibitions, and (iii) BMP types: facility or activity specific, LID,-source control, and treatment control.

a.(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its Planning Boards and Elected Officials, if applicable, have an understanding of:

- i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
- ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
- iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
- iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

- [1] Storm water management plan development and review;
- [2] Methods to control downstream erosion impacts;
- [3] Identification of pollutants of concern;
- [4] LID BMP techniques;
- [5] Source control BMPs; and
- [6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.

iv. The Copermittee’s inspection, plan review, and enforcement policies and procedures to verify consistent application.

v. Current advancements in BMP technologies.

vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year [except for staff who solely inspect new development]. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (parts E.2.f & E.2.g.)

Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 [of the permit] to develop and

implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]...[¶]

[Paragraphs (a) through (e) were not part of the test claim.]

f. Watershed Activities

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

- (a) A description of the activity;
- (b) A time schedule for implementation of the activity, including key milestones;
- (c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
- (d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
- (e) A description of how the activity is consistent with the collective watershed strategy;
- (f) A description of the expected benefits of implementing the activity; and

(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

III. Regional Urban Runoff Management Program (parts F.1, F.2 & F.3)

The Regional Urban Runoff Management Program shall, at a minimum:

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]...[¶]

1. Develop and implement a Regional Residential Education Program. The program shall include:

a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.

b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

2. Develop the standardized fiscal analysis method required in section G of the permit, and,

3. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

IV. Program Effectiveness Assessment (parts I.1 & I.2)

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge²⁵⁵ Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6²⁵⁶ to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

²⁵⁵ Illicit discharge, as defined in Attachment C of the permit, is “any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)].”

²⁵⁶ Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,²⁵⁷ Water Quality Assessment,²⁵⁸ and Integrated Assessment,²⁵⁹ where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)²⁶⁰ shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

²⁵⁷ Implementation Assessment is defined in Attachment C of the permit as an “Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed.”

²⁵⁸ Water Quality Assessment is defined in Attachment C of the permit as an “Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges.”

²⁵⁹ Integrated Assessment is defined in Attachment C of the permit as an “Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality.”

²⁶⁰ Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

- (1) Specifically assess the effectiveness of each of the following:
 - (a) Each Watershed Water Quality Activity implemented;
 - (b) Each Watershed Education Activity implemented; and
 - (c) Implementation of the Watershed Urban Runoff Management Program as a whole.
 - 2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.
 - 3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.
 - 4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.
 - 5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.
 - 6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.
 - 7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.
- b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.²⁶¹ The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

²⁶¹ Section A is “Prohibitions and Receiving Water Limitations.”

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Long Term Effectiveness Assessment (I.5):

a. Collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)²⁶² of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

1. Collaborate with all other Copermittees regulated under the permit to address common issues, promote consistency among Jurisdictional Urban Runoff

²⁶² Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

V. All Copermittee Collaboration (part L)

(a) Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.

Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum: [¶]...[¶]

3. Establishes a management structure to promote consistency and develop and implement regional activities;
4. Establishes standards for conducting meetings, decisions-making, and cost-sharing.
5. Provides guidelines for committee and workgroup structure and responsibilities;
6. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

The Commission finds that due to the fee authority under the police power (Cal. Const. art. XI, § 7) and as governed by the Mitigation Fee Act, there are no “costs mandated by the state” within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants’ fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code

section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;

- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001- 15

In the Matter of the Petitions of

**BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
AND
WESTERN STATES PETROLEUM ASSOCIATION**

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]

Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.¹

¹ NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.²

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).³ The petitions are legally and factually related, and have therefore been consolidated for purposes of review.⁴ None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of

² For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

³ On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

⁴ Cal. Code of Regs., tit. 23, section 2054.

pollutants to the maximum extent practicable [MEP].” States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.⁵ We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.⁶

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.⁷ In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,⁸ and we will not reiterate our findings and conclusions from that decision.⁹

⁵ Board Order WQ 2000-11.

⁶ As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

⁷ The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

⁸ Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

⁹ BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.¹⁰ But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.¹¹

¹⁰ On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

¹¹ On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

II. CONTENTIONS AND FINDINGS¹²

Contention: BIA contends that the discharge prohibitions contained in the permit are “absolute” and “inflexible,” are not consistent with the standard of “maximum extent practicable” (MEP), and financially cannot be met.

Finding: The gist of BIA’s contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: “Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited.” BIA generally contends that this prohibition amounts to an inflexible “zero contribution” requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. The language in the permit in Receiving

¹² This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.¹³

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require “strict compliance” with water quality standards.¹⁴ (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.¹⁵ The court determined that: “Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] with the requirement that municipal storm-sewer dischargers ‘reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants’.” (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated

¹³ In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: “Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited.” Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

¹⁴ “Water quality objectives” generally refers to criteria adopted by the state, while “water quality standards” generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

¹⁵ Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

that U.S. EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we

must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.¹⁶ The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.¹⁷

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of

¹⁶ Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

¹⁷ While BIA argues that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.¹⁸

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."¹⁹ An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.²⁰ (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly

¹⁸ The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

¹⁹ Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

²⁰ Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters (footnote continued)

true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.²¹ It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated

of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

²¹ There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)

Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Water Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.²² Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports

²² These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.²³ The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances. (See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

²³ The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.²⁴ BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting “any waste discharge requirement” pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).²⁵ BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board’s view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA’s argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board’s precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs

²⁴ Water Code section 13389; see, e.g., Board Order WQ 2000-11.

²⁵ The exemption does have an exception for permits for “new sources” as defined in the Clean Water Act, which is not applicable here.

employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for “Priority Development Project Categories,” including “retail gasoline outlets.” While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: “Retail Gasoline Outlet is defined as any facility engaged in selling gasoline.”²⁶

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute

²⁶ Permit at F.1.b(2)(a)(x).

pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.²⁷ The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.²⁸ The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.²⁹ In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

²⁷ See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

²⁸ See 40 C.F.R. sections 124.6(e) and 124.8.

²⁹ U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as "waste."

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

1. Part A.3: The words "into and" are deleted.
2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."
3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.
4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

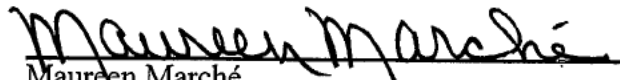
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Clerk to the Board

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WQ 2015-0075

In the Matter of Review of

Order No. R4-2012-0175, NPDES Permit No. CAS004001

**WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER
SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF
LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE
CITY OF LONG BEACH MS4**

Issued by the
California Regional Water Quality Control Board,
Los Angeles Region

SWRCB/OCC FILES A-2236 (a)-(kk)

BY THE BOARD:

In this order, the State Water Resources Control Board (State Water Board) reviews [Order No. R4-2012-0175](#) (NPDES Permit No. CAS004001) adopted by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) on November 8, 2012. Order No. R4-2012-0175 regulates discharges of storm water and non-storm water from the municipal separate storm sewer systems (MS4s) located within the coastal watersheds of Los Angeles County, with the exception of the City of Long Beach MS4, and is hereinafter referred to as the “Los Angeles MS4 Order” or the “Order.” We received 37 petitions challenging various provisions of the Los Angeles MS4 Order. For the reasons discussed herein, we generally uphold the Los Angeles MS4 Order, but with a number of revisions to the findings and provisions in response to issues raised in the petitions and as a result of our own review of the Order.

I. BACKGROUND

The Los Angeles MS4 Order regulates discharges from the MS4s operated by the Los Angeles County Flood Control District, Los Angeles County, and 84 municipal permittees (Permittees) in a drainage area that encompasses more than 3,000 square miles and multiple watersheds. The Order was issued by the Los Angeles Water Board in

accordance with section 402(p)(3)(B) of the Clean Water Act¹ and sections 13263 and 13377 of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act),² as a National Pollutant Discharge Elimination System (NPDES) permit to control storm water and non-storm water discharges that enter the area's water bodies from the storm sewer systems owned or operated by the multiple governmental entities named in the Order. The Los Angeles MS4 Order superseded Los Angeles Water Board [Order No. 01-182](#) (2001 Los Angeles MS4 Order), and is the fourth iteration of the NPDES permit for MS4 discharges in the relevant area.

The Los Angeles MS4 Order incorporates most of the pre-existing requirements of the 2001 Los Angeles MS4 Order, including the water quality-based requirement to not cause or contribute to exceedances of water quality standards in the receiving water. The Los Angeles MS4 Order also requires Permittees to comply with new water quality-based requirements to implement 33 watershed-based total maximum daily loads (TMDLs) for the region. The Order links both of these water quality-based requirements to the programmatic elements of the Order by allowing Permittees to comply with the water quality-based requirements, in part, by developing and implementing a watershed management program (WMP) or enhanced watershed management program (EWMP), as more specifically defined in the Order.

Following adoption of the Los Angeles MS4 Order, we received 37 timely petitions challenging various provisions of the Order and, in particular, the provisions implementing TMDLs and integrating water quality-based requirements and watershed-based program implementation. Several petitioners asked that their petitions be held in abeyance;³ however, due to the number of active petitions also seeking review, we declined to hold those petitions in abeyance at that time.⁴ Five petitioners additionally requested that we partially stay the Los Angeles MS4 Order. Following review, the Executive Director of the State Water Board denied the stay requests for failure to comply with the prerequisites for a stay as specified in California Code of Regulations, title 23, section 2053.

¹ 33 U.S.C. § 1342(p)(3)(B).

² Wat. Code, §§ 13263, 13377.

³ See Cal. Code Regs., tit. 23, § 2050.5, subd. (d).

⁴ By letter dated January 30, 2013, we provided an opportunity for petitioners to submit an explanation for why a petition should be held in abeyance notwithstanding the existence of the active petitions. In response, two petitioners, City of Signal Hill and the City of Claremont, argued that their petitions raised unique issues not common to the remaining petitions and therefore appropriate for abeyance. We thereafter denied their requests on July 29, 2013, finding that the unique issues could nevertheless be resolved concurrently with the issues in the other petitions. On October 9, 2013, the City of Claremont withdrew two of the claims in its petition.

We deemed the petitions complete by letter dated July 8, 2013, and, as permitted under our regulations,⁵ consolidated the petitions for review.

An issue front and center in the petitions is the appropriateness of the approach of the Los Angeles MS4 Order in addressing what we generally refer to as “receiving water limitations.” Receiving water limitations in MS4 permits are requirements that specify that storm water and non-storm water discharges must not cause or contribute to exceedances of water quality standards in the waters of the United States that receive those discharges. In precedential State Water Board [Order WQ 99-05](#) (*Environmental Health Coalition*), we directed that all MS4 permits contain specific language that explains how the receiving water limitations will be implemented. (For clarity, we refer to MS4 permit language that relates to implementation of the permit’s receiving water limitations as “receiving water limitations provisions.”) We held a workshop on November 20, 2012, concerning receiving water limitations in MS4 permits. The purpose of the workshop was to receive public comment on an issue paper discussing several alternatives to the receiving water limitations provisions currently included in MS4 permits as directed by Order WQ 99-05 (Receiving Water Limitations Issue Paper).⁶

Because the Los Angeles MS4 Order contains new provisions that authorize the Permittees to develop and implement WMP/EWMPs in lieu of requiring compliance with the receiving water limitations provisions, we view our review of the Order as an appropriate avenue for resolving some of the issues raised in our November 20, 2012 workshop. Through notice to all interested persons, we bifurcated the responses to the petitions and solicited two separate sets of responses: (1) Responses to address issues related to whether the WMP/EWMP alternatives contained in the Los Angeles MS4 Order are an appropriate approach to revising the receiving water limitations provisions in MS4 permits (August 15, 2013 Receiving Water Limitations Submissions); and (2) Responses to address all other issues raised in the petitions (October 15, 2013 Responses).⁷ We held a workshop on October 8, 2013, to hear public comment on the first set of responses.

⁵ Cal. Code Regs., tit. 23, § 2054.

⁶ Information on that workshop is available at http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml (as of Nov 18, 2014).

⁷ We requested the bifurcated responses initially by letter dated July 15, 2013. Subsequent letters on July 29, 2013, and September 18, 2013, clarified the nature of the submissions and extended the submission deadline for the second response.

State Water Board regulations generally require final disposition on petitions within 270 days of the date a petition is deemed complete.⁸ However, in this case, we required additional time to review the large number of issues raised in the petitions. When the State Water Board anticipates addressing a petition on the merits after the review period passes, it may indicate that it will review the matter on its own motion.⁹ On April 1, 2014, we adopted [Order WQ 2014-0056](#) taking up review of the issues in the petitions on our own motion.¹⁰

We now resolve the issues in the petitions with this order.

II. ISSUES AND FINDINGS

The 37 petitions raise over sixty contentions claiming deficiencies in the Los Angeles MS4 Order. This Order addresses the most significant contentions. To the extent petitioners raised issues that are not discussed in this Order, such issues are dismissed as not raising substantial issues appropriate for State Water Board review.¹¹

Before proceeding to the merits of the petitions, we will resolve several procedural issues.

Requests to Take Official Notice or Supplement the Record with Additional Evidence

We received a number of requests to take official notice of documents not in the administrative record of the adoption of the Los Angeles MS4 Order by the Los Angeles Water Board (hereinafter Administrative Record)¹² and a number of requests to admit supplemental evidence not considered by the Los Angeles Water Board.¹³ We reviewed the requests with

⁸ Cal. Code Regs., tit. 23, § 2050.5, subd. (b).

⁹ See Wat. Code, § 13320, subd. (a); Cal. Code Regs., tit. 23, § 2050.5, subd. (c).

¹⁰ To avoid premature litigation on the petition issues as a result of our review extending past the 270 day-regulatory review period, at our suggestion most of the petitioners asked that their petitions be placed in abeyance until adoption by the State Water Board of a final order. We granted those requests. Simultaneously with adopting this order, we are removing the petitions from abeyance and acting upon them.

¹¹ *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177; *Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107, 1114; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

¹² The Administrative Record was prepared by the Los Angeles Water Board and is available at <http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/AdminRecordOrderNoR4_2012_0175/index.shtml> (as of Nov. 18, 2014).

¹³ Several requests for official notice or to admit supplemental evidence were received concurrently with submission of the petitions, with the August 15, 2013 Receiving Water Limitations Submissions, and with the October 15, 2013 Responses. Additional requests for official notice were submitted concurrently with comments on first and revised public drafts of this order and were opposed by several parties. (Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay, Jan. 21, 2015; Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay, June 2, 2015.) Although we have reviewed these additional requests for official notice, we have not granted the requests for the various reasons articulated in this section, in Section II.B.8, and in footnote 74.

consideration of whether they were appropriate for notice or admission based on the legal standards governing our proceedings¹⁴ and whether the documents would materially aid in our review of the issues in the proceedings. We grant the requests with regard to documents 1-7 below, and additionally take official notice on our own motion of documents 8, 9, and 10.¹⁵

1. [Order No. 2013-0001-DWQ](#), NPDES Permit for Storm Water Discharges from Small MS4s, adopted by State Water Board, February 5, 2013;¹⁶
2. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia issued by the United States Environmental Protection Agency (USEPA), November 9, 2012, and a responsiveness summary issued in support of its original adoption of the permit, October 7, 2011;¹⁷
3. Administrative Procedures Update Number 90-004 on Antidegradation Policy Implementation for NPDES Permitting, issued by the State Water Board, July 2, 1990;¹⁸
4. Chapter 7 of the NPDES Permit Writers' Manual, updated by USEPA, September 2010;¹⁹
5. Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA, August 8, 2012;²⁰

¹⁴ For official notice see Cal. Code Regs., tit. 23, § 648.2; Gov. Code, § 11515; Evid. Code, § 452. For admission of supplemental evidence see Cal. Code Regs., tit. 23, § 2050.6.

¹⁵ We note that two documents for which we received requests for official notice are already in the administrative record: USEPA, Memorandum Setting Forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (Nov. 12, 2010) (Administrative Record, section 10.II, RB-AR23962-23968); USEPA, Chapter 6 of the NPDES Permit Writers' Manual (updated Sept. 2010) (Administrative Record, section 10.IV, RB-AR24905-24932).

¹⁶ County of Los Angeles October 15, 2013 Response, Att. C; also available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/order_final.pdf> (as of Nov. 18, 2014).

¹⁷ Los Angeles Water Board Request for State Water Board to Take Official Notice of Or Accept as Supplemental Evidence Exhibit A through SS (Oct. 15, 2013) (Los Angeles Water Board Request for Official Notice), Exh.'s A, B; also available at <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit_10-25-12.pdf> and <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/FinalPermit2011/DCMS4FINALResponsivenessSummary093011.pdf> (as of Nov. 18, 2014).

¹⁸ Los Angeles Water Board Request for Official Notice, Exh.C; also available at <http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf> (as of Nov. 18, 2014).

¹⁹ Chapter 7 of USEPA's NPDES Permit Writers' Manual, EPA-833-K-10-001, September 2010 (NPDES Permit Writers' Manual) was submitted as Exhibit C to Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay Request for Official Notice (Dec. 10, 2012) (Environmental Petitioners' Request for Official Notice). The chapter may additionally be accessed through links at <<http://water.epa.gov/polwaste/npdes/basics/NPDES-Permit-Writers-Manual.cfm>> (as of Nov. 18, 2014).

6. Memorandum to the Water Management Division Directors, Regions I-X, and NPDES State Directors, issued by USEPA, 1989;²¹
7. “Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12,” issued by USEPA, Region 9, June 3, 1987;²²
8. [Order WQ 2014-0077-DWQ](#), amending NPDES Statewide Storm Water Permit for State of California Department of Transportation, [Order 2012-0011-DWQ](#), adopted by State Water Board, May 20, 2014;²³
9. Statement from USEPA soliciting comments on the USEPA Memorandum Setting forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (November 12, 2010), issued March 17, 2011.²⁴
10. Memorandum, “Revisions to the November 22, 2002 Memorandum ‘Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,’” issued by USEPA, November 26, 2014.²⁵

In addition, we are incorporating the administrative record of the November 20, 2012 workshop on receiving water limitations, including the Receiving Water Limitations Issue Paper and comments by interested persons, into our record for the petitions on the Los Angeles MS4 Order.²⁶

(continued from previous page)

²⁰ Environmental Petitioners’ Request for Official Notice, Exh.B, available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

²¹ Environmental Petitioners’ Request for Official Notice, Exh.D; also available at <<http://www.epa.gov/npdes/pubs/owm0231.pdf>> (as of Nov. 18, 2014).

²² Environmental Petitioners’ Request for Official Notice, Exh.E; available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

²³ Available at <http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2014/wqo2014_0077_dwq.pdf> (as of Nov. 18, 2014).

²⁴ Available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014).

²⁵ Available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf> (as of March 30, 2015).

²⁶ The Receiving Water Limitations Issue Paper and comments and workshop presentations by interested person are available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml>.

Among other requests, we are not granting the requests to take official notice of or supplement the Administrative Record with the notices of intent, workplans, draft programs, and other documents filed by Permittees toward development of WMPs/EWMPs and associated monitoring programs following adoption of the Los Angeles MS4 Order or comments submitted on those documents, or the conditional approvals of several of the programs. With regard to factual evidence regarding actions taken by Permittees to comply with the Los Angeles MS4 Order after it was adopted, we believe it appropriate to close the record with the adoption of the Los Angeles MS4 Order. However, we are keenly aware that the success of the Los Angeles MS4 Order in addressing water quality issues depends primarily on the careful and effective development and implementation of programs consistent with the requirements of the Order; we speak to that issue later in our discussion.

City of El Monte's Amended Petition

Petitioner City of El Monte (El Monte) timely filed a petition on December 10, 2012, challenging a number of provisions of the Los Angeles MS4 Order. Thereafter, on February 19, 2013, El Monte filed an amended petition, based on information it asserted was not available prior to the deadline for submission of the petition.

Water Code section 13320, subdivision (a) provides that a petition for review of a regional water quality control board (regional water board) action must be filed within 30 days of the regional water board's action.²⁷ The State Water Board interprets that requirement strictly and petitions filed more than 30 days from regional water board action are rejected as untimely. El Monte asserted that the two additional arguments raised in the amended petition were based on information that was not available prior to the deadline for submitting the petition and were therefore appropriate for State Water Board consideration.

Even if we were required by statute or regulation to accept amended petitions based on new information, here, El Monte's new arguments are not supported by information previously unavailable. First, El Monte argues that the Supreme Court's decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council* (2013) 133 S.Ct. 710 invalidated certain provisions of the Los Angeles MS4 Order that require compliance with water quality standards and total maximum daily load requirements through receiving water monitoring. Contrary to El Monte's assertion, the decision by the Supreme Court did not invalidate any requirements of the Los Angeles MS4 Order and did not result in any changes to

²⁷ See also Cal. Code Regs., tit. 23, § 2050.

the Order. The Supreme Court decision, to the extent it applies to the legal issues before us in this matter, constitutes precedential case law and must be considered in our review of the Los Angeles MS4 Order, but it does not constitute new information that supports an amended petition.²⁸

Second, El Monte argues that the Los Angeles Water Board failed to consider various provisions of the California Watershed Improvement Act of 2009²⁹ when it adopted the Los Angeles MS4 Order. To the extent El Monte believed that the California Watershed Improvement Act was relevant to adoption of the Los Angeles MS4 Order, El Monte had the opportunity to raise that issue in comments before the Los Angeles Water Board and in its timely petition to the State Water Board. Having failed to raise the issue before the Los Angeles Water Board and in its timely petition, El Monte cannot raise the issue in an amended petition.³⁰

We reject El Monte's amended petition as untimely.

Environmental Petitioners' Motion to Strike

Petitioners Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (Environmental Petitioners), submitted a motion on November 11, 2013, requesting that the State Water Board strike sections of the October 15, 2013 Responses by six petitioners (Motion to Strike). The relevant sections respond to a collateral estoppel argument made by the Environmental Petitioners in their August 15, 2013 Receiving Water Limitations Submission to the State Water Board. Several parties asserted in their petitions that requiring compliance with water quality standards in MS4 permits violates federal law or conflicts with prior State Water Board precedent. The Environmental Petitioners responded in their August 15, 2013 Receiving Water Limitations Submission that these arguments were barred by collateral estoppel because the claims were settled in prior court cases challenging the 2001 Los Angeles MS4 Order. Six of the October 15, 2013 Responses, namely those by the Cities of

²⁸ We note that the State Water Board has the option of allowing additional briefing when there are material legal developments concerning issues raised in a petition, but we did not find such briefing would aid review of the petitions in this case.

²⁹ Wat. Code, § 16100 et seq.

³⁰ In addition to being untimely, El Monte's argument lacks merit. The California Watershed Improvement Act of 2009 grants authority to local government permittees regulated by an MS4 permit to develop and implement watershed improvement plans, but does not limit the authority of a regional water board to impose terms related to watershed management in an MS4 permit. Further, the terms of the WMPs/EWMPs are largely consistent with the watershed improvement plans authorized by the Act, so a permittee can comply with the Los Angeles MS4 Order while also using the authority provided by the California Watershed Improvement Act of 2009 if it so chooses.

Arcadia, Claremont, Covina, Duarte and Huntington Park, San Marino et al.,³¹ and Sierra Madre, incorporated a response to the collateral estoppel argument.

We stated in a July 15, 2013 letter that “[i]nterested persons may not use the [October 15]³² deadline for responses on the remaining petition issues as an opportunity to respond to comments filed on the receiving water limitations approach.” We clarified further in a July 29, 2013 letter: “[W]hen submitting subsequent responses to the petitions in accordance with the [October 15] deadline, petitioners and interested persons should not raise new issues related to the specific questions regarding the watershed management program/enhanced watershed management program or respond to any August 15, 2013, submissions; however petitioners and interested persons will not be precluded from responding to specific issues raised in the original petitions on grounds that the issues are related to the receiving water limitations language.”

We find that the collateral estoppel responses by the six petitioners are disallowed by the direction we provided in our July 15 and July 29, 2013 letters. However, as will be apparent in our discussion in section II.A, we do not rely on the Environmental Petitioners’ collateral estoppel argument in resolving the petitions. Our determination that portions of the October 15, 2013 Responses are disallowed is, therefore, immaterial to the resolution of the issues.³³

Having resolved the procedural issues, we turn to the merits of the Petitions.

A. Implementation of the Iterative Process as Compliance with Receiving Water Limitations

The Los Angeles MS4 Order includes receiving water limitations provisions that are consistent with our direction in Order WQ 99-05 in Part V.A of the Los Angeles MS4 Order. Part V.A. provides, in part, as follows:

1. Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited.

³¹ The cities of San Marino, Rancho Palos Verdes, South El Monte, Norwalk, Artesia, Torrance, Beverly Hills, Hidden Hills, Westlake Village, La Mirada, Vernon, Monrovia, Agoura Hills, Commerce, Downey, Inglewood, Culver City, and Redondo Beach submitted a joint October 15, 2013 Response.

³² The July 15, 2013 letter set a deadline of September 20, 2013, which was subsequently extended to October 15, 2013.

³³ In a November 21, 2013 letter, we indicated that we would consider the Motion to Strike concurrently with drafting of this Order, but that we would not accept any additional submissions in this matter, including any responses to the Motion to Strike. City of San Marino objected to the letter and submitted an opposition to the Motion to Strike. Several petitioners submitted joinders in City of San Marino’s motion. For the same reasons articulated above, we are not accepting these submissions; they would not affect our resolution of the issues.

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible [footnote omitted], shall not cause or contribute to a condition of nuisance.
3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications. . . .³⁴

The petitioners that are permittees (hereinafter referred to as “Permittee Petitioners”)³⁵ argue that the above language either means, or should be read and/or clarified to mean, that good faith engagement in the requirements of Part V.A.3, traditionally referred to as the “iterative process,” constitutes compliance with Parts V.A.1. and V.A.2. The position put forth by Permittee Petitioners is one we took up when we initiated a process to re-examine the receiving water limitations and iterative process in MS4 permits statewide with our Receiving Water Limitations Issue Paper and the November 20, 2012 workshop. We summarize the law and policy regarding Permittee Petitioners’ position again here and ultimately disagree with Permittee Petitioners that implementation of the iterative process does or should constitute compliance with receiving water limitations.

The Clean Water Act generally requires NPDES permits to include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards.³⁶ In the context of NPDES permits for MS4s, however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency.³⁷ Specifically the Clean Water Act states as follows:

Permits for discharges from municipal storm sewers –

. . .

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

³⁴ Los Angeles MS4 Order, Part V.A, pp. 38-39.

³⁵ For ease of reference, where an argument is made by multiple Permittee Petitioners, even if not by all, we attribute that argument to Permittee Petitioners generally, and do not list which of the 37 Permittee Petitioners in fact make the argument. Where only one or two Permittee Petitioners make a particular argument, we have identified the specific Permittee Petitioner(s).

³⁶ 33 U.S.C. §§ 1311, 1342(a).

³⁷ 33 U.S.C. § 1342(p)(3)(B); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants.³⁸

Thus, a permitting agency imposes requirements related to attainment of water quality standards where it determines that those provisions are “appropriate for the control of [relevant] pollutants” pursuant to the Clean Water Act municipal storm water provisions.

Under the Porter-Cologne Act, waste discharge requirements must implement applicable water quality control plans, which include the beneficial uses to be protected for a given water body and the water quality objectives reasonably required for that protection.³⁹ In this respect, the Porter-Cologne Act treats MS4 dischargers and other dischargers even-handedly and anticipates that all waste discharge requirements will implement the water quality control plans. However, when implementing requirements under the Porter-Cologne Act that are not compelled by federal law, the State Water Board and regional water boards (collectively, “water boards”) have some flexibility to consider other factors, such as economics, when establishing the appropriate requirements.⁴⁰ Accordingly, since the State Water Board has discretion under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, the State Water Board may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.

We have previously exercised the discretion we have under federal law in favor of requiring compliance with water quality standards, but have required less than strict compliance. We have directed, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters,⁴¹ but have prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. That iterative process involves reporting of the violation, submission of a report describing proposed improvements to BMPs

³⁸ 33 U.S.C. § 1342(p)(3)(B).

³⁹ Wat. Code, § 13263. The term “water quality standards” encompasses the beneficial uses of the water body and the water quality objectives (or “water quality criteria” under federal terminology) that must be met in the waters of the United States to protect beneficial uses. Water quality standards also include the federal and state antidegradation policy.

⁴⁰ Wat. Code, §§ 13241, 13263; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

⁴¹ State Water Board Orders WQ 98-01 (*Environmental Health Coalition*), WQ 99-05 (*Environmental Health Coalition*), WQ 2001-15 (*Building Industry Association of San Diego*).

expected to better meet water quality standards, and implementation of these new BMPs.⁴² The current language of the existing receiving waters limitations provisions was actually developed by USEPA when it vetoed two regional water board MS4 permits that utilized a prior version of the State Water Board's receiving water limitations provisions.⁴³ In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.

There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process.⁴⁴

The position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld on several occasions. The receiving water limitations provisions of the 2001 Los Angeles MS4 Order specifically have been litigated twice, and in both cases, the courts upheld the provisions and the Los Angeles Water Board's interpretation of the provisions. In a decision resolving a challenge to the 2001 Los Angeles MS4 Order, the Los Angeles County Superior Court stated: "[T]he Regional [Water] Board acted within its authority when it included [water quality standards compliance] in

⁴² State Water Board Order WQ 99-05, pp. 2-3; see also State Water Board Order WQ 2001-15, pp. 7-9. Additionally, consistent with federal law, we found it appropriate to require implementation of BMPs in lieu of numeric water quality-based effluent limitations to meet water quality standards. See State Water Board Orders WQ 91-03 (*Citizens for a Better Environment*), WQ 91-04 (*Natural Resources Defense Council*), WQ 98-01, WQ 2001-15. This issue is discussed in greater detail in Section II.C. of this order.

⁴³ See State Water Board Orders WQ 99-05, WQ 2001-15.

⁴⁴ Several Permittee Petitioners have argued that the State Water Board's opinion in State Water Board Order WQ 2001-15 must be read to endorse a safe harbor in the iterative process. We disagree. Regardless, the State Water Board's position that the iterative process of the subject permit did not create a "safe harbor" from compliance with receiving water limitations was clearly established in subsequent litigation on that order. (See *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (Super. Ct. 2003, No. GIC780263), *affd.* *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866.)

the Permit without a ‘safe harbor,’ whether or not compliance therewith requires efforts that exceed the ‘MEP’ standard.”⁴⁵ The lack of a safe harbor in the iterative process of the 2001 Los Angeles MS4 Order was again acknowledged in 2011 and 2013, this time by the Ninth Circuit Court of Appeal. In these instances, the Ninth Circuit was considering a citizen suit brought by the Natural Resources Defense Council against the County of Los Angeles and the Los Angeles County Flood Control District for alleged violations of the receiving water limitations of that order. The Ninth Circuit held that, as the receiving water limitations of the 2001 Los Angeles MS4 Order (and accordingly as the precedential language in State Water Board Order WQ 99-05) was drafted, engagement in the iterative process does not excuse liability for violations of water quality standards.⁴⁶ The California Court of Appeal has come to the same conclusion in interpreting similar receiving water limitations provisions in MS4 Orders issued by the San Diego Regional Water Quality Control Board in 2001 and the Santa Ana Regional Water Quality Control Board in 2002.⁴⁷

While we reiterate that the judicial rulings have been consistent with the water boards’ intention and position regarding the relationship between the receiving water limitations and the iterative process, we acknowledge that some in the regulated community perceived the 2011 Ninth Circuit opinion in particular as a re-interpretation of that relationship. Our Receiving Water Limitations Issue Paper and subsequent workshop reflected our desire to re-examine the issue in response to concerns expressed by the regulated community in the aftermath of that ruling.

As stated above, both the Clean Water Act and the Porter-Cologne Act afford some discretion to not require strict compliance with water quality standards for MS4 discharges. In each of the discussed court cases above, the court’s decision is based on the specific permit language; thus the cases do not address our authority with regard to requiring compliance with water quality standards in an MS4 permit as a threshold matter, and they do not require us to continue to exercise our discretion as we decided in State Water Board Order

⁴⁵ *In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7. The decision was affirmed on appeal (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985); however, this particular issue was not discussed in the court of appeal’s decision.

⁴⁶ *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d. 880, rev’d on other grounds sub nom. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710, mod. by *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135.

⁴⁷ *Building Industry Assn. of San Diego County, supra*, 124 Cal.App.4th 866; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377.

WQ 99-05. Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process,⁴⁸ we may even have the flexibility to reverse⁴⁹ our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance.⁵⁰

However, with this Order, we now decline to do either. As the storm water management programs of municipalities have matured, an increasing body of monitoring data indicates that many water quality standards are in fact not being met by many MS4s. The iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. Compliance with water quality standards is and should remain the ultimate goal of any MS4 permit. We reiterate and confirm our determination that provisions requiring compliance with receiving water limitations are "appropriate for the control of . . . pollutants" addressed in MS4 permits and that therefore, consistent with our authority under the Clean Water Act, we will continue to require compliance with receiving water limitations.⁵¹

⁴⁸ See, e.g. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia, *supra*, fn. 17.

⁴⁹ Of course any change of direction would be subject to ordinary principles of administrative law. (See Code Civ. Proc., § 1094.5, subd. (b).)

⁵⁰ As such, it is not necessary to address the collateral estoppel arguments raised by the Environmental Petitioners and opposed by Permittee Petitioners. We agree that it is settled law that we have the discretion to require compliance with water quality standards in an MS4 permit under federal and state law. We also agree that it is settled law that the receiving water limitations provisions currently spelled out in our MS4 permits do not carve out a safe harbor in the iterative process. But the question for us is whether we should continue to exercise our discretion to utilize the same approach to receiving water limitations established under our prior precedent, or proceed in a new direction.

⁵¹ Several Permittee Petitioners argued in comments submitted on the first draft of this order that, because we find that we have some discretion under Clean Water Act section 402(p)(3) to not require compliance with receiving water limitations, the Los Angeles Water Board's action in requiring such compliance -- and our action in affirming it -- is pursuant to state authority. (See, e.g., Cities of Arcadia, Claremont, and Covina, Comment Letter, Jan. 21, 2015.) The Permittee Petitioners argue that the action is therefore subject to evaluation in light of the factors set out in Water Code section 13263 and 13241 pursuant to *City of Burbank*, *supra*, 35 Cal.4th 613. Under *City of Burbank*, a regional water board must consider the factors specified in section 13241 when issuing waste discharge requirements under section 13263, subdivision (a), but only to the extent those waste discharge requirements exceed the requirements of the federal Clean Water Act. (35 Cal.4th at 627.) Nowhere in our discussion in this section do we mean to disavow either that the Los Angeles Water Board acted under federal authority to impose "such other provisions as . . .determine[d] appropriate for the control of . . . pollutants" in adopting the receiving water limitations provisions of the Los Angeles MS4 Order in the first instance or that we are acting under federal authority in upholding those provisions. (33 U.S.C. § 1342(p)(3)(B)(iii).) The receiving water limitations provisions do not exceed the requirements of federal law. We nevertheless also point out that the Los Angeles Water Board engaged in an analysis of the factors under section 13241 when adopting the Order. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-139 to F-155.)

As we explained in 2001, “[u]rban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses.”⁵² More than a decade later, this is still true. By definition, many of our urban waterways will never attain water quality standards and fully realize their beneficial uses if municipal runoff is allowed to continue to cause or contribute to exceedances of water quality standards. Further, the efforts of other dischargers who are required to not cause or contribute to exceedances of water quality standards would be largely in vain if we did not regulate MS4 dischargers with a somewhat even hand.

Such an approach is additionally consistent with the Porter-Cologne Act’s emphasis on water quality control plans as the cornerstone of water quality planning and regulation and the act’s expectation that all waste discharge requirements will implement the water quality control plans. We believe that direct enforcement of water quality standards is necessary to protect water quality, at a minimum as a back-stop where dischargers fail to meet requirements of the Order designed to achieve progress toward meeting the standards. We will not reverse our precedential determination in State Water Board Order WQ 99-05 that established the receiving water limitations provisions for MS4 permits statewide and reiterate that we will continue to read those provisions consistent with how the courts have: engagement in the iterative process does not excuse exceedances of water quality standards. We accordingly also decline to direct any revisions to the receiving water limitations provisions of the Los Angeles MS4 Order, which are consistent with our precedential language.⁵³

Yet, we are sympathetic to the assertions made by MS4 dischargers that the receiving water limitations provisions mandated by our Order WQ 99-05 may result in many years of permit noncompliance, because it may take years of technical efforts to achieve compliance with the receiving water limitations, especially for wet weather discharges.

⁵² State Water Board Order WQ 2001-15, p. 7.

⁵³ We disagree with Permittee Petitioners’ argument that the receiving water limitations in Part V.A of the Los Angeles MS4 Order are confusing, unclear, or overbroad, because they prohibit causing or contributing to a violation of a receiving water limitation rather than a violation of water quality standards. The Los Angeles Water Board defines “receiving water” as “[a] ‘water of the United States’ in to which waste and/or pollutants are or may be discharged.” (Los Angeles MS4 Order, Att. A., p. A-16.) The Los Angeles Water Board further defines “receiving water limitations” as “[a]ny applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 CFR §131.38.” (*Ibid.*) Receiving water limitations are therefore the water quality standards, including water quality objectives and criteria, that apply to the receiving water as expressed in the water quality control plan for the region, statewide water quality control plans that specify objectives for water bodies in the region, State Water Board policies for water quality control, and federal regulations.

Accordingly, we believe that the MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.

With the WMP/EWMP provisions of the Los Angeles MS4 Order, the Los Angeles Water Board is striving to allow one such alternative compliance path. As such, the fundamental issue for review before us in this matter is whether the Los Angeles MS4 Order's WMP/EWMP provisions constitute a legal and technically sound compliance alternative for achieving receiving water limitations. We discuss and resolve this issue in the next section.

B. WMP/EWMP as Alternative Compliance Options for Complying with Receiving Water Limitations

The WMP/EWMP provisions allow Permittees to choose an integrated and collaborative watershed-based approach to meeting the requirements of the Los Angeles MS4 Order, including the receiving water limitations. Permittees develop a plan, either collaboratively or individually, that addresses water quality priorities within a watershed. Permittees first prioritize water quality issues within each watershed. Permittees may use the WMP/EWMP to address water body-pollutant combinations for which a TMDL has been developed, giving highest priority to those with interim and final compliance deadlines within the permit term. Permittees may also address water body-pollutant combinations for which no TMDL has been developed, but where the water body is impaired or shows exceedances of the standards for the relevant pollutant from an MS4 source. Once prioritization is completed, Permittees assess the sources of the pollutants and select watershed strategies that are designed to eliminate non-storm water discharges to the MS4 that are a source of pollutants, that meet all applicable TMDL-derived interim and final water quality-based effluent limitations (WQBELs) and/or limitations to be met in the receiving water (referred to herein as "other TMDL-specific limitations")⁵⁴ pursuant to corresponding compliance schedules, and that ensure that discharges from the MS4 do not cause or contribute to exceedances of receiving water limitations. Except as described below for storm water retention projects, Permittees conduct a "reasonable assurance analysis" for each water body-pollutant combination incorporated into the

⁵⁴ Some of the TMDL limitations of the Los Angeles MS4 Order are expressed not as WQBELs but as standards to be met in the receiving water. The Los Angeles MS4 Order refers to these limitations as "receiving water limitations;" however, in order to avoid confusion with the general receiving water limitations in Part V.A., we will use the term "other TMDL-specific limitations." Accordingly, while the Los Angeles MS4 Order uses the term "receiving water limitations" to refer to both the receiving water limitations in part V.A and some of the TMDL-based requirements in Attachments L-R, when we use the term we refer only to the receiving water limitations in part V.A.

WMP/EWMP to demonstrate the ability of the program to meet those objectives. Permittees additionally implement an integrated monitoring and assessment program to determine progress, adapting strategies and measures as necessary.⁵⁵

In addition to all the requirements above, for those Permittees that choose to develop and implement an EWMP, the EWMP provisions also require that Permittees collaborate on multi-benefit regional projects and, wherever feasible, retain all non-storm runoff, as well as all storm water runoff from the 85th percentile 24-hour storm event (hereinafter “storm water retention approach”) for the drainage areas tributary to the projects.⁵⁶

The primary controversy concerning the WMP/EWMP provisions of the Los Angeles MS4 Order is the manner in which they interact with the receiving water limitations and the WQBELs and other TMDL-specific limitations. Under certain conditions detailed in the Order, Permittees may be deemed in compliance with the receiving water limitations and the WQBELs and other TMDL-specific limitations by fully implementing the WMP/EWMP, rather than by demonstrating that the receiving water limitations and the WQBELs and other TMDL-specific limitations have actually been achieved. Specifically:

1. Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/ EWMP as established in the Los Angeles MS4 Order, are deemed to be in compliance with the receiving water limitations in Part V.A for the water body-pollutant combinations addressed by the WMP/EWMP.⁵⁷

2. Permittees fully in compliance with the requirements and dates of achievement of the WMP/EWMP are deemed in compliance with the *interim* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the WMP/EWMP.⁵⁸

3. Permittees implementing an EWMP and utilizing the storm water retention approach in a drainage area tributary to the applicable water body are deemed in compliance with the *final* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the storm water retention approach.⁵⁹

⁵⁵ Los Angeles MS4 Order, Part VI.C., pp. 49-67.

⁵⁶ *Id.*, Part VI.C.1.g., pp. 48-49.

⁵⁷ *Id.*, Part VI.C.2.b., p. 52.

⁵⁸ *Id.*, Parts VI.C.3.a., p. 53, VI.E.2.d.i.4., pp. 143-44. The Los Angeles MS4 Order establishes separate requirements for Trash TMDLs and the WMP/EWMP are not a means of achieving compliance with the Trash TMDL provisions. (See Part VI.E.5, pp. 147-154.) References to TMDLs in this section exclude the Trash TMDLs.

⁵⁹ *Id.*, Part VI.E.2.e.i.(4), p. 145. As with Part VI.E.2.d.i.4, this Part does not apply to Trash TMDLs.

4. Because the Order additionally provides that full compliance with the general TMDL requirements in Part VI.E and the WQBELs and other TMDL-specific limitations in Attachments L through R constitutes compliance with the receiving water limitations in V.A for the specific pollutants addressed by the relevant TMDL,⁶⁰ provisions 2 and 3 above also constitute compliance with the receiving water limitations for the particular water body-pollutant combinations.

5. Finally, Permittees that have declared their intention to develop a WMP/EWMP may be deemed in compliance with receiving water limitations and with interim WQBELs with compliance deadlines occurring prior to approval of the WMP/EWMP if they meet certain conditions during the development phase.⁶¹

Both Environmental Petitioners and Permittee Petitioners put forth a number of arguments to the effect that the WMP/EWMP provisions of the Los Angeles MS4 Order are contrary to federal and state law or reflect poor policy. We discuss each argument below.

1. Anti-backsliding

The Environmental Petitioners argue that the inclusion of the WMP/EWMP in the Los Angeles MS4 Order violates the anti-backsliding provisions of the Clean Water Act and of the federal regulations.⁶² The Clean Water Act generally prohibits the relaxation of an effluent limitation established in an NPDES permit when that permit is renewed; the federal regulations include similar provisions. The Environmental Petitioners argue that the WMP/EWMP of the Los Angeles MS4 Order, by allowing a discharger to be deemed in compliance with receiving water limitations, even where a discharger may in fact be causing or contributing to an exceedance of a water quality standard, represent a relaxation of the receiving water limitations provisions contained in the 2001 Los Angeles MS4 Order.⁶³

We do not agree with the Environmental Petitioners that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the anti-backsliding provisions of either the Clean Water Act or the federal regulations. Anti-backsliding provisions are an important aspect

⁶⁰ *Id.*, Part VI.E.2.c.ii., p. 143. Although this provision reflects a departure from provisions in previous MS4 permits, the provision has not generated controversy and has not been contested in the petitions. The State Water Board supports this provision in MS4 permits, as discussed at section II.B.5.b. of this order.

⁶¹ *Id.*, Parts VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.

⁶² 33 U.S.C. § 1342(o); 40 C.F.R. §122.44(f).

⁶³ The receiving water limitations of the 2001 Los Angeles MS4 Order (like the receiving water limitations in Section V.A. of the Los Angeles MS4 Order) were modeled on the precedential language in State Water Board Order WQ 99-05.

of the Clean Water Act that generally promote continued progress toward clean water, but the provisions do not apply in all circumstances and are subject to certain exceptions. The 2001 Los Angeles MS4 Order required compliance with receiving water limitations, directed Permittees to achieve those limitations through the iterative process, but retained the Los Angeles Water Board's discretion to enforce compliance with the receiving water limitations at any time. The Los Angeles MS4 Order requires compliance with receiving water limitations, but allows implementation of control measures through the WMPs/EWMPs to constitute such compliance, and reserves direct enforcement of the receiving water limitations to situations where a permittee fails to comply with the WMP/EWMP provisions. The approaches under the prior and current orders are designed to achieve the same results – compliance with receiving water limitations – but through distinct paths that are not easily comparable for purposes of the specific, technical anti-backsliding requirements laid out in federal law.⁶⁴ We nevertheless discuss the provisions below.

The Clean Water Act contains both statutory anti-backsliding provisions in section 402(o) and regulatory anti-backsliding provisions in 40 C.F.R. section 122.44(f). The Clean Water Act's statutory prohibition against backsliding applies under a narrow set of criteria specified in Clean Water Act section 402(o). First, section 402(o) prohibits relaxing effluent limitations originally established based on best professional judgment, when there is a newly revised effluent limitation guideline.⁶⁵ The WMP/EWMP is not derived from an effluent limitation guideline, so this first prohibition is inapplicable. Second, section 402(o) prohibits relaxing effluent limitations imposed pursuant to Clean Water Act sections 301(b)(1)(C) or 303(d) or (e).⁶⁶ The receiving water limitations provisions in the 2001 Los Angeles MS4 Order were not

⁶⁴ Responding to an argument that NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia violated anti-backsliding requirements by removing certain numeric limitations in the prior permit, USEPA stated: "The Commenter implies that a Permit that replaces a numeric effluent limit with a non-numeric one is somehow automatically less stringent on that parameter. However, the narrative requirement only violates the anti-backsliding prohibition if the two provisions are comparable. . . . In this case, the two provisions are not comparable: EPA has determined that compliance with the performance standards in the Final Permit will result in more water quality protections for the DC MS4's receiving streams than did the previous aggregate numeric limit." (Responsiveness Summary, p. 84, *supra*, fn.17, citing *Communities for a Better Environment v. State Water Resources Control Bd.* (2005) 132 Cal. App. 4th 1313.)

⁶⁵ 33 U.S.C. § 1342(o)(1) ("In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314 (b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.").

⁶⁶ *Ibid.* ("In the case of effluent limitations established on the basis of section 1311 (b)(1)(C) or section 1313 (d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313 (d)(4) of this title.").

established based on either section 301(b)(1)(C) or section 303(d) or (e), so this prohibition on backsliding is inapplicable.⁶⁷ The receiving water limitations provisions in MS4 permits are imposed under section 402(p)(3)(B) of the Clean Water Act rather than under section 301(b)(1)(C),⁶⁸ and are accordingly not subject to the anti-backsliding requirements of section 402(o).

With respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(l), the non-applicability is less clear cut. USEPA promulgated 40 Code of Federal Regulations section 122.44(l)(1) and its predecessor anti-backsliding regulations prior to the Water Quality Act of 1987, which established the municipal permitting requirements of section 402(p)(3)(B). There is ample regulatory history to demonstrate USEPA's intent in establishing the anti-backsliding policy and regulations with respect to evolving technology standards for traditional point sources.⁶⁹ We have found no definitive guidance, however, since that time from USEPA or the courts applying the general provisions of section 122.44(l) in the context of municipal storm water permits.⁷⁰ Further, we have previously noted that anti-backsliding principles may be difficult to assess in the context of non-

⁶⁷ The Environmental Petitioners do not argue that the Los Angeles MS4 Order is contrary to Clean Water Act section 303(d)(4) (33 U.S.C. § 1313(d)(4)), which also sets out anti-backsliding requirements. Section 303(d)(4) sets out the conditions under which effluent limitations based on TMDL wasteload allocations may be relaxed. Specifically, effluent limitations for a discharge impacting an impaired water body where standards have not yet been attained may only be relaxed if either the cumulative effect of the revisions still assures the attainment of the water quality standards or the designated use that is not being attained is removed. (33 U.S.C. § 1313(d)(4)(A).) Where a water body has attained standards, effluent limitations may only be relaxed consistent with the federal antidegradation policy. (33 U.S.C. § 1313(d)(4)(B).)

⁶⁸ *Defenders of Wildlife, supra*, 191 F.3d at pp. 1165-1166.

⁶⁹ See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979) (describing codification of predecessor regulation codified at 40 C.F.R. 122.15(i).) In the context of municipal storm water, the MEP standard is the technology standard; the record here supports that MEP, as reflected in the permit conditions, has evolved since the issuance of the 2001 Los Angeles MS4 Order to become more stringent. (See, e.g., Los Angeles MS4 Order, Part VI.D.9.h.vii., p.132, compared to 2001 Los Angeles MS4 Order, Part 4.F.5.c., pp.48-49 [trash controls]; Los Angeles MS4 Order, Part VI.D.7.c., pp. 97-109, as compared to 2001 Los Angeles MS4 Order, Part 4.D.3., pp.36-37 [new development/redevelopment project performance criteria]; Los Angeles MS4 Order, Part VI.D.8.d., pp.113-114, as compared to 2001 Los Angeles MS4 Order, Part 4.E., pp.42-45 [requirements for construction sites less than one acre].)

⁷⁰ As requested by the Environmental Petitioners, we took official notice of a Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA Region III on August 8, 2012. (See fn. 19). We acknowledge that the letter states at page 3 that a provision in the Prince George County, Maryland, Phase I MS4 draft permit allowing for more time to complete tasks that were required under the previous permit constituted backsliding. The letter refers in passing to section 122.44(l)(1), but the letter has no regulatory effect and, further, is devoid of any analysis. The Environmental Petitioners have also pointed us to discussion of the regulatory anti-backsliding provisions in the NPDES Permit Writers' Manual. (NPDES Permit Writers' Manual, p. 7-4.) The relevant section of the NPDES Permit Writers' Manual does not explicitly distinguish between municipal storm water permits and traditional NPDES Permits in its discussion of the applicability of regulatory anti-backsliding provisions; however, nor does it specifically direct application of the anti-backsliding regulatory provisions to municipal storm water permits. We do not find this discussion to be to be determinative on the issue.

quantitative, non-numeric requirements such as BMPs and plans.⁷¹ It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because, assuming for the sake of argument they do apply, the WMP/EWMP provisions would qualify for an exception to backsliding as discussed below.

Even if the receiving water limitations in MS4 permits could be considered subject to the anti-backsliding requirements of the Clean Water Act or the federal regulations, backsliding would be permissible based on the new information available to the Los Angeles Water Board when it developed and adopted the Los Angeles MS4 Order. The Clean Water Act and federal regulations contain exceptions to the anti-backsliding requirements where new information is available to the permitting authority that was not available at the time of the issuance of the prior permit and that would have justified the imposition of less stringent effluent limitations at that time.⁷² The Los Angeles Water Board makes a compelling argument in its October 15, 2013 Response that the development of 33 watershed-based TMDLs adopted since 2001, the inclusion and implementation of three of those TMDLs in the 2001 Los Angeles MS4 Order, and the TMDL-specific and general monitoring and analysis during implementation, have made new information available to the Los Angeles Water Board that fundamentally shaped the WMP/EWMP alternative of the Los Angeles MS4 Order. The Los Angeles Water Board states that the new information resulted in a new understanding that “time to plan, design, fund, operate and maintain [best management practices (BMPs)] is necessary to attain water quality improvements, and these BMPs are best implemented on a watershed scale.”⁷³ The Los Angeles Water Board further points out that, in terms of water supply, there has been a paradigm shift in the last decade from viewing storm water as a liability to viewing it as a regional asset, and that the Los Angeles MS4 Order was drafted to incorporate this new paradigm into its structure.

The WMP/EWMP approach represents a comprehensive attempt to implement the Board’s new understanding regarding how to make progress toward achieving water quality

⁷¹ See Order WQ 96-13 (*Save San Francisco Bay Association*) at pp. 8-10. Although the relevant portion of that decision primarily concerned Clean Water Act section 402(o), its analysis is equally instructive with respect to 40 C.F.R. section 122.44(l). (In passing, we note that the order appears to assume that the permit’s water quality-based requirements for the MS4 permit were derived pursuant to section 301(b)(1)(C); however, that assumption is in error based on the *Defenders of Wildlife* decision and subsequent State Water Board precedent.)

⁷² See 33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1) (anti-backsliding does not apply if the circumstances on which the previous permit was based have materially and substantially changed and would constitute cause for permit modification under 40 C.F.R. section 122.62); 40 C.F.R. § 122.62(a)(2) (stating that new information not available at the time the previous permit was issued is cause for modification); see also 40 C.F.R. §122.44(l)(2)(i)(B)(1).

⁷³ Los Angeles Water Board October 15, 2013 Response, p. 51.

standards as well as supporting the development of new water supplies.⁷⁴ The anti-backsliding requirements of the Clean Water Act and the federal regulations thus did not foreclose the incorporation of the WMP/EWMP alternatives into the Los Angeles MS4 Order even though the alternatives allow additional time to achieve receiving water limitations as compared to the immediate compliance required under the 2001 Los Angeles MS4 Order.

We shall amend Finding II.N. and Part III.D.4, page F-20, of Attachment F, Fact Sheet, as follows:

Finding II.N:

N. Anti-Backsliding Requirements. Section 402(o)(2) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit. **The Fact Sheet of this Order contains further discussion regarding anti-backsliding.**

Attachment F, Fact Sheet, Part III.D.4:

4. Anti-Backsliding Requirements. Sections 402(o)(2) and 303(d)(4) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. ~~All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit.~~ **While this Order allows implementation of Watershed Management Plans/EWMPs to constitute compliance with receiving water limitations under certain circumstances, the availability of that alternative and the corresponding availability of additional time to come into compliance with receiving water limitations, does not violate the anti-backsliding provisions. The receiving**

⁷⁴ The Environmental Petitioners argue that information relied on to develop the WMP/EWMP approach was available to the Los Angeles Water Board at the time of the issuance of the 2001 Los Angeles MS4 Order, since regional and watershed based strategies and technologies in storm water planning, as well as the potential benefits of storm water for water supply, were considered prior to the last permit cycle. Similarly, the Environmental Petitioners argue that some of the data gathered through TMDL development was through the process of assessing impairments and through preparing drafts of the TMDL and was therefore available to the Los Angeles Water Board in 2001. (Environmental Petitioners, Written Comments, Jan. 21, 2015, pp. 15-17, 23-25.) The Environmental Petitioners have asked us to take official notice of several documents that support these assertions. It is not necessary for us to do so because we do not disagree with the Environmental Petitioners that some of the information that the Los Angeles Water Board has cited in support of an exception to the anti-backsliding requirements was available at the time of the adoption of the 2001 Los Angeles MS4 Order. We nevertheless concur with the Los Angeles Water Board that the more than a decade of implementation of storm water requirements, as well as the development and implementation of TMDL requirements, since 2001, has, as a whole, fundamentally reshaped our understanding of the physical and time scale on which such measures must be implemented to bring MS4s into compliance with receiving water limitations. Further, we find that all regional water boards are informed by the information gained in the Los Angeles region, so that any regional water board that adopts an alternative compliance path in a subsequent Phase I permit would not be in violation of anti-backsliding requirements, regardless of the particular storm water permitting history of that region.

water limitations provisions of this Order are imposed under section 402(p)(3)(B) of the Clean Water Act rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or (e), and are accordingly not subject to the anti-backsliding requirements of section 402(o). Although the non-applicability is less clear with respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(l), the regulatory history suggests that USEPA's intent was to establish the anti-backsliding regulations with respect to evolving technology standards for traditional point sources. (See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979)). It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because the WMP/EWMP provisions qualify for an exception to backsliding as based on new information. The Watershed Management Plan/EWMP provisions of this Order were informed by new information available to the Board from experience and knowledge gained through the process of developing 33 watershed-based TMDLs and implementing several of the TMDLs since the adoption of the previous permit. In particular, the Board recognized the significance of allowing time to plan, design, fund, operate and maintain watershed-based BMPs necessary to attain water quality improvements and additionally recognized the potential for municipal storm water to benefit water supply. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions. (33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1); 40 C.F.R. §122.44(l)(2)(i)(B)(1)).

2. Antidegradation

The Environmental Petitioners argue that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the federal and state antidegradation policies.⁷⁵ The federal and state antidegradation policies generally require that the existing quality of water bodies be maintained, unless degradation is justified through specific findings. At a minimum, any degradation may not lower the quality of the water below the water quality standards.⁷⁶

The federal and state antidegradation policies are not identical; however, where the federal antidegradation policy is applicable, the State Water Board has interpreted State Water Board Resolution No. 68-16, the state antidegradation policy, to incorporate the federal antidegradation policy.⁷⁷ In the context of the Los Angeles MS4 Order, a federal NPDES permit, compliance with the federal antidegradation policy would require consideration of the following: First, the Los Angeles MS4 Order must ensure that “existing instream uses and the level of

⁷⁵ 40 C.F.R. § 131.12; State Water Board Resolution No. 68-16, Statement of Policy with Respect to Maintaining High Quality Waters in California (State Water Board Resolution No. 68-16).

⁷⁶ *Ibid.*

⁷⁷ State Water Board Order WQ 86-17 (*Fay*), pp. 16-19.

water quality necessary to protect the existing uses” is maintained and protected.⁷⁸ Second, if the baseline quality of a water body for a given constituent “exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected” through the requirements of the Los Angeles MS4 Order unless the Los Angeles Water Board makes findings that (1) any lowering of the water quality is “necessary to accommodate important economic or social development in the area in which the waters are located;” (2) “water quality adequate to protect existing uses fully“ is assured; and (3) “the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control” are achieved.⁷⁹

The Los Angeles MS4 Order must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy.⁸⁰ In particular, the Los Angeles Water Board must find that not only present, but also anticipated future uses of water are protected, and must ensure “best practicable treatment or control” of the discharges.⁸¹ The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.⁸²

⁷⁸ 40 C.F.R. § 131.12(a)(1). This provision has been interpreted to mean that, “[i]f baseline water quality is equal to or less than the quality as defined by the water quality objective, water quality shall be maintained or improved to a level that achieves the objectives.” (State Water Board, Administrative Procedures Update, Antidegradation Policy Implementation for NPDES Permitting, 90-004 (APU 90-004), p. 4.) This provision is completely consistent with, and implemented by, the receiving water limitations provisions discussed above.

⁷⁹ 40 C.F.R. § 131.12(a)(2); see also State Water Board Resolution No. 68-16, Resolve 2. The federal regulations additionally require strict maintenance of water quality for “outstanding national resources.” (40 C.F.R. § 131.12(a)(3).) There are no designated outstanding national resource waters covered by the Los Angeles MS4 Order.

⁸⁰ See State Water Board Order WQ 86-17 (*Fay*), p. 23, fn. 11.

⁸¹ State Water Board Resolution No. 68-16, Resolve 2. Best practicable treatment or control is not defined in Resolution No. 68-16; however, the State Water Board has evaluated what level of treatment or control is technically achievable using “best efforts.” (See State Water Board Orders WQ 81-5 (*City of Lompoc*), WQ 82-5 (*Chino Basin Municipal Water District*), WQ 90-6 (*Environmental Resources Protection Council*).) A Questions and Answers document on Resolution No. 68-16 by the State Water Board states as follows: “To evaluate the best practicable treatment or control method, the discharger should compare the proposed method to existing proven technology; evaluate performance data, e.g. through treatability studies; compare alternative methods of treatment or control; and/or consider the method currently used by the discharger or similarly situated dischargers . . . The costs of the treatment or control should also be considered . . .” (Questions and Answers, Resolution No. 68-16, State Water Board (Feb. 16, 1995), pp. 5-6.)

⁸² APU 90-004, p.4. The baseline for application of the federal antidegradation policy is 1975. For state antidegradation requirements, see also *Asociacion de Gente Unida por el Agua v. Central Valley Water Board* (2012) 210 Cal.App.4th 1255,1270. The baseline for the application of the state antidegradation policy is generally the highest water quality achieved since 1968. However, where a water quality objective for a particular constituent was adopted after 1968, the baseline for that constituent is the highest water quality achieved since the adoption of the (*Continued*)

The Los Angeles MS4 Order contains a conclusory antidegradation finding, but the Fact Sheet contains additional discussion.⁸³ The Fact Sheet discussion essentially conveys that, where there are high quality waters in the region, the antidegradation requirements are met because the Order requires best practicable treatment or control in the form of MEP and water quality standards compliance and, further, where the water quality is already impaired, the Order requires implementation of TMDL requirements to achieve water quality standards over time. The Fact Sheet also finds that the Los Angeles MS4 Order does not authorize an increase in waste discharges. The Los Angeles Water Board argues that it was not required to make more detailed findings because, using its best professional judgment and available data, it concluded that the Los Angeles MS4 Order would prevent any degradation. For this proposition, the Los Angeles Water Board cites to State Water Board guidance from 1990 (APU 90-004).⁸⁴ The guidance may be construed to exempt the Los Angeles Water Board from conducting an extensive pollutant by pollutant analysis for each water body in the region, but it does not exempt the Board from clearly stating its basis for finding that its action is consistent with the antidegradation policies.

The Los Angeles Water Board has provided a more extensive analysis of why the Los Angeles MS4 Order complies with the antidegradation policies in its October 15, 2013 Response. The Los Angeles Water Board argues that most of the water bodies impacted by the Los Angeles MS4 Order are already impaired for multiple constituents and that, even if some of these water bodies may have been higher quality in 1968, a scenario largely contradicted by the available data,⁸⁵ the appropriate baseline for the quality of such waters is the level of control achieved under the prior permit. The Los Angeles Water Board further argues that the Los Angeles MS4 Order has provisions that are equally or more stringent than those of the

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objective. Resolution 68-16 requires a comparison of the existing quality to “the quality established in policies as of the date on which such policies become effective.” (Resolution 68-16, Resolve 1.)

⁸³ Los Angeles MS4 Order, Finding II.M; Fact Sheet, Att. F, pp. F19-F20.

⁸⁴ APU 90-004, p. 2.

⁸⁵ We reviewed the Administrative Record, including the 1998 Clean Water Act section 303(d) List (May 12, 1999) (Administrative Record, section 10.VI.E., RB-AR35684-35733), the 2010 Clean Water Act section 303(d) List (Oct. 11, 2011) (Administrative Record, section 10.VI.E., RB-AR35734-35785), Santa Monica Bay Restoration Project, An Assessment of Inputs of Fecal Indication Organisms and Human Enteric Viruses from Two Santa Monica Bay Storm Drains (1990) (Administrative Record, section 10.VI.E, RB-AR43363-43413), Toxic Substances Monitoring Program, 10 Year Summary Report 1978-1987 (Administrative Record, Order No. 01-182, R0044602-0045053) and comments submitted by interested persons to the Los Angeles Water Board (Administrative Record RB-AR1006-1038, RB-AR1100-1128, RB-AR1768-2119, RB-AR2653-2847, RB-AR5642-17888). We found no specific evidence presented to the Los Angeles Water Board of high quality waters in the region with regard to pollutants typically associated with storm water discharges; however, we also recognize that in the absence of specific evidence of high quality waters, a blanket statement that there are no high quality water body-pollutant combinations may be overbroad.

2001 Los Angeles MS4 Order and therefore will not allow water quality to degrade below the level of control achieved under the prior permit.

We agree with the Los Angeles Water Board that the Los Angeles MS4 Order maintains and improves the level of control achieved under the 2001 Los Angeles MS4 Order. We expect that the Los Angeles MS4 Order's TMDL requirements and receiving water limitations, which may be implemented through the WMP/EWMP provisions, will be the means for achieving water quality standards for the majority of degraded water bodies in the region. To assert, as the Environmental Petitioners do, that compliance with the receiving water limitations provisions of the 2001 Los Angeles Order is more stringent than establishing specific implementation requirements with clear deadlines for TMDL and receiving water limitations compliance is misguided. We are concerned with the totality of the provisions in the two permits and find that, viewed from that broader perspective, the Los Angeles MS4 Order is at least as stringent in addressing degradation as its predecessor.⁸⁶ The Los Angeles MS4 Order improves on past practices that have been inadequate to protect water quality, and includes a monitoring and assessment program that will identify any changes in water quality.⁸⁷ In general, under the Los Angeles MS4 Order, we expect to see a trajectory away from any past degradation, even if there may be some continued short-term degradation.

We are not persuaded, however, that the level of control achieved under the 2001 Los Angeles MS4 Order necessarily represents the baseline for purposes of an antidegradation analysis. The 2001 Los Angeles MS4 Order had only minimal findings regarding antidegradation and it is not apparent that any degradation that may have continued under the conditions of the 2001 Los Angeles MS4 Order was anticipated by the Los Angeles Water Board and supported with appropriate analysis regarding economic and social benefits⁸⁸ and best practicable treatment or control. We therefore find that the appropriate baseline remains 1968 or the highest quality of receiving waters attained since 1968. We acknowledge

⁸⁶ In making this finding we also recognize that the Permittees may be deemed in compliance with receiving water limitations prior to approval of the WMP/EWMP. (Los Angeles MS4 Order Parts VI.C.2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.) As discussed further under section II.B.6., we find that the Los Angeles Water Board reasonably exercised its discretion in allowing for compliance during the program development phase and further that the program development phase does not detract from the overall effectiveness of the permit provisions.

⁸⁷ See *Asociacion de Gente Unida, supra*, 210 Cal.App.4th at p. 1278.

⁸⁸ We note that the administrative record provides evidence that some discharge of storm water is to the maximum benefit of the people of the state because such discharge is necessary for flood control and public safety and helps accommodate development. (See, e.g., Administrative Record, section 10.VI.C, RB-AR30101; RB-AR32557-32558.)

that the evidence in the record indicates that it is unlikely that many water bodies were high quality even as far back as 1968, but we cannot make a blanket statement to that effect.⁸⁹

Despite this conclusion, we will not remand the antidegradation issue to the Los Angeles Water Board for further consideration, but will make the findings ourselves based on the record before us. Our findings are necessarily made at a generalized level. Even if the directive of APU 90-004 to carry out a complete antidegradation analysis for each water body-pollutant combination is applicable here, there is simply insufficient data available (to us or the Los Angeles Water Board) to make such findings. The APU 90-004 contemplates the appropriate antidegradation analysis for a discrete discharge or facility. It has limited value when considering antidegradation in the context of storm water discharges from diffuse sources, conveyed through multiple outfalls, with multiple pollutants impacting multiple water bodies within a municipality, or in this case, region, especially given that reliable data on the baseline water quality from 1968 is not available.⁹⁰

The Environmental Petitioners propose that antidegradation be addressed in subsequent actions of the Los Angeles Water Board by requiring that the reasonable assurance analysis (discussed in greater detail in section II.B.4.c. of this Order) supporting a WMP/EWMP also demonstrate that the proposed control measures will maintain high quality of waters with regard to pollutants for which they are not impaired. We reject this approach for two reasons. First, the Los Angeles Water Board was required under the federal and state antidegradation policies to evaluate whether permit conditions would lead to degradation of high quality waters at the time of permit issuance. Second, requiring Permittees to incorporate an evaluation of all water body-pollutant combinations, including those where there are no impairments or exceedances, would require them to expand the reasonable assurance analysis beyond its useful function and manageable scope.

We shall amend Finding II.M and Part D.3 at pages F-19 to F-20 of Attachment F, the Fact Sheet, as follows:

⁸⁹ See fn. 85.

⁹⁰ We note that USEPA did not conduct a detailed antidegradation analysis in issuing NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia, presumably for similar reasons. The court in *Asociacion de Gente Unida* relied on APU 90-004 in part in rejecting an antidegradation analysis conducted by the Central Valley Regional Water Quality Control Board for discharges of pollutants to groundwater from dairy facilities region-wide, but the court's objection was to the regional water board's reliance on an illusory prohibition of discharge to groundwater in finding that no antidegradation analysis was required, not to the sufficiency of any generalized antidegradation analysis the Board might have conducted in lieu of its reliance on the prohibition. (210 Cal.App.4th at pp. 1271-1273.)

Finding II. M.

M. Antidegradation Policy

40 CFR section 131.12 requires that state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. Resolution No. 68-16 requires that existing water quality be maintained unless degradation is justified based on specific findings. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the state and federal antidegradation policies. The permitted discharge is consistent with the antidegradation provision of section 131.12 and State Water Board Resolution No. 68-16 as set out in the Fact Sheet.

Attachment F, Fact Sheet Part III.D.3.

3. Antidegradation Policy. 40 CFR section 131.12⁴ requires that the state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in [State Water Board Resolution No. 68-16](#) ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies. Resolution No. 68-16 and 40 CFR section 131.12 require the Regional Water Board to maintain high quality waters of the State unless degradation is justified based on specific findings. First, the Board must ensure that "existing instream uses and the level of water quality necessary to protect the existing uses" are maintained and protected. Second, if the baseline quality of a water body for a given constituent exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected through the requirements of the Order unless the Board makes findings that (1) any lowering of the water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) water quality adequate to protect existing uses fully is assured; and (3) the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control are achieved. The Board must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy. In particular, the Board must find that not only present, but also anticipated future uses of water are protected, and must ensure best practicable treatment or control of the discharges. The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies. until it is demonstrated that any change in quality will

~~be consistent with maximum benefit to the people of the State, will not unreasonably affect beneficial uses, and will not result in water quality less than that described in the Regional Water Board's policies. Resolution 68-16 requires that discharges of waste be regulated to meet best practicable treatment or control to assure that pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained.~~

The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR section 131.12 and Resolution 68-16 **as set out in the Findings below:-**

1. Many of the water bodies within the area covered by this Order are of high quality. The Order requires the Permittees to meet best practicable treatment or control to meet water quality standards. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology based standard set forth in CWA section 402(p). Many of the waters within the area covered by this Order are impaired and for multiple pollutants discharged through MS4s and are not high quality waters with regard to these pollutants. In most cases, there is insufficient data to determine whether these water bodies were impaired as early as 1968, but the limited available data shows impairment dating back for more than two decades. Many such water bodies are listed on the State's CWA Section 303(d) List and either the Regional Water Board or USEPA has established TMDLs to address the impairments. This Order ensures that existing instream (beneficial) water uses and the level of water quality necessary to protect the existing uses is maintained and protected. This Order requires the Permittees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. This Order further requires compliance with receiving water limitations to meet water quality standards in the receiving water either by demonstrating compliance pursuant to Part V.A and the Permittee's monitoring and reporting program pursuant to Part VI.B or by implementing Watershed Management Programs/EWMPs with a compliance schedule. This Order includes requirements to develop and implement storm water management programs, achieve water quality-based effluent limitations, and effectively prohibit non-storm water discharges through the MS4.

2. To the extent that some of the water bodies within the jurisdiction are high quality waters with regard to some constituents, this Order finds as follows:

a. Allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state. The discharge of storm water in certain circumstances is to the maximum benefit to the people of the state because it can assist with maintaining instream flows that support beneficial uses, may spur the development of multiple-benefit projects, and may be necessary for flood control, and public safety as well as to accommodate development in the

area. The alternative – capturing all storm water from all storm events – would be an enormous opportunity cost that would preclude MS4 permittees from spending substantial funds on other important social needs. The Order ensures that any limited degradation does not affect existing and anticipated future uses of the water and does not result in water quality less than established standards. The Order requires compliance with receiving water limitations that act as a floor to any limited degradation.

b. The Order requires the highest statutory and regulatory requirements and requires that the Permittees meet best practicable treatment or control. The Order prohibits all non-storm water discharges, with a few enumerated exceptions, through the MS4 to the receiving waters. As required by 40 CFR section 122.44(a), the Permittees must comply with the “maximum extent practicable” technology-based standard set forth in CWA section 402(p), and implement extensive minimum control measures in a storm water management program. Recognizing that best practicable treatment or control may evolve over time, the Order includes new and more specific requirements as compared to Order No. 01-182. The Order incorporates options to implement Watershed Management Programs or EWMPs that must specify concrete and detailed structural and non-structural storm water controls that must be implemented in accordance with an approved time schedule. The Order contains provisions to encourage, wherever feasible, retention of the storm water from the 85th percentile 24-hour storm event.

~~The issuance of this Order does not authorize an increase in the amount of discharge of waste. The Order includes new requirements to implement WLAs assigned to Los Angeles County MS4 discharges that have been established in 33 TMDLs, most of which were not included in the previous Order.~~

3. Compliance Schedules and the Appropriateness of Enforcement Orders

The Environmental Petitioners concede that immediate compliance with receiving water limitations is not achievable in many instances and that some additional time to reach compliance is warranted. They have proposed an alternative to the WMP/EWMP that would incorporate many of the provisions of those programs but require implementation through the mechanism of a time schedule order or other enforcement order rather than as permit conditions. The Los Angeles MS4 Order already provides that Permittees who are out of compliance with final WQBELs and other TMDL-specific limitations may request a time schedule order.⁹¹ Under the alternative proposed by the Environmental Petitioners, all Permittees that are currently out of compliance with receiving water limitations not addressed by a TMDL as well as with interim TMDL requirements with passed compliance deadlines, would be issued a time schedule order or other enforcement order not to exceed the five year term of

⁹¹ Los Angeles MS4 Order, Part VI.E.4., pp.146-147.

the permit. The Permittees would then implement a WMP/EWMP type plan to achieve compliance with the appropriate limitations within the confines of the enforcement order.

In the prior two sections, we found that the WMP/EWMP provisions are not contrary to the anti-backsliding or antidegradation requirements of federal and state law. We therefore disagree with the Environmental Petitioners that the relevant provisions must be stricken from the Order and incorporated instead into an enforcement order for those reasons. We also find that, given that strict compliance with water quality standards is discretionary in MS4 permits, the Los Angeles Water Board was not restricted to limiting the schedule for compliance with receiving water limitations to the term of the Los Angeles MS4 Order.

Further, from a policy perspective, we find that the MS4 Permittees that are developing and implementing a WMP/EWMP should be allowed additional time to come into compliance with receiving water limitations and interim and final TMDLs through provisions built directly into their permit, rather than through enforcement orders. Building a time schedule into the permit itself, as the Los Angeles MS4 Order does, is appropriate because it allows a more efficient regulatory structure compared to having to issue multiple enforcement orders. More importantly, it is appropriate to regulate Permittees in a manner that allows them to strive for compliance with the permit terms, provided no provision of law otherwise precludes including the schedule in the NPDES permit. For example, for traditional point source discharges subject to strict compliance with water quality standards pursuant to section 301(b)(1)(C), the terms of a compliance schedule are dictated by our compliance schedule policy (State Water Board Resolution 2008-0025) and any additional time for compliance could only be under the auspices of an enforcement order outside the permit.⁹²

The WMP/EWMP provisions constitute an effort to set ambitious, yet achievable, targets for Permittees; receiving water limitations, on the other hand, while the ultimate goal of MS4 permitting, may not in all cases be achievable within the five-year permit cycle. Generally, permits are best structured so that enforcement actions are employed when a discharger shows some shortcoming in achieving a realistic, even if ambitious, permit condition and not under circumstances where even the most diligent and good faith effort will fail to achieve the required condition. We add that it is our intention to encourage a watershed-based approach to addressing storm water issues going forward and that it would be contrary to that intention to

⁹² We also note that the State Water Board's Policy for the Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (2005) (State Implementation Policy) and the CTR itself (40 C.F.R. § 131.38(e)) restrict the scope of compliance schedules for effluent limitations addressing the discharge of toxic pollutants; however the policy does not apply to storm water discharges. (State Implementation Policy, p.3, fn.1.)

structure the watershed-based requirements as an enforcement order. We will not require Permittees that propose and timely implement a WMP/EWMP to request time schedule orders or other enforcement orders as a precondition of being in compliance with the receiving water limitations or interim TMDL requirements of the Los Angeles MS4 Order.

While declining to structure the WMP/EWMP provisions generally as an enforcement order, we acknowledge that time schedule orders are appropriate under some circumstances. We have already noted that the Los Angeles MS4 Order allows a Permittee to request a time schedule order where a final compliance deadline for a state-adopted TMDL has passed and the Permittee believes that additional time to comply with the requirement is necessary.⁹³ We expect that a Permittee will request a time schedule order also if the Permittee fails to meet a final compliance deadline for a TMDL after the adoption date of the Los Angeles MS4 Order. We will also provide that a Permittee may request a time schedule order if the Permittee fails to meet a final compliance deadline for a receiving water limitation set in the Permittee's WMP/EWMP.

We shall add a new Part VI.C.6.b and revise Part VI.E.4.b as follows:

Part VI.C.6

b. Where a Permittee believes that additional time to comply with a final receiving water limitation compliance deadline set within a WMP/EWMP is necessary, and the Permittee fails to timely request or is not granted an extension by the Executive Officer, a Permittee may, no less than 90 days prior to the final compliance deadline, request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

Part VI.E.4

b. Where a Permittee believes that additional time to comply with the final water quality-based effluent limitations and/or receiving water limitations is necessary, a Permittee may within 45 days of Order adoption, **or no less than 90 days prior to the final compliance deadline if after adoption of the Order,** request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

4. Rigor and Accountability in the WMPs/EWMPs

We now turn to a consideration, from a technical as well as policy lens, as to whether the WMPs/EWMPs are structured in a manner that will maximize the likelihood of

⁹³ *Ibid.*

reaching the ultimate goal of the compliance alternative – achieving receiving water limitations.⁹⁴ We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met. Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations.

We find below that the WMP/EWMP provisions generally ensure the appropriate rigor, transparency, and accountability, and that, with the few revisions we direct, are designed to lead to achievement of receiving water limitations.⁹⁵

a. Milestones and Compliance Deadlines

We first consider whether the WMP/EWMP provisions require clear, concrete, and finite milestones and deadlines.

For water body-pollutant combinations addressed by TMDLs, the Los Angeles MS4 Order requires the Permittees to incorporate the compliance schedules found in Attachments L through R of the Order, which reflect previously adopted TMDL-based requirements, into the WMP/EWMP, and, as necessary, to develop interim milestones and dates for their achievement.⁹⁶ A Permittee that does not thereafter comply with the approved compliance schedule must instead demonstrate compliance with the WQBELs and other TMDL-specific limitations of the Order.⁹⁷ For water body-pollutant combinations not addressed by a TMDL, but where the relevant pollutant is one for which the water body is identified as impaired on the Clean Water Act section 303(d) List and the pollutant is in the same class as a TMDL pollutant, the Order requires that the WMP/EWMP incorporate a schedule consistent with the TMDL schedule for the same class pollutant.⁹⁸ A Permittee that does not thereafter comply with

⁹⁴ From a legal standpoint, our analysis serves to verify that the Los Angeles MS4 Order's alternative compliance approach through WMPs/EWMPs is supported by the findings and by evidence in the record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.)

⁹⁵ We do not agree with Permittee Petitioners that the WMP/EWMP provisions are precluded by the program requirements of 40 Code of Federal Regulations section 122.26. Nor do we agree that the requirements are vague or lack definition. The WMP/EWMP provisions of the Order are guidelines for development of a subsequent program with more specificity to be approved by the Los Angeles Water Board or its Executive Officer.

⁹⁶ Los Angeles MS4 Order, Part VI.C.5.c., pp.64-65.

⁹⁷ *Id.*, Part VI.E.2.d.i(4)(c), p.144.

⁹⁸ *Id.*, Part VI.C.2.a.i., pp. 49-50.

the approved compliance schedule must instead demonstrate immediate compliance with the receiving water limitations in Part V.A.⁹⁹ We will not disturb these provisions.

With regard to exceedances of receiving water limitations not addressed by a TMDL, and where the pollutant is not in the same class as a pollutant addressed by a TMDL, the Order requires that the WMP/EWMP include milestones based on measurable criteria or indicators and a schedule for achieving the milestones. The WMP/EWMP must also incorporate a final date for achievement of receiving water limitations, but that date is circumscribed simply as “as soon as possible.”¹⁰⁰ Parts VI.C.2.a.ii.(4) and VI.C.2.a.iii.(2)(c) help clarify the meaning of “as soon as possible:”

Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.¹⁰¹

We will make a revision to the compliance schedule provisions to make it clear that the term “as soon as possible” is to be interpreted consistent with the more specific direction cited above. However, because the WMP/EWMP, and therefore the proposed compliance schedule, is subject to public review and comment and approval by the Los Angeles Water Board or its

⁹⁹ *Id.*, Part VI.C.2.c., p.52.

¹⁰⁰ *Id.*, Part VI.C.5.c.iii.(3), p. 65. If the pollutant is not in the same class as those addressed in a TMDL, but the water body is still identified as impaired for that pollutant, the WMP/EWMP must either have a final compliance deadline within the 5 year permit term or Permittees are expected to initiate development of a stakeholder-proposed TMDL and incorporate a compliance schedule consistent with the TMDL. (*Id.*, Part VI.C.2.a. ii., pp. 50-51) (If the exceedances are in a drainage area implementing the storm water retention approach, there is no requirement to initiate the TMDL development process.) The requirement to address receiving water limitations is ongoing. As exceedances are found through monitoring for water body-pollutant combinations not identified on the 303(d) List, Permittees must either meet receiving water limitations or include the water body-pollutant combination in the WMP/EWMP and set enforceable requirements and milestones and dates for their achievement within a time frame that is as short as possible. (*Id.*, Part VI.C.2.a.iii, pp. 51-52.) Permittees are deemed in compliance with receiving water limitations only for water body-pollutant combinations addressed in the WMP/EWMPs. Thus, as pointed out by several interested parties, for lower priority water body-pollutant combinations not incorporated into a WMP/EWMP for which exceedances are detected, Permittees may be in violation of the receiving water limitations. A Permittee always has the ability to reprioritize a water body-pollutant combination from low priority to high priority and amend its WMP/EWMP to incorporate measures to address that water body-pollutant combination.

¹⁰¹ *Id.*, Parts VI.C.2.a.ii.4, p. 50, VI.C.2.a.iii.(2)(c), p. 51 (identical language).

Executive Officer,¹⁰² we do not find it necessary to constrain the determination of milestones and dates for the achievement of receiving water limitations any further.

We shall amend Part VI.C.5.c.iii.(3)(b) as follows:

- (b) A final date for achieving the receiving water limitations as soon as possible, **consistent with Parts VI.C.2.a.ii.(4) & VI.C.2.a.iii.(2)(c).**

b. Constraints on Extension of Deadlines

The fact that the Los Angeles MS4 Order requires the establishment of concrete and rigorous deadlines within the WMP/EWMP for the achievement of receiving water limitations is critical to ensuring progress on such achievement; however, the Order also contemplates that the deadlines, with the exception of those compliance deadlines established in a TMDL, may be extended.¹⁰³ The WMP/EWMP is subject to an adaptive management process. Based on the results of that process the Permittees may propose modifications, including modifications to compliance deadlines and interim milestones, in the Annual Report.¹⁰⁴

The potential for multiple extensions is nevertheless ameliorated by the fact that extensions of compliance deadlines and interim milestones require Los Angeles Water Board Executive Officer approval,¹⁰⁵ and are accordingly, subject to a 30-day public comment period.¹⁰⁶ The public comment period will allow all other interested persons to weigh in on the appropriateness of any requested extensions. If thereafter dissatisfied with the determination made by the Executive Officer, interested persons may additionally seek review of the Executive Officer's decision by the Los Angeles Water Board.¹⁰⁷ Of course, in cases where no extension

¹⁰² *Id.*, Part VI.C.4.c., p.56, Table 9, p. 54, Part VI.A.5.b., p. 42, Att. F, Fact Sheet, p. F-42. Under Part VI.A.5.b, “[a]ll documents submitted to the Regional Water Board Executive Officer for approval shall be made available to the public for a 30-day period to allow for public comment.”

¹⁰³ *Id.*, Parts VI.C.7, p.66, VI.C.8, pp.66-67.

¹⁰⁴ *Id.*, Part, VI.C.8, p.67. Under another provision of the Order, Permittees may at any time request an extension of deadlines for achievement of interim milestones established to address exceedances of receiving water limitations not otherwise addressed by a TMDL. (*Id.*, Part VI.C.6.a., p.65.) (We note that the cited provision refers to “milestones established pursuant to Part VI.C.4.c.ii.(3),” but the intent appears to have been to reference Part VI.C.5.c.iii.(3).) But as we read the Los Angeles MS4 Order, extensions of not just interim deadlines for achievement of milestones but also final compliance deadlines to achieve receiving water limitations are already allowed under the adaptive management provisions of Part VI.C.8.a.ii.: “Based on the results of the adaptive management process, Permittees shall report any modifications, including where appropriate *new compliance deadlines* and interim milestones, with the exception of those compliance deadlines established in a TMDL, necessary to improve the effectiveness of the Watershed Management Program or EWMP, in the Annual Report” (Emphasis added.)

¹⁰⁵ *Id.*, Parts VI.C.8, p.67, VI.C.6.a., p.65. We recognize that as currently written the adaptive management provisions in effect deem any modifications to the WMPs/EWMPs approved if the Executive Officer “expresses no objections” within 60 days. (*Id.*, Part VI.C.8.a.iii., p. 67.) With our revisions, any deadline extensions must be affirmatively approved by the Executive Officer.

¹⁰⁶ *Id.*, Part VI.A.5.b, p. 42.

¹⁰⁷ *Id.*, Part VI.A.6, p.42.

is available, as with final deadlines established in TMDLs,¹⁰⁸ or where no extension is requested or granted, failure to meet a deadline means that the Permittee will have to comply from that time forward with the receiving water limitations or WQBELs and other TMDL-specific limitations or request a time schedule order. Therefore, Permittees cannot rely on the certainty of a deadline extension, and Permittees have a strong incentive to implement control measures that will in fact get them to compliance by the established deadline. Given that the Permittees and the Los Angeles Water Board are working with limited data regarding storm water impacts and control measure performance, especially where TMDLs have not been developed, we are hesitant to remove all flexibility for deadline extensions, and find that the Order strikes an appropriate balance.

Permittee Petitioners seek even greater flexibility under the WMP/EWMP provisions for adjusting approved control measures and time lines. They advocate for amendments that would allow a Permittee to propose alternative controls or time lines upon a demonstration that required controls for timely achievement of a limitation are either technically infeasible or otherwise constitute a substantial hardship to the Permittee. We have found above that, in the case of final deadlines set in the WMP/EWMP for achievement of receiving water limitations not otherwise addressed in a TMDL, the Los Angeles MS4 Order already provides for an opportunity to propose new deadlines through the adaptive management process. We will make a clarifying revision below to confirm that Permittees may ask for extensions in meeting receiving water limitations not addressed by a TMDL. Technical infeasibility or substantial hardship may be grounds for such a request. The Los Angeles Water Board Executive Officer, in turn, may, after allowing for public review and comment, choose to (1) extend the deadline, (2) decline the extension but approve any time schedule order requested by the Permittee, or (3) decline the extension and not approve a time schedule order, with the result that the Permittee will be out of compliance with the provision of the WMP/EWMP and therefore the receiving water limitations of Part V.A. As stated previously, interested persons may thereafter ask the Los Angeles Water Board to review the Executive Officer's determination.¹⁰⁹

With regard to final deadlines for WQBELs and other TMDL-specific limitations, we will not amend the WMP/EWMP provisions to add flexibility for extensions. We find that the only option appropriately available to a Permittee unable to meet final deadlines that are set out in a TMDL and incorporated into the Los Angeles MS4 Order and the WMP/EWMPs, is to

¹⁰⁸ *Id.*, Part VI.C.8.a.ii., p.67.

¹⁰⁹ *Id.*, Part VI.A.6, p.42.

request a time schedule order, consistent with Part VI.E.2.e. of the Order, as that Part was amended in section II.B.3. above.¹¹⁰

We shall amend Part VI.C.6.a as follows:

- a. Permittees may request an extension of deadlines for achievement of interim milestones **and final compliance deadlines** established pursuant to Part VI.C.45.c.iii.(3) ~~only~~, **with the exception of those final compliance deadlines established in a TMDL**. Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request the justification for the extension. Extensions ~~shall be subject to approval by~~ **must be affirmatively approved by** the Regional Water Board Executive Officer, **notwithstanding Part VI.C.8.a.iii.**

c. Rigor and Accountability in the Process

We see three additional components of the WMPs/EWMPs as essential to ensuring that the proposed WMPs/EWMPs are in fact designed to achieve receiving water limitations within the appropriate time frame.

First, as documents to be approved by either the Los Angeles Water Board or its Executive Officer, the WMPs/EWMPs are subject to a public review and comment period.¹¹¹ Such review includes consideration of proposed control measures, deadlines for achievement of final limitations, and the reasonable assurance analysis that supports the WMP/EWMP. We expect this public process to vet the proposed WMPs/EWMPs and facilitate revisions to strengthen the programs as needed, thereby providing some assurance that approved WMPs/EWMPs will achieve the water quality targets set out.

Second, the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP.¹¹² Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines.¹¹³

¹¹⁰ Final TMDL deadlines are established and incorporated into the Basin Plans during the TMDL development process. That process invites stakeholder participation and the proposed schedule is subject to public review and comment and approval by the relevant regional water board, the State Water Board, and USEPA. The deadlines are established with consideration of the time needed for compliance for all dischargers contributing to an impairment, including industrial and construction storm water dischargers and traditional NPDES dischargers. Although we recognize that it may not always be feasible for municipal storm water dischargers to meet final TMDL deadlines, short of amending the Basin Plan to modify the deadlines (see *California Association of Sanitation Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4th 1438), we find it appropriate for the dischargers to request time schedule orders rather than be granted an extension within the provisions of the Los Angeles MS4 Order.

¹¹¹ See Los Angeles MS4 Order, Parts VI.C.4.d., p. 57, VI.C.6, p. 65, Table 9, p.54; see also *id.*, Part VI.A.5., p. 42.

¹¹² *Id.*, Part VI.C.5.b.iv.(5), pp. 63-64.

¹¹³ We note that the Los Angeles Water Board has released guidance on the development of a reasonable assurance analysis. The guidance was released after adoption of the Los Angeles MS4 Order and accordingly is not (*Continued*)

Third, the adaptive management provisions of the Order ensure that the Permittees will evaluate monitoring data and other new information every two years and consider progress up to that point on achieving WQBELs and other TMDL-specific limitations. Permittees are required as part of the adaptive management process to propose modifications to improve the effectiveness of the WMP/EWMP and implement those modifications.¹¹⁴

While we are supportive of all of these measures, we find that they should be strengthened. As a preliminary matter, we will require the Permittees to submit specific information, concurrently with the two-year adaptive management process, that will assist the Los Angeles Water Board in determining how effective the WMP/EWMP path is in spurring the completion of on-the-ground structural control measures that lead to measurable water quality improvement. As we discuss further in Section II.B.8 of this Order, we will direct the Los Angeles Water Board to report to the State Water Board periodically on the effectiveness of the WMP/EWMP approach and expect the additional information submitted by the Permittees to inform that report.

More significantly, we will add a provision that requires Permittees to comprehensively update the reasonable assurance analysis and the WMP/EWMP, following an opportunity to implement the adaptive management process. Given the limitations inherent in models, as well as the potential incentive to choose the lowest effort and cost level predicted by the model to achieve receiving water limitations,¹¹⁵ we are concerned that reliance on one initial reasonable assurance analysis is insufficient to ensure that in the long term WMPs/EWMPs will

(continued from previous page)

part of the Administrative Record. We nevertheless take this opportunity to state that we expect any revisions and updates to the guidance to be subject to a public process as part of reissuance of the Los Angeles MS4 Order.

¹¹⁴ Los Angeles MS4 Order, Part VI.C.8., pp. 66-67. We add that the adaptive management process will also allow Permittees to revise their WMPs/EWMPs to take advantage of funding opportunities as they arise in the future, including funding opportunities through Assembly Bill 2403 (approved by Governor, June 28, 2014 (2013-2014 Reg. Sess.)) and Proposition 1 (approved by ballot Nov. 4, 2014). We are cognizant of criticism that the adaptive management process is just another version of the ineffective iterative process of the receiving water limitations. These arguments are misplaced. Unlike the iterative process of the receiving water limitations, the adaptive management process is only one component of a series of actions required under the WMP/EWMP and acts as a periodic check to ensure that all the other requirements are achieving the stated goals of the WMP/EWMP within clearly stated deadlines. As our discussion above makes clear, we would not endorse an alternative compliance path with the sole requirement to adaptively manage implemented control measures. Further, the adaptive management process in the Los Angeles MS4 Order differs from the iterative process in that Permittees must carry out the adaptive management process every two years, limiting any discretionary determination as to when the program must be evaluated. (Los Angeles MS4 Order, Part VI.C.8.a.)

¹¹⁵ The numerical analysis methods and models approved for use by Permittees for estimating hydrologic conditions and contaminant fate and transport in the watersheds should, in principle, be able to propagate any and all known uncertainty to the outputs and results. It is in the public interest that the Los Angeles Water Board communicate this uncertainty to all stakeholders, as the results in most cases will affect the beneficial uses of California waters. Moreover, it is highly desirable that, to the extent possible, the Los Angeles Water Board define a minimum level of uncertainty (or level of confidence) acceptable for a reasonable assurance analysis to be approved.

achieve relevant water quality goals. . Currently, as stated above, the Permittees are required to implement the adaptive management process every two years from the date of program approval. Under the provision we add, the Permittees will be required to comprehensively update the reasonable assurance analysis (including potentially considering whether the model itself and its assumptions require updating) and the WMP/EWMP after several years of adaptive management, based on previous years' monitoring data and other performance measures. The Permittee will submit a full revised package to the Los Angeles Water Board Executive Officer for approval, following public review.

Given that the WMPs/EWMPs in many cases address water quality targets that are to be achieved a decade or more in the future, a periodic, complete re-consideration and recalibration of the assumptions and predictions that support the proposed control measures and implementation schedule in light of new data, above and beyond the two-year adaptive management requirements of the Los Angeles MS4 Order, is essential, notwithstanding the additional time and effort that Permittees must expend on the update. We also recognize that such review is a staff intensive process for the Los Angeles Water Board, but addressing storm water impacts is a priority for that Board. Although we expect that the update will be necessary in most cases, the new requirements provide that the Executive Officer of the Los Angeles Water Board may waive the requirement for an update if the Permittee demonstrates through water quality monitoring that the WMP/EWMP is meeting appropriate targets. Our direction to require a comprehensive update of the reasonable assurance analyses and the WMPs/EWMPs after several cycles of adaptive management should in no way be construed as limiting the Los Angeles Water Board Executive Officer's discretion to request such updates earlier in the implementation process or the obligation of the Permittees to initiate such updates earlier in the implementation process based on the ongoing adaptive management process.

The second added provision will not be relevant for the permit term of the order before us; however, we anticipate that the next iteration of an MS4 Order for the Los Angeles area will closely track the Los Angeles MS4 Order to allow for continued implementation of the WMP/EWMPs.

We shall amend Part VI.C.8 by adding new subsections a.iv. and b. as follows:

a.

iv. Permittees shall report the following information to the Regional Water Board concurrently with the reporting for the adaptive management process:

(1) On-the-ground structural control measures completed;

(2) Non-structural control measures completed;

- (3) Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;**
- (4) Comparison of the effectiveness of the control measures to the results projected by the RAA;**
- (5) Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the Watershed Management Program or EWMP;**
- (6) Control measures proposed to be completed in the next two years pursuant to the Watershed Management Program or EWMP and the schedule for completion of those control measures;**
- (7) Status of funding and implementation for control measures proposed to be completed in the next two years.**

b. Watershed Management Program Resubmittal Process

- i. In addition to adapting the Watershed Management Program or EWMP every two years as described in Part VI.C.8.a., Permittees must submit an updated Watershed Management Program or EWMP with an updated Reasonable Assurance Analysis by June 30, 2021, or sooner as directed by the Regional Water Board Executive Officer or as deemed necessary by Permittees through the Adaptive Management Process, for review and approval by the Regional Water Board Executive Officer. The updated Reasonable Assurance Analysis must incorporate both water quality data and control measure performance data, and any other information informing the two-year adaptive management process, gathered through December 31, 2020. As appropriate, the Permittees must consider any new numeric analyses or other methods developed for the reasonable assurance analysis. The updated Watershed Management Program or EWMP must comply with all provisions in Part VI.C. The Regional Water Board Executive Officer will allow a 60-day public review and comment period with an option to request a hearing. The Regional Water Board Executive Officer must approve or disapprove the updated Watershed Management Program or EWMP by June 30, 2022. The Executive Officer may waive the requirement of this provision, following a 60-day public review and comment period, if a Permittee demonstrates through water quality monitoring data that the approved Watershed Management Program or EWMP is meeting appropriate water quality targets in accordance with established deadlines.**

5. Determination of Compliance with Final Requirements

a. Compliance with Final TMDL Requirements¹¹⁶

Part VI.E.2.e.i.4. of the Los Angeles MS4 Order provides that Permittees will be deemed in compliance with the final WQBELs and other TMDL-specific limitations if “[i]n drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water.”¹¹⁷ Part VI.E.2.e.i.4 is one of four options available to the Permittee in Part VI.E.2.e. to be deemed in compliance with WQBELs and other TMDL-specific limitations. The other three options allow a Permittee to establish compliance with a final WQBEL or other TMDL-specific limitation by showing that (1) there are no violations of the final WQBEL; (2) there are no exceedances of the receiving water limitation for the specific pollutant in the receiving water at or downstream of the Permittee’s outfall, or (3) there is no direct or indirect discharge from the Permittee’s MS4 to the receiving water during any relevant time period.¹¹⁸ These three options ensure that either the receiving water limitations or WQBELs and other TMDL-specific limitations are in fact being complied with. In contrast, the storm water retention approach assumes compliance with *final* WQBELs and other TMDL-specific limitations, and accordingly, compliance with the receiving water limitations in Part V for the relevant water body-pollutant combinations,¹¹⁹ even if the final WQBELs and other TMDL-specific limitations are not actually being achieved. The Environmental Petitioners argue that the Los Angeles Water Board has failed to establish through findings and record evidence that the storm water retention approach will in fact achieve compliance with the WQBELs and other TMDL-specific limitations and that the Los Angeles

¹¹⁶ The Los Angeles MS4 Order additionally deems compliance with *interim* WQBELs and other TMDL-specific limitations if the “Permittee has submitted and is fully implementing an approved” WMP/EWMP. (Los Angeles MS4 Order, Part VI.E.2.d.i.(4), p. 143; see also *id.*, Part VI.C.3.a., p. 53.) Because Permittees are required to incorporate into the WMP/EWMP compliance schedules “compliance deadlines occurring within the permit term for all applicable interim . . . water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R,” we expect that in most cases full implementation of the WMP/EWMP necessarily results in compliance with interim WQBELs and other TMDL-specific limitations. However, to the extent this is not the result reached, we find that requiring implementation of the WMP/EWMP with control measures designed to achieve interim WQBELs and other TMDL-specific limitations, in lieu of showing actual compliance with any *interim* numeric requirements, is consistent with the assumptions and requirements of the wasteload allocations of the relevant TMDLs. (40 C.F.R. § 122.44(d)(1)(vii)(B).)

¹¹⁷ Los Angeles MS4 Order, Part VI.E.2.e.i.(4), p. 145.

¹¹⁸ *Id.*, Part VI.E.2.e.i.(1)-(3), pp. 144-45.

¹¹⁹ We note again that Part VI.E.2.c.i. states that Part VI.E establishes the manner of achieving compliance with the receiving water limitations in Part V.A where the receiving water limitations are associated with water body-pollutant combinations addressed in a TMDL.

MS4 Order's reliance on the storm water retention approach for final compliance determination is therefore contrary to the law.

We are supportive of the EWMP's use of the storm water retention approach as a technical requirement. Retention of storm water is likely to be an effective path to water quality improvement. Furthermore, in addition to preventing pollutants from reaching the receiving water except as a result of high precipitation events (which also generally result in significant dilution in the receiving water), the storm water retention approach has additional benefits including recharge of groundwater, increased water supply, reduced hydromodification effects, and creation of more green space to support recreation and habitat.¹²⁰

We have some concerns, however, with the lack of verification in the Los Angeles MS4 Order that final WQBELs and other TMDL-specific limitations or receiving water limitations will in fact be met as a result of implementation of the storm water retention approach. We acknowledge that, in most cases, the final TMDLs have deadlines outside of the permit term for the Los Angeles MS4 Order and that, therefore, with regard to those, our concerns are more theoretical at this point than immediate. Nevertheless, we agree with the Environmental Petitioners that the evidence in the Administrative Record is not sufficient to establish that the storm water retention approach will in all cases result in achievement of final WQBELs and other TMDL-specific limitations and, more importantly, are concerned that the Order itself does not incorporate clear requirements that would provide for such verification in the process of implementation.

With regard to evidence in the Administrative Record, it is clear that the storm water retention approach is a promising approach for achieving compliance with receiving water limitations, with multiple additional environmental benefits. But the research regarding the storm water retention approach is still in early stages and we cannot say with certainty at this point that implementation will lead to compliance with receiving water limitations in all cases.¹²¹

With that conclusion in mind, we look to the Los Angeles MS4 Order itself to determine if there are sufficient additional provisions to assure that, in the long run, the storm water retention approach will achieve the ultimate goal of compliance with receiving water limitations. We first note that the Order does not require a reasonable assurance analysis when

¹²⁰ See e.g. Administrative Record, section 10.VI.C, RB-AR29263-29311, RB-AR32318-32350.

¹²¹ We reviewed the citations to the Administrative Record provided in the Los Angeles Water Board October 15, 2013 Response and in the October 15, 2013 Responses of many of the Petitioners. We find that the cited studies show the storm water retention to be a promising approach to meeting water quality standards, but do not establish, at a sufficiently high level of confidence, that the storm water retention approach will definitively achieve compliance with the receiving water limitations.

a Permittee opts for the storm water retention approach. Permittees are required to conduct a reasonable assurance analysis for each water body-pollutant combination addressed by a WMP, with the objective of demonstrating the ability of the controls to ensure that MS4 discharges achieve applicable WQBELs and do not cause or contribute to exceedances of receiving water limitations.¹²² The relevant provisions reference EWMPs, but elsewhere the Order states that the reasonable assurance analysis is only required for areas covered by the EWMP where retention of the 85th percentile, 24-hour storm event is not feasible.¹²³ The Fact Sheet also implies that the requirement for a reasonable assurance analysis is confined to situations where the storm water retention approach is not feasible.¹²⁴ In sum, then, Permittees that choose to develop and implement an EWMP are required to conduct a reasonable assurance analysis for each waterbody-pollutant combination addressed by the EWMP, except in the drainage areas that are tributary to the storm water retention projects.

The fact that the storm water retention approach does not require a reasonable assurance analysis prior to implementation to demonstrate the ability of the approach to achieve compliance with the limitations is mitigated in part by required monitoring and adaptive management to verify compliance following implementation. Although the provision could be clearer, we read the language “[i]n drainage areas where Permittees are implementing an EWMP” in Part VI.E.2.e.i.(4) to require Permittees to be in compliance with all aspects of the EWMP, including the monitoring and adaptive management provisions of Parts VI.C.7 and 8, to be deemed in compliance with final limitations through the storm water retention approach. As we read the Order, a Permittee’s showing that it has retained all non-storm water and all storm water up to and including the volume equivalent to the 85th percentile, 24-hour event, establishes compliance, but only if the Permittee continues to conduct monitoring and adapt the EWMP in response to the monitoring. The Los Angeles Water Board appears to read the Order the way we do, as it states in its October 15, 2013 Response that “the Permit requires monitoring and adaptive management, which will continue to inform the Los Angeles Water Board regarding the efficacy of this storm water retention approach in conjunction with implementation of the other storm water management program elements and any needed

¹²² Los Angeles MS4 Order, Part VI.C.5.b.iv.(5), pp. 63-64.

¹²³ *Id.*, Part VI.C.1.g., p. 48.

¹²⁴ *Id.*, Att. F, Fact Sheet, p. F-39.

modifications to the approach.”¹²⁵ The Los Angeles Water Board further states in comments submitted on a draft of this order, as follows:

The Los Angeles MS4 Order does not exclude EWMPs or areas within an EWMP where the stormwater retention standard is achieved from the integrated watershed monitoring, assessment and adaptive management processes. Neither does the Los Angeles MS4 Order specify or contemplate an end to the monitoring, assessment and adaptive management processes in the case of a Watershed Management Program (WMP) or EWMP. These required elements, including receiving water and outfall monitoring, evaluation of these monitoring data, and modification of the EWMP to improve its effectiveness, will be continually conducted throughout the Watershed Management Area addressed by the EWMP. . . . The Los Angeles Water Board understood that these regional multi-benefit projects would take time to implement and that Permittees needed to be afforded this time in the Los Angeles MS4 Order. The Los Angeles Water Board will continually evaluate progress during the implementation period. If, as full implementation nears, some Receiving Water Limitations are still not achieved, the Los Angeles Water Board and State Water Board have a variety of tools that can be used at a regional or statewide level including reconsideration of TMDLs, Basin Planning actions, policy development and permitting, among others.¹²⁶

We will make a revision to Part VI.E.2.e.i. to make it clear that the Permittee must be in compliance with all other requirements of the EWMP in addition to implementation of the storm water retention approach in order to be deemed in compliance with the final WQBELs and other TMDL-specific limitations.

With no definitive evidence in the record establishing that the storm water retention approach will achieve final requirements, no reasonable assurance analysis required at the outset, and reliance only on subsequent monitoring and adaptive management to improve results if final limitations are not in fact achieved, the storm water retention approach does not provide a level of assurance of success that would lead us to conclude that its implementation, with nothing else, is sufficient to constitute compliance with final WQBELs and other TMDL-specific limitations. We understand that there are nevertheless very good reasons to encourage its use. Certainly for all non-storm water and for all storm water generated in storms up to the 85th percentile storm, the storm water retention approach achieves compliance because there is no discharge. And there are significant benefits beyond water quality, including most importantly benefits to water supply. We also believe that public projects requiring investment of this magnitude are unlikely to be carried out without a commitment from the water boards that Permittees will be considered in compliance even if the resulting improvement in water quality

¹²⁵ Los Angeles Water Board, October 15, 2013 Response, p. 62.

¹²⁶ Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3.

does not rise all the way to complete achievement of the final WQBELs and other TMDL-specific limitations.

We are not willing to go as far as saying that compliance with the storm water retention approach alone constitutes compliance with final WQBELs and other TMDL-specific limitations for all time, regardless of the actual results.¹²⁷ Nonetheless, we anticipate that implementation of such projects will bring the drainage area most and, in many cases, all of the way to achievement of water quality standards. Where there is still a gap in required water quality improvement, we expect the Executive Officer of the Los Angeles Water Board to require appropriate actions, consistent with the provisions of the Los Angeles MS4 Order and the Los Angeles Water Board's stated interpretation of those provisions,¹²⁸ to close that gap with additional control measures in order for the Permittee to be considered in compliance with the WQBEL or other TMDL-specific limitation. There are various mechanisms to provide assurances that additional control measures will be implemented to achieve the WQBEL or other TMDL-specific limitation, and in some instances, it may be appropriate for the Los Angeles Water Board to issue a time schedule order governing the implementation of further control measures. Further, as acknowledged by the Los Angeles Water Board in its comments, in some circumstances, reconsideration of the underlying TMDLs and the final deadlines within those TMDLs may instead be warranted.¹²⁹ We additionally recognize that municipal storm water management is an area of continued development and, with continued research and data evaluation, water quality standards may evolve and become more nuanced or sophisticated over time.

While we decline to interpret the storm water retention approach to, in and of itself, constitute compliance with final WQBELs and other TMDL-specific limitations, we emphasize here that any additional control measures to reach compliance that may be required by the Los Angeles Water Board must not require changes to installed storm water retention projects. Any revisions should be prospective in nature and should not disturb projects that Permittees have already installed in good faith to comply with the provisions of their EWMP.

¹²⁷ Further, Permittees still have substantial incentive to develop and implement an EWMP. If a permittee pursues an EWMP, it will be deemed in compliance with the receiving water limitations during the EWMP development phase, and it may also recognize significant non-water quality benefits.

¹²⁸ Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3. As explained in footnote 110, at this time we see limited options available to the Los Angeles Water Board in addressing compliance with final deadlines for WQBELs and other TMDL-specific limitations.

¹²⁹ We also acknowledge the need for and commit to supporting state-wide solutions for source reduction as appropriate, similar to the brake pad legislation adopted to address copper discharges. (Senate Bill 346 (approved by the Governor September 27, 2010).)

Ultimately, we must set out to verify through appropriate monitoring that final WQBELs and other TMDL-specific limitations can be achieved through the storm water retention approach, or be willing to revise that approach. However, new or additional measures required at that point should be additive to the storm water retention approach measures already installed.

In sum, despite the uncertainty inherent in allowing the storm water retention approach, we concur in its use in the Los Angeles MS4 Order, with the clarification that ultimate compliance is subject to continued planning, monitoring and adaptive management. We shall amend Part VI.E.2.e.i. as follows:

- i. A Permittee shall be deemed in compliance with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:

...

- (4) In drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85^h percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water, **and the Permittee is implementing all requirements of the EWMP, including, but not limited to, Parts VI.C.7 and VI.C.8 of this Order.** This provision (4) shall not apply to final trash WQBELs.

b. Compliance with Final Receiving Water Limitations

The Los Angeles MS4 Order states that for receiving water limitations associated with water-body pollutant combinations addressed in a TMDL, compliance with the TMDL requirements of the Order in Part VI.E and Attachments L through R constitutes compliance with the receiving water limitations in Part V.A.¹³⁰ In other words, if there is an exceedance for a pollutant in a water body that has a TMDL addressing that pollutant, as long as the Permittee is complying with the requirements for the TMDL, the Permittee is deemed in compliance with the receiving water limitation. No petitioner has contested this provision and we find that it constitutes an appropriate approach to compliance with receiving water limitations for water body-pollutant combinations that are addressed by a TMDL.

For exceedances of receiving water limitations for a water body-pollutant combination not addressed by a TMDL, as previously discussed, the Permittee must either incorporate control measures to address the exceedances into the Permittee's WMP/EWMP or comply directly with the receiving water limitations provisions of Part V.A of the Order. For

¹³⁰ Los Angeles MS4 Order, Part VI.E.2.c.ii., p. 143.

Permittees that choose the WMP/EWMP approach, the WMP/EWMP must incorporate “a final date for achieving the receiving water limitation.”¹³¹ To the extent the Permittee does not achieve the limitation by that final date and does not request and receive an extension, the Permittee has “fail[ed] to meet [a] requirement or date for its achievement in an approved Watershed Management Program or EWMP”¹³² and is immediately subject to the receiving water limitations provisions of the Order, with the same result that it is out of compliance. In other words, implementation of non-structural and structural control measures in accordance with the timelines established in the WMP/EWMP constitutes compliance with the receiving water limitations up until the final deadline for achievement of the relevant receiving water limitation; however, at the deadline for final compliance, there must be verification of achievement based on the receiving water limitation itself. While we find that the Order provisions lead to this result as written, for the sake of greater clarity, we will specifically state that final compliance with receiving water limitations must be determined through verification that the receiving water limitation is actually being achieved.

We shall amend Part VI.C.2.c. as follows:

- c. If a Permittee fails to meet any requirement or date for its achievement in an approved Watershed Management Program or EWMP, the Permittee shall be subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement. **For water body-pollutant combinations that are not addressed by a TMDL, final compliance with receiving water limitations is determined by verification through monitoring that the receiving water limitation provisions in Part V.A.1 and 2 have been achieved.**

c. Compliance with the Non-Storm Water Discharge Prohibition

The Environmental Petitioners suggest that the Los Angeles MS4 Order is unclear as to whether compliance with the WMP/EWMP may also constitute compliance with the non-storm water discharge prohibition of the Order. We disagree that the Los Angeles MS4 Order is unclear on this issue. The Permittees’ obligation to comply with the receiving water limitations and WQBELs and other TMDL-specific limitations in Parts V.A and VI.E is independent of the Permittees’ obligation to comply with the effective prohibition of non-storm water discharges in Part III.A. The several provisions stating that Permittees will be deemed to be in compliance with the receiving water limitations of the Los Angeles MS4 Order for implementing the WMP/EWMP specifically reference Parts V.A and VI.E of the Order and not

¹³¹ *Id.*, Part VI.C.5.c.iii.(3)(b), p. 65.

¹³² *Id.*, Part VI.C.2.c., p. 52.

III.A.¹³³ This notwithstanding, Parts VI.C.1.d and VI.C.5.b.iv.(2) require that a Permittee's WMP/EWMP include program elements and control measures to effectively prohibit non-storm water discharges consistent with Part III.A and Part VI.D.4.d or VI.D.10. Therefore, a Permittee's implementation of program elements and control measures consistent with Part III.A and Part VI.D.4.d or VI.D.10, through its approved WMP/EWMP, may provide a mechanism for compliance with Part III.A. Although we accordingly see no need to direct revisions to the Order, we provide this clarification here to respond to the Environmental Petitioners' concern and address any confusion that may exist.

6. "Safe Harbor" During the Planning Phase for the WMP/EWMP

Under the Los Angeles MS4 Order, a Permittee that has declared its intention to develop a WMP/EWMP is deemed in compliance with the receiving water limitations and with interim WQBELs with due dates prior to approval of the WMP/EWMP for the water body-pollutant combinations the WMP/EWMP addresses, provided it meets certain conditions, even though the Permittee is developing, not implementing the WMP/EWMP. Specifically, the Permittee is deemed in compliance if the Permittee (1) provides timely notice of its intent to develop a WMP/EWMP; (2) meets all interim and final deadlines for development of a WMP/EWMP; (3) targets implementation of watershed control measures in the existing program

¹³³ Los Angeles MS4 Order, Parts VI.C.2.b., p. 52, VI.C.3.a., p. 53, VI.E.2.c.ii., p. 143, VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144. To the extent that a non-storm water discharge authorized by Part III.A may be causing or contributing to an exceedance of receiving water limitations in V.A, compliance with the WMP/EWMP provisions would constitute compliance with the receiving water limitations and any relevant interim WQBELs and other TMDL-specific limitations, as long as the WMP/EWMP addresses the water body-pollutant combination for that water body. However, the discharger would have to additionally comply with requirements in Part III.A. and Part VI.D.4.d or VI.D.10 through its approved WMP/EWMP for conditionally exempt non-storm water discharges that are found to cause or contribute to an exceedance in the receiving water. (See *id.*, Part III.A.4.c.-e., pp. 31-32.) We disagree that every discharge from a Permittee's MS4 to the receiving water of non-storm water that is not specifically authorized under Part III.A will necessarily be subject to enforcement under the Los Angeles MS4 Order. Section 402(p)(3)(B)(ii) of the Clean Water Act imposes a requirement to "effectively prohibit" non-storm water discharges. Part III.A of the Los Angeles MS4 Order effectuates that requirement with a requirement for the Permittee to prohibit non-storm water discharges: "Each Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters, except where such discharges are . . . [listing exceptions]." (Los Angeles MS4 Order, Part III.A.1, p. 27.) The Los Angeles MS4 Order incorporates a specific and detailed programmatic requirement – the Illicit Connections and Illicit Discharges Elimination Program – for the Permittees to achieve their obligation to effectively prohibit non-storm water discharges. (Los Angeles MS4 Order, Parts VI.D.4.d., pp. 81-86, VI.D.10, pp. 137-141.) We recognize that even the most comprehensive efforts to address unauthorized non-storm water discharges may not eliminate all such discharges. Where a Permittee is fully implementing its Illicit Connections and Illicit Discharges Elimination Program, either pursuant to Parts VI.D.4.d. or VI.D.10, or by incorporation of customized actions into a WMP/EWMP as approved by the Los Angeles Water Board (see Los Angeles MS4 Order Part VI.D.1.a., p. 67), we would expect any enforcement action under Part III.A to be supported by a fact-specific analysis of the nature and source of the unauthorized non-storm water discharge and the efforts of the Permittee to prohibit the discharge.

to address known contributions of pollutants; and (4) receives approval of the WMP/EWMP within the specified time periods.¹³⁴

The Environmental Petitioners object to the availability of a “safe harbor” during the planning phase. We disagree with the Environmental Petitioners that providing a “safe harbor” in the planning phase is disallowed by applicable law -- see our discussion of anti-backsliding requirements in section II.B.1. and antidegradation requirements in section II.B.2. However, we understand that deeming a discharger in compliance with receiving water limitations during the planning phase, not just the implementation phase, could weaken the incentive for Permittees to efficiently and timely seek approval of a WMP/EWMP and to move on to implementation. It is the implementation of the WMP/EWMP that will in fact lead to progress toward compliance with receiving water limitations; the planning phase is essential, but should be only as long as necessary for a well-planned program with carefully analyzed controls to be developed. Given the significance of the water quality issues addressed by the WMP/EWMPs, it is paramount that implementation begin as soon as feasible. Accordingly, the “safe harbor” in the planning phase is appropriate only if it is clearly constrained in a manner that sustains incentives to move on to approval and implementation and is structured with clear, enforceable provisions.

Having reviewed the planning sections of the WMP/EWMP provisions carefully, we find that the Los Angeles MS4 Order does sufficiently constrain the planning phase, so that the “safe harbor” provided is not unreasonable. As already stated, compliance is deemed only if the Permittee is meeting the relevant deadlines for development and approval of the WMP/EWMP.¹³⁵ There are no provisions in the Order that allow for extensions to these deadlines. If a Permittee fails to obtain approval within the allowed number of months for the development of a WMP/EWMP, the Order states that the Permittee must then instead demonstrate actual compliance with receiving water limitations and with applicable interim WQBELs.¹³⁶ The Los Angeles MS4 Order is also clear that achievement of any TMDL-associated final deadlines occurring prior to the approval deadlines for the WMP/EWMP cannot be excused through commitment to planning for a WMP/EWMP.¹³⁷

¹³⁴ *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

¹³⁵ *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

¹³⁶ *Id.*, Part VI.C.4.e., p. 58.

¹³⁷ *Id.*, Parts VI.C.3.c., p. 53, VI.C.4.d.iii, p. 58. Under Part VI.C.4.d.iii., Permittees must ensure that MS4 discharges achieve compliance with interim, in addition to final, trash WQBELs during the planning phase.

Further, Permittees are subject to a number of conditions during the planning phase that will ensure that progress toward achievement of receiving water limitations is not put on hold pending approval of the plan. These include requirements to put in place Low Impact Development (LID) ordinances and green streets policies¹³⁸ and to continue to implement watershed control measures in the existing storm water management programs, including those to eliminate non-storm water discharges,¹³⁹ but in a manner that is targeted to address known pollutants.¹⁴⁰

Given the clear, enforceable requirements limiting the planning phase of the WMP/EWMP provisions, we find that the Los Angeles MS4 Order's inclusion of provisions deeming compliance with the receiving water limitations and with interim WQBELs during development of the programs is reasonable.

In fact, we are concerned that the Los Angeles Water Board has left no room for any deviation from the prescribed development schedule for WMP/EWMPs. A Permittee working in good faith to develop a WMP/EWMP over multiple months may encounter an issue that requires it to ask for a short extension on an interim or final deadline. Under such circumstances, the Los Angeles Water Board should be able to consider the request for the extension, rather than have its hands tied and have to reject a WMP/EWMP based on lack of timeliness. We will add a provision to the Order that provides the Los Angeles Water Board or its Executive Officer discretion in granting such extensions, but the Permittee will not be deemed in compliance with the applicable receiving water limitations and WQBELs during the period of the extension.

We shall add a new Part VI.C.4.g. as follows:

g. Permittees may request an extension of the deadlines for notification of intent to develop a Watershed Management Program or EWMP, submission of a draft plan, and submission of a final plan. The extension is subject to approval by the Regional Water Board or the Executive Officer. Permittees that are granted an extension for any deadlines for development of the WMP/EWMP shall be subject to the baseline requirements in Part VI.D and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. and with applicable interim water quality-based effluent limitations in Part VI.E pursuant to subparts VI.E.2.d.i.(1)-(3) until the Permittee has an approved WMP/EWMP in place.

¹³⁸ *Id.*, Part VI.C.4.c., pp. 56-57.

¹³⁹ *Id.*, Part VI.C.4.d.i.-ii., pp. 57-58.

¹⁴⁰ *Id.*, Parts VI.C.2.d.iii., pp. 52-53, VI.C.3.b.iii., p. 53, VI.E.2.d.i.(4)(d)(3), p. 144.

7. Conclusion

In conclusion, we uphold the WMP/EWMP provisions as a reasonable alternative compliance option for meeting receiving water limitations and uphold the WMP/EWMP provisions in all other aspects, except as specifically stated above. We find that the WMP/EWMP approach is a clearly defined, implementable, and enforceable alternative to the receiving water limitations provisions that we mandated in Order WQ 99-05, and that the alternative provides Permittees an ambitious, yet achievable, path forward for steady and efficient progress toward achievement of those limitations while remaining in compliance with the terms of the permit.

We direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward.¹⁴¹ In doing so, we acknowledge that regional differences may dictate a variation on the WMP/EWMP approach, but believe that such variations must nevertheless be guided by a few principles.¹⁴² We expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

1. The receiving water limitations provisions of Phase I MS4 permits should continue to require compliance with water quality standards in the receiving water and should not deem good faith engagement in the iterative process to constitute such compliance. The Phase I MS4 permits should therefore continue to use the receiving water limitations provisions as directed by State Water Board Order WQ 99-05.

¹⁴¹ We acknowledge that small MS4s permitted under the statewide General Permit for WDRs for Storm Water Discharges from Small MS4s (Order No. 2013-0001-DWQ) (General Phase II MS4 Permit) have similar practical issues as Phase I permittees in complying with receiving water limitations. Nevertheless, because the General Phase II MS4 Permit is issued by the State Water Board, not the regional water boards, we limit our guidance to regional water boards to the Phase I permits. The State Water Board is committed to working with small MS4s, the regional water boards, and interested persons in developing an alternative compliance option for the General Phase II MS4 Permit.

¹⁴² In considering appropriate guidance for regional water boards drafting alternative compliance paths in municipal storm water permits, we have reviewed the proposed "strategic compliance program" model language that was submitted by the California Stormwater Quality Association (CASQA) and supported in whole or in part by a number of interested persons. (CASQA August 15, 2013 Receiving Water Limitations Submission, Attachment A, Section E.) While we have not in these proceedings adopted the CASQA language, or, for that matter, any specific language, for alternative compliance path provisions, regional water boards remain free to consider and incorporate the CASQA approach into their municipal storm water permits to the extent they determine and document that the approach, including any modifications, satisfies the principles we set out in this section as well as all other direction we have provided in this order.

2. The Phase I MS4 permits should include a provision stating that, for water body-pollutant combinations with a TMDL, full compliance with the requirements of the TMDL constitutes compliance with the receiving water limitations for that water body-pollutant combination.
3. The Phase I MS4 permits should incorporate an ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during full implementation of the compliance alternative.
4. The alternative compliance path should encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements.
5. The alternative compliance path should encourage the use of green infrastructure and the adoption of low impact development principles.
6. The alternative compliance path should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.
7. The alternative compliance path should have rigor and accountability. Permittees should be required, through a transparent process, to show that they have analyzed the water quality issues in the watershed, prioritized those issues, and proposed appropriate solutions. Permittees should be further required, again through a transparent process, to monitor the results and return to their analysis to verify assumptions and update the solutions. Permittees should be required to conduct this type of adaptive management on their own initiative without waiting for direction from the regional water board.

8. Direction to the Los Angeles Water Board to Report to the State Water Board on Implementation

We recognize that our review has been limited to the provisions of the Los Angeles MS4 Order. The success of the WMP/EWMP approach depends in large part on the steps that follow adoption of these provisions, i.e., the effort invested by Permittees in developing WMPs/EWMPs that truly address the stringent provisions of the Order, the precision with which the Los Angeles Water Board reviews the draft programs and requires revisions, and, most importantly, the actual implementation and appropriate enforcement of the programs once approved. The work going forward must ensure that the WMPs/EWMPs in fact exhibit the rigor and accountability the provisions of the Los Angeles MS4 Order demand. We expect that the Los Angeles Water Board will make careful oversight and enforcement a priority and that they will be aided in this process by the public review and comment opportunities built into the terms of the Order.

The process of developing the WMPs/EWMPs is currently ongoing -- the Los Angeles Water Board has been reviewing draft and revised draft WMPs and workplans for EWMPs – and, although we have been asked by the Environmental Petitioners to take official notice of some of the submissions and conditional approvals in the process, it is premature for the State Water Board to speak to the sufficiency of the resulting WMPs/EWMPs until the Los Angeles Water Board, with full input from the stakeholders, has had the opportunity to consider, revise, and finally approve the programs. We note again that all documents submitted to the Los Angeles Water Board Executive Officer for approval are subject to a 30-day public comment period¹⁴³ and that any formal determination or approval by the Executive Officer may be reviewed by the Los Angeles Water Board upon request by an interested person.¹⁴⁴ And an interested person may petition the State Water Board to review an action or failure to act of the Los Angeles Water Board.¹⁴⁵

Once the WMPs/EWMPs are approved, ensuring that they are diligently and timely implemented must remain a top priority for the Los Angeles Water Board. We expect that the Los Angeles Water Board will continue to work cooperatively and closely with the Permittees, the Environmental Petitioners, and other interested persons in this process, but that the Board will also use its enforcement authority to ensure that appropriate progress is made toward water quality goals. We intend to remain involved in this process, as we must learn statewide from the successes and shortcomings of the approach we are endorsing with this order. We accordingly direct the Los Angeles Water Board to report to us on progress in implementation of the WMPs/EWMPs, and progress in improving water quality during this and the next permit term by February 28, 2018, by February 29, 2020, and by March 31, 2022. Specifically, we ask that the Los Angeles Water Board report on region-wide data for the following:

- On-the-ground structural control measures completed;
- Non-structural control measures completed;
- Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;

¹⁴³ Los Angeles MS4 Order, Part V.A.5.b, p. 42.

¹⁴⁴ *Id.*, Part V.A.6, p. 42.

¹⁴⁵ Wat. Code, § 13320. On April 28, 2015, the Executive Officer of the Los Angeles Water Board conditionally approved several submitted WMPs. On May 28, 2015, the Environmental Petitioners filed a petition challenging the conditional approvals and requesting review by the Los Angeles Water Board and by the State Water Board of the Executive Officer's determination.

- Comparison of the effectiveness of the control measures to the results projected by the reasonable assurance analyses;
- Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the WMPs/EWMPs;
- Control measures proposed to be completed in the next two years pursuant to the WMPs/EWMPs and the schedule for completion of those control measures;
- Status of funding and implementation for control measures proposed to be completed in the next two years;
- Trends in receiving water quality related to pollutants typically associated with storm water;
- Available permit compliance data, including requests for compliance extensions;
- Enforcement actions taken and results.

In addition to covering the above information, the third report shall summarize and reflect the comprehensive information gathered through the updates of the reasonable assurance analyses and WMPs/EWMPs conducted by the Permittees in the second permit term.

C. Appropriateness of TMDL Requirements

Section 303(d) of the Clean Water Act requires the water boards to identify impaired water bodies that do not meet water quality standards after applying required technology-based effluent limitations.¹⁴⁶ TMDLs are developed by either the regional water boards or by USEPA in response to section 303(d) listings of impaired water bodies. A TMDL is defined as the sum of the individual wasteload allocations for point sources of pollution, the load allocations for nonpoint sources of pollution, and the contribution from background sources of pollution,¹⁴⁷ and represents the maximum amount of a pollutant that a water body may receive and still achieve water quality standards. TMDLs developed by regional water boards include implementation provisions¹⁴⁸ and are typically incorporated into the regional water board's water quality control plan.¹⁴⁹ TMDLs developed by USEPA typically contain the total load and load allocations required by section 303(d), but do not set out comprehensive implementation provisions.¹⁵⁰ Most TMDLs are not self-executing, but instead rely upon subsequently-issued permits to impose requirements on discharges that implement the TMDLs' wasteload

¹⁴⁶ 33 U.S.C. § 1313(d).

¹⁴⁷ 40 C.F.R. § 130.2(i).

¹⁴⁸ Wat. Code, §§ 13050, subd. (j), 13242.

¹⁴⁹ See 40 C.F.R. §§ 130.6(c)(1).

¹⁵⁰ *Am. Farm Bureau Fed'n v. U.S. E.P.A.* (M.D. Pa. 2013) 984 F. Supp. 2d 289, 314.

allocations.¹⁵¹ The Los Angeles MS4 Order includes TMDL-specific requirements that implement 33 TMDLs (twenty-five adopted by the Los Angeles Water Board, seven established by USEPA, and one adopted by the Santa Ana Regional Water Quality Control Board that assigned requirements to two Permittees of the Los Angeles MS4 Order) in Part VI.E and in Attachments L-R.

Petitioners raise a number of challenges to the TMDL-based requirements of the Los Angeles MS4 Order. We take up several of those arguments in this section.¹⁵²

1. Inclusion of Numeric WQBELs

Permittee Petitioners argue that the numeric WQBELs incorporated into the Los Angeles MS4 Order as TMDL-based limitations are contrary to the Clean Water Act and to state law and policy. We disagree.

Under the federal regulations implementing the Clean Water Act, effluent limitations in NPDES permits developed to achieve water quality standards must be consistent with the assumptions and requirements of any available wasteload allocation for the discharge.¹⁵³ In addition, the Porter-Cologne Act requires that waste discharge requirements implement any relevant water quality control plans,¹⁵⁴ including TMDL requirements that have been incorporated into the water quality control plans. The Los Angeles MS4 Order incorporates numeric WQBELs and other limitations that the Los Angeles Water Board found are consistent with the TMDL requirements applicable to the Permittees.

Permittee Petitioners argue that there is no requirement under federal law for incorporation of TMDL requirements into an MS4 permit and that the inclusion of the requirements in Part VI.E and in Attachments L-R was therefore at the discretion of the Los Angeles Water Board. They point out, as we acknowledged in section II.A, that MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the MEP, but that requirements to strictly meet water quality standards are at the discretion of the permitting agency.¹⁵⁵ Because TMDL requirements are a path to achieving water quality standards, the Permittee Petitioners argue, the Los Angeles Water Board had the discretion not to include them in the Los Angeles MS4 Order.

¹⁵¹ *City of Arcadia v. EPA* (N.D. Cal. 2013) 265 F.Supp.2d 1142, 1144-1145.

¹⁵² We note that we do not take up any arguments that challenge the terms of the TMDLs. Those arguments should have been made during the public process when the TMDLs were adopted. They are untimely now.

¹⁵³ 40 C.F.R. § 122.44(d)(1)(vii)(B).

¹⁵⁴ Wat. Code, § 13263, subd. (a).

¹⁵⁵ 33 U.S.C. § 1342(p); *Defenders of Wildlife, supra*, 191 F.3d 1159.

Answering the question of whether the Los Angeles Water Board was required under federal law to strictly effectuate TMDL compliance through the Los Angeles MS4 Order is a largely irrelevant exercise because we have already reaffirmed in this order that we will continue to require water quality standards compliance in MS4 permits. Further, given the back-stop nature of TMDLs, and the fact that each set of dischargers must meet their share of the allocation to reach the total reductions set out, a regime in which municipal storm water dischargers were given a pass on TMDL obligations would render the promise of water quality standards achievement through TMDLs illusory. This is especially true in a large urbanized area where pollutants in storm water constitute a significant share of the impairment and where other dischargers would be disproportionately burdened if MS4s were not held to their allocations. Although not dispositive, we also note that USEPA has assumed in guidance (discussed in more detail below) issued on storm water and TMDL implementation that MS4 permits must incorporate effluent limitations consistent with the assumptions and requirements of relevant wasteload allocations.¹⁵⁶ To the extent the TMDL provisions of the Clean Water Act and the federal regulations could be read to preclude mandatory incorporation of wasteload allocations into an MS4 permit, effluent limitations consistent with those load allocations should nevertheless be required under Clean Water Act section 402, subsection (p)'s direction that the MS4 permit shall require "such other controls" as the permitting authority determines "appropriate for the control of such pollutants."¹⁵⁷ Finally, for TMDLs incorporated into water quality control plans, the implementation plan associated with the TMDL applies to all dischargers named, including MS4 permittees, and the MS4 permits must be consistent with the direction in the water quality control plan.¹⁵⁸

Having found that the Los Angeles Water Board acted in a manner consistent with federal and state law when it developed WQBELs to address applicable TMDLs, we next turn to whether *numeric* WQBELs were appropriate. We find that the Los Angeles Water Board

¹⁵⁶ USEPA, Memorandum, "Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs," (Nov. 22, 2002) (2002 USEPA Memorandum); see also USEPA, Memorandum, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,'" (Nov. 26, 2014) (2014 USEPA Memorandum). The 2014 USEPA Memorandum replaced a memorandum with the same title issued on November 12, 2010, which was subsequently opened to public comment. (USEPA Statement (March 17, 2011), available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014).)

¹⁵⁷ 33 U.S.C. § 1342(p)(3)(B)(iii). See, e.g., State Water Board Orders WQ 91-03, WQ 91-04, WQ 98-01, WQ 99-05, WQ 2001-15.

¹⁵⁸ Wat. Code, § 13263, subd. (a); see also *State Water Res. Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 730 (noting the obligation of the water boards to follow the program of implementation included in a water quality control plan).

acted within its legal authority when establishing numeric WQBELs, and further that its choice of numeric WQBELs was a reasonable exercise of its policy discretion.

In the context of MS4 discharges, effluent limitations in NPDES permits may be expressed in the form of either numeric limitations or best management practices (BMPs). The federal regulations specifically state that BMP-based effluent limitations may be used to control pollutants for storm water discharges.¹⁵⁹ USEPA has issued two memoranda, on November 22, 2002 (2002 USEPA Memorandum), and on November 26, 2014 (2014 USEPA Memorandum), providing guidance to the states on translating wasteload allocations for storm water into effluent limitations in NPDES Permits.¹⁶⁰ The 2002 USEPA Memorandum contemplated that “the NPDES permitting authority will review the information provided by the TMDL . . . and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit.”¹⁶¹ The 2002 USEPA Memorandum further stated that “EPA expects that most WQBELs for NPDES-regulated municipal . . . storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances.”¹⁶² The 2014 USEPA Memorandum, after noting the increased information available to the permitting agencies after more than a decade of experience with setting wasteload allocations and effluent limitations, explained that:

Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this objective. This could take the form of a numeric limit, or of a measurable, objective BMP-based limit that is projected to achieve the WLA. . . . The permitting authority’s decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying

¹⁵⁹ 40 C.F.R. § 122.44(k)(2); see also 33 U.S.C. § 1342(p)(3)(B)(iii). 40 Code of Federal Regulations section 122.44(k)(3) further contemplates that BMP-based effluent limitations are appropriate where it is infeasible to develop a numeric effluent limitation.

¹⁶⁰ 2002 USEPA Memorandum; 2014 USEPA Memorandum. In addition to the two memoranda, USEPA published guidance titled “Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits” ((Sept. 1996) 61 Federal Register 57425), which recommended inclusion of BMPs in first-round permits, and expanded or better-tailored BMPs in subsequent permits. In 2005, the State Water Board assembled a blue ribbon panel to address the feasibility of including numeric effluent limits as part of NPDES municipal, industrial, and construction storm water permits. The panel issued a report dated June 19, 2006, which included recommendations as to the feasibility of including numeric limitations in storm water permits. The report concluded that it was not feasible, at that time, to set enforceable numeric effluent limitations for municipal storm water discharges.

¹⁶¹ 2002 USEPA Memorandum, p. 5.

¹⁶² *Id.*, p. 2.

WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information.¹⁶³

Both options – to choose BMP-based WQBELs or to choose numeric WQBELs – were legally available to the Los Angeles Water Board. In adopting numeric WQBELs, the Los Angeles Water Board analyzed the specific facts and circumstances surrounding storm water discharges in the region and reasonably concluded that numeric WQBELs were warranted because storm water discharges constituted a significant contributor to the water quality standards exceedances in the area and the exceedances had not been to date resolved through BMP-based requirements. Moreover, the Los Angeles Water Board concluded that it could feasibly develop numeric WQBELs following the extensive work already conducted to develop the TMDLs, which involved analyzing pollutant sources and allocating loads using empirical relationships or quantitative models. We will not second-guess the determination of the Los Angeles Water Board, given its extensive and unique role in developing the TMDLs and the permit to implement the TMDLs, that numeric WQBELs were appropriate for the Los Angeles MS4 Order.¹⁶⁴

We emphasize, however, that we are not taking the position that numeric WQBELs are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. In a recent amendment to State Water Board Order 2011-0011-DWQ, NPDES Statewide Storm Water Permit for State of California Department of Transportation (Caltrans),¹⁶⁵ we found BMP-based TMDL requirements to be “consistent with the assumptions and requirements of the WLAs” of the TMDLs applicable to Caltrans. That determination was based on a number of factors including the fact that Caltrans, a single discharger, was named in over 80 TMDLs statewide, the fact that Caltrans had relatively little contribution to the exceedances in each of those TMDLs, and the consideration that there was significant efficiency to be gained by streamlining and standardizing control measure implementation throughout Caltrans’ statewide storm water program. Similarly, regional water boards may find BMP-based requirements to be appropriate based on TMDL-specific, region-specific, or permittee-specific

¹⁶³ 2014 USEPA Memorandum, p. 6.

¹⁶⁴ The Los Angeles Water Board incorporated a discussion in the Fact Sheet of how the TMDL wasteload allocations were translated into numeric WQBELs in order to implement the TMDLs in the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att.F, Fact Sheet, pp. F-89-F-100). See 40 C.F.R. § 124.8. We are not independently reviewing the calculations and analyses underlying the specific numeric limitations arrived at by the Los Angeles Water Board; rather, our review has been limited to a determination of whether the choice of numeric rather than BMP-based limitations was reasonable. To the extent any petitioners asked us to independently review the issue in their petitions seeking review of the Order, the issue is dismissed. See fn. 11.

¹⁶⁵ State Water Board Order WQ 2014-0077-DWQ.

considerations. In many ways, the Los Angeles MS4 Order was uniquely positioned to incorporate numeric WQBELs because of the extensive TMDL development in the region in the past decade and the documented role of MS4 discharges in contributing to the impairments addressed by those TMDLs. Thus, while we decline to remove the numeric WQBELs from the Los Angeles MS4 Order, we also decline to urge the regional water boards to use numeric WQBELs in all MS4 permits.¹⁶⁶

2. Requirement for Reasonable Potential Analysis

The federal regulations implementing NPDES permitting require the permitting authority to establish WQBELs for point source discharges when those discharges cause, have the “reasonable potential” to cause, or contribute to an excursion above water quality standards.¹⁶⁷ Permittee Petitioners argue that the Los Angeles Water Board did not conduct an appropriate reasonable potential analysis prior to imposing numeric WQBELs. The argument is misguided. The Los Angeles Water Board established that the MS4 discharges can cause or contribute to exceedances of water quality standards through the process of developing TMDLs and assigning wasteload allocations. At the permitting stage, the Los Angeles Water Board’s legal obligation was to develop WQBELs “consistent with the assumptions and requirements of any wasteload allocation” in the TMDLs,¹⁶⁸ and not to reconsider reasonable potential.¹⁶⁹

3. USEPA-Established TMDLs

USEPA has established seven TMDLs that include wasteload allocations for MS4 discharges covered by the Los Angeles MS4 Order. In contrast to state-adopted TMDLs, USEPA-established TMDLs do not contain an implementation plan or schedule for achievement of the wasteload allocations,¹⁷⁰ with the effect that Permittees must comply with wasteload allocations immediately. To avoid this result, the regional water board may either adopt a

¹⁶⁶ Relying on the 2014 USEPA Memorandum, Permittee Petitioners also argue that the Los Angeles Water Board was required to disaggregate storm water sources within applicable TMDLs. The 2014 USEPA Memorandum only encourages permit writers to assign specific shares of the wasteload allocation to specific permittees during the permitting process, reasoning that permit writers may have more detailed information than the TMDL writers to assign reductions for specific sources. (2014 USEPA Memorandum, p.8.) In an MS4 system as complex and interconnected as that covered under the Los Angeles MS4 Order, we do not expect the permitting authority to be able to disaggregate wasteload allocations by discharger. Further, as discussed in section II.F. on joint responsibility, the Los Angeles MS4 Order has provided a means for Permittees with commingled discharges to demonstrate that they are not responsible for any given exceedance of a limitation.

¹⁶⁷ 40 C.F.R. § 122.44(d)(1)(iii).

¹⁶⁸ 40 C.F.R. § 122.44(d)(1)(vii)(B).

¹⁶⁹ See USEPA, NPDES Permit Writers Manual (updated September 2010), Chapter 6, section 6.3.3.

¹⁷⁰ See, e.g., *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, *supra*, 984 F. Supp. 2d at p. 314.

separate implementation plan as a water quality control plan amendment¹⁷¹ or issue the Permittee a compliance order with a compliance schedule.¹⁷² For the seven USEPA-established TMDLs applicable to the Permittees, the Los Angeles Water Board authorizes Permittees subject to a wasteload allocation in a USEPA-established TMDL to propose control measures that will be effective in meeting the wasteload allocation, and a schedule for their implementation that is as short as possible, as part of a WMP/EWMP.¹⁷³ Permittees that do not submit an adequate WMP/EWMP are required to demonstrate compliance with the wasteload allocations immediately.¹⁷⁴

Permittee Petitioners argue that the Los Angeles Water Board has acted inconsistently in requiring BMP-based compliance with the USEPA-established TMDLs but requiring numeric WQBELs for the state-established TMDLs. We have already stated above in section C.1 that the permitting authority has discretion to choose between BMP-based and numeric effluent limitations depending on fact-specific considerations. The Los Angeles Water Board was not restricted to choosing one single uniform approach to implementing all 33 TMDLs in the Los Angeles MS4 Order. In fact, straight-jacketing NPDES permit writers to choose one approach to the exclusion of another, even within the confines of a single MS4 permit, would run afoul of USEPA's expectations in the 2014 USEPA Memorandum for a fact-specific, documented justification for the permit requirements included to implement a wasteload allocation.

The Environmental Petitioners argue that the provisions are contrary to law because they excuse Permittees from complying with final numeric wasteload allocations as long as they are implementing the BMPs proposed in the WMP/EWMP. The approach taken by the Los Angeles MS4 Order to compliance here is similar to the provisions for compliance with receiving water limitations that are not otherwise addressed by a TMDL: The Permittee proposes control measures and a timeline that is as short as possible and is considered in compliance with the final numeric limitations while implementing the control measures consistent with the schedule. We find that, given the absence of an implementation plan with final compliance deadlines specified in the Los Angeles Water Board's water quality control

¹⁷¹ Wat. Code, § 13242.

¹⁷² *Id.*, See, e.g., § 13300.

¹⁷³ The Los Angeles MS4 Order's Fact Sheet states that the Los Angeles Water Board may choose to adopt implementation plans or issue enforcement orders in the future. (Los Angeles MS4 Order, Att. F, Fact Sheet, p. F-111.)

¹⁷⁴ Los Angeles MS4 Order, Part VI.E.3., pp. 145-146.

plan, this approach is consistent with the assumptions and requirements of the relevant wasteload allocations. We will not revise the provisions.

D. Non-Storm Water Discharge Provisions

Permittee Petitioners argue that the non-storm water discharge provisions of the Los Angeles MS4 Order are contrary to the Clean Water Act. Specifically, Permittee Petitioners assert that the Los Angeles MS4 Order improperly regulates non-storm water discharges from the MS4 to the receiving waters by imposing the prohibition of discharge “through the MS4 to the receiving waters” and by imposing WQBELs and other numeric limitations, rather than the MEP standard, on dry weather discharges.

The Los Angeles MS4 Order states that “[e]ach Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters” with certain exceptions including discharges separately regulated under an NPDES permit and discharges conditionally exempt from the prohibition consistent with the federal regulations.¹⁷⁵ Permittee Petitioners take issue with the imposition of the prohibition “through the MS4 to receiving waters” because the language does not track the specific requirement of the Clean Water Act that the MS4 permit “include a requirement to effectively prohibit non-stormwater discharges *into the storm sewer.*” (Emphasis added.)¹⁷⁶

We find the variation in language to be a distinction without a difference. Whether the Los Angeles MS4 Order prohibits non-storm water discharges *into* the MS4 or *through* the MS4 to receiving waters, the intent and effect of the prohibition is to prevent non-exempt non-storm water discharges from reaching the receiving waters.¹⁷⁷ The legal standard governing non-storm water – effective prohibition -- is not altered because the Los Angeles MS4 Order imposes the prohibition at the point of entry into the receiving water rather than the point of entry into the MS4 itself. Instructively, USEPA has used the terms “into,” “from,” and “through” interchangeably when describing the prohibition.¹⁷⁸

¹⁷⁵ *Id.*, Part III.A, pp 27-33.

¹⁷⁶ 33 U.S.C. § 1342(p)(3)(B)(ii).

¹⁷⁷ The Los Angeles Water Board notes that the language in the Los Angeles MS4 Order is not significantly changed from the version in the 2001 Los Angeles MS4 Order, which prohibited non-storm water discharges “into the MS4 and watercourses.” The Board additionally asserts that phrasing the prohibition as “through the MS4 to receiving waters” provides Permittees with greater flexibility to use measures that control non-storm water after it enters the MS4, including regional solutions such as low-flow diversions and catch-basin inserts.

¹⁷⁸ See, e.g., 55 Fed. Reg. 47990, 47995-47996 (“Section 402(p)(B)(3) of the CWA requires that permits for discharges *from municipal separate storm sewer systems* require the municipality to ‘effectively prohibit’ non-storm water discharges *from the municipal separate storm sewer*...Ultimately, such non-storm water discharges *through a municipal separate storm sewer* must either be removed from the system or become subject to an NPDES permit. . . . (Continued)

Permittee Petitioners' objection to the phrasing of the prohibition in the Los Angeles MS4 Order appears to be based largely on the assumption that prohibiting non-storm water discharges at the point of entry into the receiving water rather than at the point of entry into the MS4 allows the Los Angeles Water Board to impose requirements on those discharges that would otherwise not be available under the Clean Water Act and federal regulations. We disagree.

As a preliminary matter, regardless of the phrasing of the non-storm water discharge prohibition, MEP is not the standard that governs non-storm water discharges. Permittee Petitioners have asserted that, for non-storm water discharges that enter the MS4, MEP is the governing standard just as it is for storm water discharges. This assertion misinterprets the statute. The Clean Water Act imposes two separate standards for regulation of non-storm water and storm water in an MS4 permit: The MS4 permit "shall include a requirement to effectively prohibit non-stormwater discharges" into the MS4, and "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . ." ¹⁷⁹ Although the statute imposes the MEP standard to control of "pollutants" rather than specifically to "pollutants in storm water," any reading of section 402(p)(3)(B)(iii) to apply generally to both non-storm water and storm water would render the effective prohibition of non-storm water in section 402(p)(3)(B)(ii) meaningless. The federal regulations confirm the distinction between the treatment of storm water and non-storm water by establishing requirements to prevent illicit discharges from entering the MS4. ¹⁸⁰ While the regulations have no definition for "non-storm water discharges," illicit discharges most closely represent the statutory term and are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit . . . and discharges resulting from firefighting activities." ¹⁸¹ Further, contrary to assertions by Permittee Petitioners, the definition of storm water in the federal regulations is not inclusive of dry weather discharges. The federal regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and

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The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit *through municipal separate storm sewers to waters of the United States.*" (Emphasis added.)

¹⁷⁹ 33 U.S.C. § 1342(p)(3)(b)(iii).

¹⁸⁰ 40 C.F.R. § 122.26(d)(2)(iv)(B).

¹⁸¹ *Id.*, § 122.26(b)(2). The preamble to the regulations states: "Today's rule defines the term 'illicit discharge' to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit." (55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).)

drainage.”¹⁸² Surface runoff and drainage cannot be understood to refer to dry weather discharges where USEPA has specifically stated in the preamble to the relevant regulations that it would not expand the definition of storm water to include “a number of classes of discharges which are not in any way related to precipitation events.”¹⁸³ Accordingly, dry weather discharges are not a component of storm water discharges subject to the MEP standard.¹⁸⁴

Second, the Los Angeles Water Board’s legal authority to impose TMDL-based WQBELs and other limitations on dry weather discharges is derived not from the phrasing of the discharge prohibition in the statute but from the TMDLs themselves, as well as the Clean Water Act direction to require “such other provisions” as the permitting authority “determines appropriate for the control of such pollutants.” We have already found that the Los Angeles MS4 Order reasonably (and legally) incorporated numeric WQBELs and other limitations to implement the TMDLs. The Los Angeles Water Board’s authority to impose the limitations for dry weather conditions is accordingly independent of the provisions establishing the non-storm water effective prohibition.

Permittee Petitioners also assert that requiring compliance with the non-storm water discharge prohibition through and from the MS4 would frustrate enforcement of the illicit connection and illicit discharge elimination programs of the Los Angeles MS4 Order, which continue to require the Permittee to prohibit illicit discharges and connections to the MS4.¹⁸⁵ On this point, we agree with the Los Angeles Water Board that the illicit connection and illicit discharge elimination program is a means to implement the non-storm water prohibition and independently implementable and enforceable. We are more sympathetic to the argument by Permittee Petitioners that, in the context of a complex MS4 system with commingled discharges, the prohibition of discharges through the MS4 to the receiving waters poses greater compliance challenges than a prohibition of discharges into the MS4; however, the Los Angeles MS4 Order’s Monitoring and Reporting Program contains a procedure by which a Permittee will notify the Board and the upstream jurisdiction when non-exempted, non-storm water discharges pose an issue in commingled discharges.¹⁸⁶ Further, the Los Angeles Water Board states in its

¹⁸² 40 C.F.R. § 122.26(b)(13).

¹⁸³ 55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).

¹⁸⁴ We disagree that the phrasing of the non-storm water discharge prohibition in the Los Angeles MS4 Order means that *any* dry weather discharges from the MS4 could be construed as a violation of the Clean Water Act for the same reasons articulated in footnote 133 of this order.

¹⁸⁵ Los Angeles MS4 Order, Parts VI.A.2.a.iii, p. 40, VI.D.4.d., p. 81-86, VI.D.10, p. 137-141.

¹⁸⁶ Los Angeles MS4 Order, Att. E, Monitoring and Reporting Program, Part IX.F.6, p. E-27.

October 15, 2013 Response that the upstream jurisdiction would then have the responsibility to further investigate and address the discharge.¹⁸⁷ The challenge of addressing compliance and enforcement in the context of interconnected MS4s and commingled discharges is a challenge pervasive in the MS4 regulatory structure and not unique to non-storm water discharges. We are not sufficiently persuaded by Permittee Petitioners' arguments regarding compliance to disturb the non-storm water prohibitions as currently established in the Los Angeles MS4 Order.

E. Monitoring Provisions

Relying on Water Code sections 13165, 13225, and 13267, Permittee Petitioners argue that the Los Angeles Water Board was required to conduct a cost-benefit analysis to support the monitoring and reporting requirements of the Los Angeles MS4 Order. Because the monitoring and reporting provisions of the Los Angeles MS4 Order are incorporated pursuant to federal law, the cited provisions are inapplicable here. The monitoring and reporting provisions of the Los Angeles MS4 Order were established under the Clean Water Act and USEPA's regulations.¹⁸⁸ Further, under state law, Water Code section 13383, rather than Water Code section 13267, controls monitoring and reporting requirements in the context of NPDES permitting, and that provision does not include a requirement to ensure that the burden, including costs of the report, bear a reasonable relationship to the need for the report.¹⁸⁹

¹⁸⁷ Los Angeles Water Board, October 15, 2013 Response, p. 33 & fn. 116.

¹⁸⁸ See 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)D, 122.41(h), 122.41(j), 122.41(l), 122.42(c), 122.44(i), 122.48.

¹⁸⁹ Permittee Petitioners argue that the cost considerations of Water Code sections 13225 and 13267 are relevant to the Los Angeles MS4 Order notwithstanding the fact that it was issued under federal authority because the requirements of those section are not inconsistent with the requirements of section 13383. (See Water Code, §13372, subd. (a) ("To the extent other provisions of this division are consistent with the requirements for state programs . . . those provisions apply . . .").) This exact assertion was taken up by the trial court in litigation challenging the 2001 Los Angeles MS4 Order and decided in favor of the Los Angeles Water Board. The trial court stated: "As noted in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, the Court held, in part: 'state law is still preempted. . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' (464 U.S. at p. 248.) Applying Water Code sections 13225 and 13267 would stand, in the words of *Silkwood* as: 'an obstacle to the accomplishment of the full purposes and objectives of [the federal law].' (Ibid)." (*In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, at pp.19-20 (Administrative Record, section 10.II., RB-AR23197-23198.)). Further, we note that Water Code section 13383, subdivision (c) specifically references subdivision (c) of section 13267 when establishing facility inspection requirements; in contrast, section 13383, subdivision (a) does not reference subdivision (b) of section 13267, which incorporates the requirement that "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." Water Code section 13383, subdivision (a), was therefore arguably intended to stand in place of the requirements in section 13267(b). Finally, even where authority to impose a monitoring and reporting requirement is clearly derived from Water Code section 13267, the provision requires consideration of the costs and benefits of monitoring and reporting, but not a full cost-benefit analysis. We therefore find that the Los Angeles Water Board did not fail to meet its legal obligations by not carrying out a full cost-benefit analysis specific to the monitoring and reporting requirements of the Los Angeles MS4 Order. However, in making this finding, in no way do we mean to disavow the significance of cost consideration in permitting actions, even where not specifically required by law. We note again that the Los Angeles Water Board carefully considered the costs of (Continued)

Moreover, the monitoring and reporting requirements of the Los Angeles MS4 Order do not exceed the requirements of the Clean Water Act and the federal regulations.¹⁹⁰ In particular, we find that the receiving water monitoring requirements of the Order are reasonable in light of the need to identify water quality exceedances and evaluate progress in compliance with water quality standards. The argument made by several Permittee Petitioners that the federal regulations allow only two types of monitoring – effluent and ambient – for compliance is without support in the relevant regulations. The relevant law is clear that the permitting authority is required to incorporate monitoring and reporting requirements sufficient to determine compliance with the permit conditions.¹⁹¹ In contrast, nothing in the Clean Water Act or the regulations states that requiring wet weather receiving water monitoring is beyond the authority of the permitting agency.¹⁹² Further, accepting such a constrained interpretation of the Clean Water Act’s monitoring requirements would undermine storm water permitting assessment. Excluding wet weather receiving water monitoring would preclude storm water dischargers from assessing the impacts of their discharges on waters of the United States during the events for which they are primarily being permitted—storm events. We find nothing in the text or preamble of the federal regulations to support a narrow interpretation of monitoring to exclude wet weather receiving monitoring.

To the extent Permittee Petitioners are arguing that the MEP standard, applied at the outfall, constrains the permitting authority’s discretion to require monitoring beyond the outfall, we also find no support in the law for that proposition. We have already stated that we will continue to require compliance with water quality standards in MS4 permits. Wet weather receiving water monitoring is fundamental to assessing the effects of storm water discharges on water quality and determining the trends in water quality as Permittees implement control

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compliance with the Los Angeles MS4 Order generally as summarized in the Fact Sheet. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-144-F-149.) Further, the Los Angeles Water Board considered monitoring costs-related comments on earlier drafts of the Los Angeles MS4 Order, and, in a number of cases, where presented with an argument that a cost related to a particular monitoring requirement was not commensurate with the benefits to be received from that requirement, made revisions to the requirement. (See, e.g., Administrative Record, section 8, RB-AR19653-19654, RB-AR19666, RB-AR19674, RB-AR19681.)

¹⁹⁰ The Los Angeles Water Board provided its rationale for the receiving water monitoring requirements in the Fact Sheet of the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att. F, Fact Sheet, F-113-F-137.)

¹⁹¹ See 33 U.S.C. § 1318(a)(2); 40 C.F.R. § 122.26(d)(2)(i)(F). While we do not interpret these requirements to mean that each and every permit condition must have a corresponding monitoring and reporting requirement, neither do we see any constraints on the water boards’ authority to establish monitoring and reporting requirements.

¹⁹² Permittee Petitioners reference language in the federal regulations concerning “effluent and ambient monitoring” (40 C.F.R. § 122.44(d)(1)(vi)(C)(3)) and appear to be using the phrase as support for their argument. That section is inapposite as it applies to situations where a State has not established a water quality objective for a pollutant present in the effluent and instead establishes effluent limitations on an indicator parameter for the pollutant of concern.

measures. Compliance may be determined at the outfall – for example, where a permittee determines that the discharge does not exceed an applicable WQBEL or receiving water limitation – but outfall monitoring alone cannot provide the broader data related to trends in storm water discharge impacts on the receiving water. Accordingly, receiving water monitoring is a legal and reasonable component of the monitoring and reporting program. Further, because Permittees are responsible for impacts to the receiving waters resulting from their MS4 discharges, Permittees may be required to participate in monitoring not only in receiving waters within their jurisdiction but also in monitoring all receiving waters that their discharges impact.

We will make no revisions to the Monitoring and Reporting provisions of the Order.

F. Joint Responsibility

In the extensive and interconnected system regulated by the Los Angeles MS4 Order, discharges originating from one Permittee's MS4 frequently commingle with discharges from other Permittees' MS4s within or outside of the Permittee's jurisdiction. Permittee Petitioners argue that the Los Angeles MS4 Order improperly ascribes responsibility to all Permittees with commingled discharges where those commingled discharges exceed a WQBEL or cause or contribute to exceedances of receiving water limitations. Specifically, Permittee Petitioners take issue with the fact that the Los Angeles MS4 Order ascribes "joint responsibility"¹⁹³ to the co-Permittees without a showing that a particular Permittee has in fact discharged the pollutant causing or contributing to the exceedance.

The Los Angeles Water Board counters that the joint responsibility regime is consistent with the intent of the Clean Water Act and further that it does not compel a Permittee to clean up the discharge of another Permittee. The Los Angeles Water Board points to two provisions for this latter proposition. First, even with joint responsibility, Permittees that have commingled MS4 discharges need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.¹⁹⁴ Second, even where joint responsibility is presumed, a Permittee may subsequently counter the presumption of joint responsibility by

¹⁹³ "Joint responsibility" is the term used in the Los Angeles MS4 Order. (See Los Angeles MS4 Order, Part II.K.1, p. 23 ("Joint responsibility" means that the Permittees that have commingled MS4 discharges are responsible for implementing programs in their respective jurisdictions, or within the MS4 for which they are an owner and/or operator, to meet the water quality-based effluent limitations and/or receiving water limitations assigned to such commingled MS4 discharges.") As defined by the Los Angeles Water Board and as discussed below, this term does not have the same meaning and scope as the legal doctrine of "joint liability.")

¹⁹⁴ Los Angeles MS4 Order, Parts II.K.1, pp. 23-24, VI.A.4.a., p. 41; 40 C.F.R. § 122.26(a)(3)(vi); see also, *id.*, Part VI.E.2.b.ii., p. 142 (stating in the context of TMDL requirements that, where discharges are commingled and assigned a joint WLA, "each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.")

affirmatively demonstrating that its MS4 discharge did not cause or contribute to the relevant exceedances.¹⁹⁵

Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order and the challenges inherent in designing a monitoring program that could parse out responsibility for each individual Permittee, we find that a joint responsibility regime is a reasonable approach to assigning initial responsibility for an exceedance. The Los Angeles MS4 Order provisions addressing TMDLs also appropriately take a joint responsibility approach, given that the wasteload allocations from which the WQBELs and other TMDL-specific limitations are derived are most frequently expressed as joint allocations shared by all MS4 dischargers in the watershed. We further agree with the Los Angeles Water Board that the regime is one that is permissible under applicable law. The Clean Water Act contemplates that MS4 permits may be issued on a system-wide or jurisdiction-wide basis¹⁹⁶ and the federal regulations anticipate the need for inter-governmental cooperation.¹⁹⁷ Further, the United States Court of Appeal, Ninth Circuit, recently stated in *Natural Resources Defense Council v. County of Los Angeles* (2013) 725 F.3d 1194 that the permitting authority has wide discretion concerning the terms of a permit, including the manner in which permittees share liability.¹⁹⁸

Yet, we also find that joint responsibility in an MS4 Order is only appropriate if the ultimate responsibility for addressing an exceedance rests with those permittees that actually cause or contribute to the exceedance in question. The re-issued Los Angeles MS4 Order contains additional specificity and monitoring, beyond that contained in the 2001 Los Angeles MS4 Order, to document compliance and the presence or absence of an individual municipality's contribution of pollutants to the storm water. For this reason, the general reasoning of the Ninth Circuit's 2013 *Natural Resources Defense Council v. County of Los Angeles* decision finding liability based solely on the presence of pollutants above water quality standards in the receiving waters is of limited forward-looking importance. Generally, in the context of MS4 permits, we do not sanction joint responsibility to the extent that that joint

¹⁹⁵ *Id.*, Part VI.E.2., pp.141-42; see also *id.*, Part II.K.1, pp. 23-24.

¹⁹⁶ 33 U.S.C. § 1342(p)(3)(B)(i).

¹⁹⁷ See 40 C.F.R. §§ 122.26(d)(2)(i)(D), 122.26(d)(2)(iv), 122.26(d)(2)(vii).

¹⁹⁸ *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1205, fn. 16, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135. The Ninth Circuit went on to find that, based on the specific language of the 2001 Los Angeles MS4 Order, the Permittees were jointly liable for exceedances detected by mass emissions monitoring.

responsibility would require each Permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permittee contributed to the violation.¹⁹⁹

The Los Angeles MS4 Order does not impose such a joint responsibility regime where each Permittee must take full responsibility for addressing other Permittees' violations. In addition to clearly stating that permittees are responsible only for their contribution to the commingled discharges, the Los Angeles MS4 Order provides that Permittees may affirmatively show that their discharge did not cause or contribute to an exceedance. Joint responsibility, as applied by the Los Angeles MS4 Order, is thus consistent with our expectation that ultimate responsibility for addressing an exceedance rests with those Permittees that actually cause or contribute to the exceedance and consistent with the regulatory direction that co-permittees need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.

While the result is that the burden rests on the Permittee to demonstrate that its commingled discharge is not the source of an exceedance, rather than on the Los Angeles Water Board to demonstrate that a Permittee's commingled discharge is causing or contributing to the exceedance, the result is not contrary to law. The Los Angeles Water Board has the initial burden to show that a violation of the Los Angeles MS4 Order has occurred,²⁰⁰ but the Board can do so by establishing an exceedance of a limitation by jointly responsible Permittees and need not identify the exact source of the exceedance. This scheme represents a reasonable policy approach to a complicated compliance question where the Permittees are more closely familiar than the Los Angeles Water Board with their outfalls and their discharges in the extensive and interconnected MS4 network.

We are, however, concerned that the Los Angeles MS4 Order's treatment of the joint responsibility issue is too narrow. The Los Angeles Water Board addresses the issue of joint responsibility primarily in the context of compliance with the TMDL requirements of the Order. Commingled discharges pose the same questions of assigning responsibility where receiving water limitations are exceeded in water bodies receiving MS4 discharges from multiple jurisdictions, but where the pollutant is not addressed by a TMDL. A similar approach to

¹⁹⁹ In a "joint and several liability" scheme, a plaintiff may collect his or her entire damages from any one defendant, and the defendants must then rely on principles of indemnity or contribution to apportion ultimate liability amongst themselves. (See *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 586-590.) Because the Los Angeles MS4 Order's joint responsibility scheme does not equate to joint liability, and because we do not find such liability appropriate from a policy perspective, we do not address Petitioners' legal arguments as to whether joint or joint and several liability in the storm water context would be consistent with applicable law.

²⁰⁰ See e.g. *Sackett v. E.P.A.* (9th Cir. 2010) 622 F.3d 1139 rev'd on other grounds *Sackett v. E.P.A.* (2012) 132 S. Ct. 1367.

assigning responsibility for addressing the exceedances is appropriate there. We will add new language to the Los Angeles MS4 Order mirroring Part VI.E.2.b., but applying the principles more generally.

We also take this opportunity to emphasize that all MS4 permits should be drafted to avoid one potential, but likely unintended, result arising from *Natural Resources Defense Council v. County of Los Angeles*. The broadest reading of the Ninth Circuit's holding following remand from the U.S. Supreme Court would assign joint liability to all Permittees for any exceedance at a monitoring location designated for the purpose of compliance determination, even if the particular pollutant is not typically found in storm water and has a likely alternative source such as an industrial discharger or waste water treatment plan. Providing municipalities an opportunity to demonstrate that they did not contribute to a pollutant present in receiving waters above standards will prevent this outcome.

We shall amend Part VI.B. as follows:

B. Monitoring and Reporting Program (MRP) Requirements

- 1.** Dischargers shall comply with the MRP and future revisions thereto, in Attachment E of this Order or may, in coordination with an approved Watershed Management Program per Part VI.C, implement a customized monitoring program that achieves the five Primary Objectives set forth in Part II.A. of Attachment E and includes the elements set forth in Part II.E. of Attachment E.

2. Compliance Determination for Commingled Discharges

- a. For commingled discharges addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part E as specified at Part E.2.b.**
- b. For commingled discharges not addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part V.A as follows:**
 - i. Pursuant to 40 CFR section 122.26(a)(3)(vi), each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.**
 - ii. Where Permittees have commingled discharges to the receiving water, or where Permittees' discharges commingle in the receiving water, compliance in the receiving water shall be determined for the group of Permittees as a whole unless an individual Permittee demonstrates that its discharge did not cause or contribute to the exceedance, pursuant to subpart iv. below.**

- iii. For purposes of compliance determination, each Permittee is responsible for demonstrating that its discharge did not cause or contribute to an exceedance of the receiving water limitation in the target receiving water.
- iv. A Permittee may demonstrate that its discharge did not cause or contribute to an exceedance of a receiving water limitation in one of the following ways:
 - (1) Demonstrate that there was no discharge from the Permittee's MS4 into the applicable receiving water during the relevant time period;
 - (2) Demonstrate that the discharge from the Permittee's MS4 was controlled to a level that did not cause or contribute to the exceedance in the receiving water;
 - (3) Demonstrate that there is an alternative source of the pollutant that caused the exceedance, that the pollutant is not typically associated with MS4 discharges, and that the pollutant was not discharged from the Permittee's MS4; or
 - (4) Demonstrate that the Permittee is in compliance with the Watershed Management Programs provisions under VI.C.

G. Separation of Functions in Advising the Los Angeles Water Board

Petitioners Cities of Duarte and Huntington Park (Duarte and Huntington Park) argue that their rights to due process of law were violated when the same attorneys advised both the Los Angeles Water Board staff and the Board itself in the course of the proceedings to adopt the Los Angeles MS4 Order. We disagree and reaffirm our position that permitting actions do not require the water boards to separate functions when assigning counsel to advise in development and adoption of a permit.

A water board proceeding to adopt a permit, including an NPDES permit, waste discharge requirements, or a waiver of waste discharge requirements, is an adjudicative proceeding subject to the Administrative Procedure Act's administrative adjudication statutes in Government Code section 11400 et seq.²⁰¹ Section 11425.10, part of the "Administrative Adjudication Bill of Rights," provides that "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions with the agency" ²⁰² In accordance with

²⁰¹ See Cal. Code Regs., tit. 23, § 648, subd. (b).

²⁰² Gov. Code, § 11425.10, subd. (a)(4). Subdivision (a)(4) references section 11425.30, which addresses disqualification of a presiding officer that has served as "investigator, prosecutor, or advocate" in the proceeding or its preadjudicative stage or is subject to "the authority, direction, or discretion" of a person who has served in such roles.

this directive, the water boards separate functions in all enforcement cases, assigning counsel and staff to prosecute the case, and separate counsel and staff to advise the board.

In a permitting action, water board counsel have an advisory role, not an investigative, prosecutorial, or advocacy role. Permitting actions are not investigative in nature and there is no consideration of liability or penalties that would make the action prosecutorial in nature. Further, while both counsel and staff are expected to develop recommendations for their boards, the role of counsel and staff is not to act as an advocate for one particular position or party concerning the permitting action, but to advise the board as neutrals, with consideration of the legal, technical, and policy implications of all options before the board. In the case of counsel, such consideration and advice includes not just legal evaluation of the substantive options for permitting but also of procedural issues such as admissibility of the evidence, conduct of the hearing, and avoidance of board member conflicts. Because counsel and staff are advisors to the board rather than advocates for a particular position, the same counsel may advise staff in the course of development of the permit and the board in the adoption proceedings.

A primary purpose of separation of functions in adjudicatory proceedings is the need to prevent improper ex parte communications.²⁰³ The exceptions to the ex parte communications rules further support the position that counsel advising board staff may also advise the board itself. While section 11430.10 of the Government Code generally prohibits communications concerning issues in a pending administrative proceeding between the presiding officer and an employee of the agency that is a party,²⁰⁴ one exception provides that a communication “for the purpose of assistance and advice to the presiding officer,” in this case the board, “from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage” is permissible. Even if board counsel could be considered an advocate in the proceeding, another provision (specifically referencing the water boards) excepts the communication from the general ex parte communications rules. A communication is not an ex parte communication if:

- (c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is nonprosecutorial in character:

²⁰³ See *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 9-10.

²⁰⁴ Government Code section 11430.10 prohibits communications between an employee that is a “party” to a pending proceeding and the presiding officer. We disagree that Los Angeles Water Board staff, as an advisor to the Board, was a “party” to the proceedings for adoption of the Los Angeles MS4 Order, but, even if staff could be considered a party, the cited exceptions to the ex parte communications rules would apply.

. . .
(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.²⁰⁵

The fact that communications that would otherwise be considered prohibited *ex parte* communications are specifically permitted in non-prosecutorial adjudicative proceedings of the water boards further supports the position that the water boards are not obligated by law to separate functions in permitting actions.

We acknowledge that there may be some unique factual circumstances under which a permitting proceeding could violate due process or the Administrative Procedure Act because board counsel either acted or gave the appearance of acting as a prosecutor or advocate. Duarte and Huntington Park point to a writ of mandate issued by the Los Angeles Superior Court in 2010,²⁰⁶ holding that a 2006 proceeding to incorporate provisions of the Santa Monica Bay Beaches TMDL into the 2001 Los Angeles MS4 Order was not fairly conducted because Los Angeles Water Board counsel had acted as an advocate for Board staff, directly examining Board staff witnesses, cross-examining witnesses called by permittees, objecting to questions asked by permittees, and making a closing argument on behalf of Board staff, while simultaneously advising the Board. The proceedings to adopt the Los Angeles MS4 Order did not follow the type of adversarial structure that led the Superior Court to find a violation of separation of functions in the 2006 proceedings.²⁰⁷ Further, nothing in the conduct of the Los Angeles Water Board attorneys in the Los Angeles MS4 Order proceedings leads us to find that they acted as advocates for a particular position or party, rather than as advisors to the Board.

²⁰⁵ Gov. Code, § 11430.30. We note that the Law Revision Commission comments on section 11430.30, subdivision (c), state that “[s]ubdivision (c) applies to nonprosecutorial types of administrative adjudications, such as . . . proceedings . . . setting *water quality protection . . . requirements*.” (Emphasis added.) The notes further state that “[t]he provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for any agency to adhere to the restrictions of [ex parte communications], given limited staffing and personnel.” (25 Cal.L.Rev.Comm. Reports 711 (1995).) We agree that the lengthy and complex nature of permitting proceedings, and the limited staffing resources of the water boards, caution against an expansive interpretation of separation of functions in non-prosecutorial adjudications.

²⁰⁶ *County of Los Angeles v. State Water Resources Control Board* (Super. Ct., Los Angeles Co. (June 2, 2010, Minute Order) No. BS122724) (Administrative Record, section 10.II, RB-AR23665-23667.)

²⁰⁷ We also note that, although the writ directed that petitioners were entitled to a new hearing “in which the same person does not act as both an advocate before the Board and an advisor to the Board,” the writ had no direct bearing on the separate proceedings to adopt the Los Angeles MS4 Order. In any case, as discussed, Board attorneys did not act as advocates in the proceedings to adopt the Los Angeles MS4 Order.

The two specific cases pointed to by Duarte and Huntington Park – advice by Board counsel to Board member Mary Ann Lutz regarding recusal due to ex parte communications and advice to the Board generally on the lack of a cost-benefit analysis requirement in federal law – may be contrary to the legal position held by Duarte and Huntington Park, but there is nothing in the record to suggest that the advice was driven by biased advocacy for a Board staff position.²⁰⁸ In the absence of such evidence, we find no reason to depart from the general rule that separation of functions is not required in a permitting proceeding²⁰⁹ and find that Los Angeles Water Board counsel acted in accordance with applicable laws in advising Board staff and the Board itself.

H. Signal Hill's Inclusion in the Order

The City of Signal Hill (Signal Hill) argues that the Los Angeles Water Board acted contrary to relevant law when it issued the system-wide Los Angeles MS4 Order that included Signal Hill, even though Signal Hill had submitted an application for an individual permit.²¹⁰ We disagree.

Signal Hill points out that the federal regulations allow an operator of an MS4 to choose between submitting an application jointly with one or more other operators for a joint permit or individually for a distinct permit.²¹¹ However, the choice of application does not necessarily dictate the type of permit that the permitting authority ultimately deems appropriate. The permitting authority in turn has discretion to determine if the permit should be issued on a

²⁰⁸ See Administrative Record, section 7, RB-AR18309-18316, RB-AR18397-18400 (Transcript of Proceedings on Oct. 4, 2012), section 7, RB-AR18892-18894 (Transcript of Proceedings on Oct. 5, 2012).

²⁰⁹ Although *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731 concerned an enforcement proceeding and therefore is not on point for our legal determination above, we take note of the direction by the California Supreme Court that separation of functions in an administrative tribunal should not be expanded beyond its appropriate scope: “In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular . . . [and where proper procedure is followed and in the absence of a specific demonstration of bias or unacceptable risk of bias] we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.” (*Morongo Band of Mission Indians, supra*, at pp. 741-742.)

²¹⁰ Signal Hill was one of several permittees under the 2001 Los Angeles MS4 Order that elected not to submit an application jointly with the other permittees for the renewed permit. The other parties have not challenged their inclusion under the Los Angeles MS4 Order. The Los Angeles Water Board rejected Signal Hill's application as incomplete; however, our determination that the Los Angeles Water Board had the discretion to issue the system-wide Los Angeles MS4 Order is not dependent on that fact.

²¹¹ 40 C.F.R. § 122.26(a)(3)(iii). Signal Hill has also cited regulations applicable to Small MS4s at 40 Code of Federal Regulations sections 122.30 through 122.37. These regulations are not applicable here because the Los Angeles Water Board has designated the Greater Los Angeles County MS4, which includes the incorporated cities and the unincorporated areas of Los Angeles County within coastal watersheds, as a large MS4 pursuant to 40 Code of Federal Regulations section 122.26(b)(4).

jurisdictional or system-wide basis.²¹² While the federal regulations do not specifically state that, in exercising that discretion, the permitting authority may override the permit applicant's preference for an individual permit, nothing in the regulations constrains its authority to do so. Section 122.26(a)(3)(iii) of 40 Code of Federal Regulations does not require the permitting authority to take any specific action in response to the submission of an individual application. And sections 122.26(a)(3)(ii) and 122.26(a)(3)(iv) provide that the permitting authority "may issue" system-wide or distinct permits. The preamble to the regulations similarly contemplates wide discretion for the permitting authority to choose system-wide permits, including a permit that would allow an entire system in a geographical region to be designated under one permit.²¹³ Particularly because the option of a system-wide permit would be significantly frustrated if MS4 operators were allowed to opt out at their discretion, the most reasonable reading of the regulations is that the permitting authority, not the applicant, makes the ultimate decision as to the scope of the permit that will be issued. Accordingly, we find that the Los Angeles Water Board had the discretion under the relevant law to issue the Los Angeles MS4 Order with Signal Hill as a permittee.

We also find that the Los Angeles Water Board's decision regarding Signal Hill was appropriately supported by findings in the Order and in the Fact Sheet.²¹⁴ Finding C of the Los Angeles MS4 Order, as well as discussion in the Fact Sheet,²¹⁵ establishes that the Los Angeles Water Board found a system-wide permit to be appropriate for a number of reasons, including that Permittees' MS4s comprise a large interconnected system with frequently commingled discharges, that the TMDLs to be implemented apply to the jurisdictional areas of multiple Permittees, that the passage of Assembly Bill 2554²¹⁶ in 2010 provided a potential means for funding collaborative water quality improvement plans among Permittees, and that the results of an online survey conducted by Los Angeles Water Board staff showed that the

²¹² 33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(1)(v), (a)(3)(ii), (a)(3)(iv).

²¹³ See 55 Fed. Reg. 47990, 48039-48043 (preamble to the Phase I regulations noting that section 122.26(a)(3)(iv) would allow an entire system in a geographical region to be designated under one permit and further discussing that sections 122.26(a)(1)(v) and (a)(3)(ii) allow the permitting authority broad discretion in issuing system-wide permits).

²¹⁴ *Topanga Assn., supra*, 11 Cal.3d at 515.

²¹⁵ Los Angeles MS4 Order, Part II.C., pp. 14-15; *id.*, Att. F, Fact Sheet, pp. F-15-F-18.

²¹⁶ Assembly Bill No. 2554, Chapter 602, an act to amend sections 2 and 16 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), relating to the Los Angeles County Flood Control District, Sept. 30, 2010 (Administrative Record, section 10.VI.C., RB-AR29172-29179). The Bill allows the Los Angeles County Flood Control District to assess a property-related fee or charge, subject to voter approval in accordance with proposition 218, for storm water and clean water programs.

majority of Permittees favored either a single MS4 permit for Los Angeles County or several watershed-based permits.

Signal Hill points out that the reasons enumerated by the Los Angeles Water Board as grounds for issuance of a system-wide permit did not preclude the Los Angeles Water Board from issuing an individual permit to the City of Long Beach (Long Beach).²¹⁷ The Los Angeles Water Board has provided the rationale for distinguishing Signal Hill and Long Beach in its October 15, 2013 Response. The Los Angeles Water Board explains that Long Beach has had an individual permit for more than a decade and that, unlike Signal Hill, it was not permitted under the 2001 Los Angeles MS4 Order. The Board's decision to issue a separate permit to Long Beach was originally the result of a settlement agreement that resolved litigation on the MS4 permit issued by the Los Angeles Water Board in 1996, and Long Beach has a proven track record in implementing the individual permit while cooperating with Permittees under the Los Angeles MS4 Order.²¹⁸ We find that the Los Angeles Water Board reasonably distinguished between Long Beach and the Permittees under the Los Angeles MS4 Order in making determinations as to individual permitting. We will not reverse its determination but we will add a brief statement reflecting that reasoning to the Fact Sheet.

We shall amend section III.D.1.a. at page F-18, Attachment F, Fact Sheet, as follows:

The Regional Water Board determined that the cities of Signal Hill and Downey, the five upper San Gabriel River cities, and the LACFCD are included as Permittees in this Order. **In making that determination, the Regional Water Board distinguished between the permitting status of those cities and the permitting status of the City of Long Beach at this time because the City of Long Beach has a proven track record in implementing an individual permit and developing a robust monitoring program under that individual permit, as well as in cooperation with other MS4 dischargers on watershed based implementation. While all other incorporated cities with discharges within the coastal watersheds of Los Angeles County, as well as Los Angeles County and the Los Angeles County Flood Control District, are permitted under this Order,** individually tailored permittee requirements are provided in this Order, where appropriate.

²¹⁷ Signal Hill is located in the geographical middle of Long Beach and is entirely surrounded by that city.

²¹⁸ Los Angeles Water Board, October 15, 2013 Response, p. 25, fn. 78.

III. CONCLUSION

Based on the above discussion, we conclude as follows:

1. Although we are not bound by federal law or state law to require compliance with water quality standards in municipal storm water permits, we will not depart from our prior precedent regarding compliance with water quality standards. The regional water boards shall continue to require compliance with receiving water limitations in municipal storm water permits through incorporation of receiving water limitations provisions consistent with State Water Board Order WQ 99-05.
2. However, we find that municipal storm water dischargers may not be able to achieve water quality standards in the near term and therefore that it is appropriate for municipal storm water permits to incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.
3. We find that the WMP/EWMP provisions of the Los Angeles MS4 Order, with minor revisions that we incorporate herein, are an appropriate alternative to immediate compliance with receiving water limitations. The WMP/EWMP provisions are ambitious, yet achievable, and include clear and enforceable deadlines for the achievement of receiving water limitations and a rigorous and transparent process for development and implementation of the WMPs/EWMPs.
4. We find that the WMP/EWMP provisions do not violate anti-backsliding requirements.
5. We find that the WMP/EWMP provisions do not violate antidegradation requirements; however, we find that the antidegradation findings made by the Los Angeles Water Board are too cursory and revise those findings consistent with the federal and state antidegradation policies.
6. We find that issuance of time schedule orders is appropriate where a final receiving water limitations deadline set in the WMP/EWMP or a final TMDL-related deadline is not met; however we find that the WMP/EWMP compliance schedule need not otherwise be structured as an enforcement order.
7. We clarify the WMP/EWMP provisions to make it clear that final compliance with receiving water limitations and final WQBELs and other TMDL-specific limitations must be verified through monitoring.

8. We clarify the WMP/EWMP provisions to make it clear that Permittees may request extensions of deadlines incorporated into the WMPs/EWMPs except those final deadlines established in a TMDL. However, any deadline extensions must be approved by the Executive Officer after public review and comment.
9. In order to add greater rigor and accountability to the process of achieving receiving water limitations, we revise the WMP/EWMP provisions to add that the Permittees must comprehensively evaluate new data and information and revise the WMPs/EWMPs, including the supporting reasonable assurance analysis, by June 30, 2021, for approval by the Executive Officer.
10. We find that the storm water retention approach is a promising approach to achieving receiving water limitations, but also find that the Administrative Record does not support a finding that the approach will necessarily lead to achievement of water quality standards in all cases. We revise the WMP/EWMP provisions to clarify that, in the case of implementation of an EWMP with the storm water retention approach, if compliance with a final WQBEL or other TMDL-specific limitation is not in fact achieved in the drainage area, a Permittee will be considered in compliance with the relevant limitation only if the Permittee continues to adaptively manage the EWMP to achieve ultimate compliance with the WQBEL or other TMDL limitation.
11. We find reasonable the WMP/EWMP provisions that allow permittees to be deemed in compliance with receiving water limitations during the planning and development phase of the WMP/EWMP. We revise the WMP/EWMP provisions to state that, if a Permittee fails to meet one of the deadlines, the Permittee may still develop a WMP/EWMP for approval by the Los Angeles Water Board or its Executive Officer; however, the Permittee will not be deemed in compliance with receiving water limitations or WQBELs and other TMDL-specific limitations during the subsequent WMP/EWMP development period.
12. We recognize that the Los Angeles MS4 Order WMP/EWMP compliance path alternative may not be appropriate in all MS4 permits. In order to provide guidance to regional water boards preparing Phase I MS4 permits, we lay out several principles to be followed in drafting receiving water limitations compliance alternatives: Phase I MS4 permits should (1) continue to require compliance with water quality standards in accordance with our Order WQ 99-05; (2) allow compliance with TMDL requirements to constitute compliance with receiving water limitations; (3) provide for a compliance

alternative that allows permittees to achieve compliance with receiving water limitations over a period of time as described above; (4) encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements; (5) encourage the use of green infrastructure and the adoption of low impact development principles; (6) encourage the use of multi-benefit regional projects that capture, infiltrate, and reuse storm water; and (7) require rigor, accountability, and transparency in identification and prioritization of issues in the watershed, in proposal and implementation of control measures, in monitoring of water quality, and in adaptive management of the program. We expect the regional water boards to follow these principles unless the regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

13. We recognize that the success of the WMP/EWMP approach depends in large part on the steps that follow adoption of the provisions, including the development and approval of rigorous WMPs/EWMPs and the implementation and appropriate enforcement of the programs once approved. We direct the Los Angeles Water Board to periodically report specific information to the State Water Board regarding implementation of the WMPs/EWMPs, including on-the-ground structural control measures completed, monitoring data evaluating the effectiveness of such measures, control measures proposed to be completed and proposed funding and schedule, trends in receiving water quality related to storm water discharges, and compliance and enforcement data.
14. We find that the Los Angeles Water Board acted in a manner consistent with the law when establishing numeric WQBELs. We further find that the development of numeric WQBELs was a reasonable exercise of the Los Angeles Water Board's policy discretion, given its experience in developing the relevant TMDLs and the significance of storm water impacts in the region. However, we find that numeric WQBELs are not necessarily appropriate in all MS4 permits or for all parameters in any single MS4 permit.
15. We find that the Los Angeles Water Board's choice of BMP-based WQBELs, to be proposed by the Permittee in the WMP/EWMP to address USEPA-established TMDLs was reasonable.

16. We find that the Los Angeles Water Board did not act contrary to federal law when it prohibited the discharge of non-storm water “through the MS4 to receiving water” instead of “into” the MS4. Regardless of the exact wording of the prohibition, the standard that applies to non-storm water is the requirement of “effective prohibition.” However, the Los Angeles Water Board also has authority to regulate any dry weather discharges from the MS4s under the applicable TMDLs.
17. We find that the monitoring and reporting provisions of the Los Angeles MS4 Order are consistent with applicable law and reasonable.
18. We find that assigning joint responsibility for commingled discharges that cause exceedances is not contrary to applicable law. Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order, the joint responsibility regime also constitutes a reasonable policy choice. The Los Angeles MS4 Order specifically allows a permittee to avoid joint responsibility by demonstrating that its commingled discharge is not the source of an exceedance.
19. We find that representation of the Los Angeles Water Board and the Los Angeles Water Board staff by the same attorneys in the proceedings to adopt the Los Angeles MS4 Order was lawful and reasonable.
20. We find that the Los Angeles Water Board acted in a manner consistent with applicable law and reasonably when it issued a system-wide permit that included Signal Hill.

Addressing the water quality impacts of municipal storm water is a complex and difficult undertaking, requiring innovative approaches and significant investment of resources. We recognize and appreciate the commendable effort of the Los Angeles Water Board to come up with a workable and collaborative solution to the difficult technical, policy, and legal issues, as well as the demonstrated commitment of many of the area’s MS4 dischargers and of the environmental community to work with the Los Angeles Water Board in the development and implementation of the proposed solution. We also recognize the extensive work that interested persons from across the state, including CASQA, have invested in assisting us in understanding how the watershed-based alternative compliance approach developed by the Los Angeles Water Board may inform statewide approaches to addressing achievement of water quality requirements. While storm water poses an immediate water quality problem, we believe that a rigorous and transparent watershed-based approach that emphasizes low impact development, green infrastructure, multi-benefit projects, and capture, infiltration, and reuse of storm water is

a promising long-term approach to addressing the complex issues involved. We must balance requirements for and enforcement of immediate, but often incomplete, solutions with allowing enough time and leeway for dischargers to invest in infrastructure that will provide for a more reliable trajectory away from storm water-caused pollution and degradation. We believe that the Los Angeles MS4 Order, with the revisions we have made, strikes that balance at this stage in our storm water programs, but expect that we will continue to revisit the question of the appropriate balance as the water boards' experience in implementing watershed-based solutions to storm water grows.

IV. ORDER

IT IS HEREBY ORDERED that the Los Angeles MS4 Order is amended as described above in this order. The Los Angeles Water Board is directed to prepare a complete version of the Los Angeles MS4 Order (including any necessary non-substantive conforming corrections), post the conformed Los Angeles MS4 Order on its website, and distribute it as appropriate.

CERTIFICATION


The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held June 16, 2015.

AYE: Chair Felicia Marcus
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore
Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

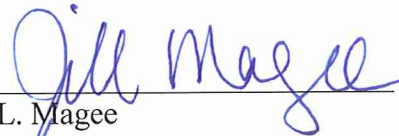
On September 21, 2018, I served the:

- **Notice of Complete Test Claim, Schedule for Comments, Request for Administrative Record, and Notice of Tentative Hearing Date issued September 21, 2018**
- **Test Claim filed by the City of San Juan Capistrano and the County of San Diego on May 30, 2018**

*California Regional Water Quality Control Board, San Diego Region,
Order No. R9-2017-0077, Sections A.1, A.3, and A.5, 17-TC-05
City of San Juan Capistrano and County of San Diego, Claimants*

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 21, 2018 at Sacramento, California.



Jill L. Magee
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/21/18

Claim Number: 17-TC-05

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2017-0077, Sections A.1, A.3, and A.5

Claimants: City of San Juan Capistrano
County of San Diego

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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