

ITEM 3

PROPOSED DECISION AND PARAMETERS AND GUIDELINES

San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6)

07-TC-09-R

Period of reimbursement is January 24, 2007 to December 31, 2017.

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May 26, 2023

Exhibit A

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Department of Finance
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Mr. Thomas Deak
County of San Diego
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Amended Decision on Remand

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, 07-TC-09-R

On Remand Pursuant to Department of Finance v. Commission on State Mandates (2022) 85 Cal.App.5th 535; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS

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

Dear Mr. Cook and Mr. Deak:

On May 26, 2023, the Commission on State Mandates adopted the Amended Decision on Remand on the above-captioned matter.

Sincerely,

Heather Halsey
Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON REMAND:

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-R

*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*

**AMENDED DECISION ON REMAND
PURSUANT TO GOVERNMENT CODE
SECTION 17500 ET SEQ.; TITLE 2,
CALIFORNIA CODE OF REGULATIONS,
DIVISION 2, CHAPTER 2.5, ARTICLE 7.**

On Remand from *Department of Finance
v. Commission on State Mandates* (2022)
85 Cal.App.5th 535; Judgment and
Administrative Writ of Mandate Issued by
Sacramento County Superior Court, Case
No. 34-2010-80000604-CU-WM-GDS

(Adopted March 26, 2010)

(Amended on Remand on May 26, 2023)

(Served on May 26, 2023)

TEST CLAIM ON REMAND

The Commission on State Mandates adopted the Amended Decision on Remand on
May 26, 2023.



Heather Halsey, Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON REMAND:

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-R

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

AMENDED DECISION ON REMAND PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

On Remand from *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535; Judgment and Administrative Writ of Mandate Issued by Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS

(Adopted March 26, 2010)

(Amended on Remand on May 26, 2023)

(Served on May 26, 2023)

AMENDED DECISION ON REMAND

The Commission on State Mandates (“Commission”) originally 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.

The Commission heard and decided this Amended Decision on Remand during a regularly scheduled hearing on May 26, 2023. Catherine Hagan appeared on behalf of the State Water Resources Control Board and the San Diego Regional Water Quality Control Board. Donna Ferebee appeared on behalf of the Department of Finance. Shawn Haggerty, of Best Best & Krieger, LLC provided public comment.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Amended Decision on Remand to approve the amendments by a vote of 7 to 0, as follows:

Member	Vote
Lee Adams, County Supervisor	Yes
Jennifer Holman, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Renee Nash, School District Board Member	Yes
Sarah Olsen, Public Member	Yes
Lynn Paquin, Representative of the State Controller, Vice Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

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.

In 2017, the Third District Court of Appeal issued a published opinion in *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, finding that the contested permit provisions are mandated by the state and not be federal law, affirming the Commission's findings on that issue. On October 24, 2022, the Third District Court of Appeal issued its published opinion in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, affirming the Commission's findings on the remaining issues, except for the finding that the permittees do not have sufficient authority to levy a fee for the street sweeping condition in part D.3.a.(5) of the test claim

permit within the meaning of Government Code section 17556(d).¹ On that issue, the Court of Appeal reversed the Commission's Decision, finding that the street sweeping condition expressly requires permittees to collect refuse. Thus, a fee for collecting refuse and charged pursuant to Public Resources Code section 40059 is exempt from article XIII D's voter approval requirement, and only the voter protest provisions apply.² Consistent with its ruling in *Paradise Irrigation Dist.*, the court concluded that the permittees have sufficient authority to levy a fee for the street sweeping condition in part D.3.a.(5) of the test claim permit within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state.³ As a result, the street sweeping condition does not trigger the subvention requirement under article XIII B, section 6 of the California Constitution.⁴ On May 11, 2023, the Sacramento County Superior Court issued a judgment and writ directing the Commission to "amend its decision in Test Claim 07-TC-09, addressing the underlying San Diego Permit, Order No. R9-2007-0001, with respect to part D.3.a.(5) (street sweeping) in order to make it consistent with the Court of Appeal's decision and the amended judgment."⁵

Accordingly, 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:

- 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);

¹ Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595.

² Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583.

³ Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595; *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

⁴ Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 595.

⁵ Exhibit B, Amended Judgment, Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS; Exhibit C, Writ of Administrative Mandate, Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS.

- 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 claimants⁶ have fee authority sufficient (within the meaning of Gov. Code § 17556, subd. (d)) to pay for them: street sweeping (part D.3.a.(5)), 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- 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.

Municipal Stormwater

⁶ 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.

The purpose of the permit is to specify “requirements necessary for the copermitees⁷ 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),⁸ through which it discharges urban runoff into waters of the United States within the San Diego region.”

Stormwater⁹ 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.¹⁰

⁷ “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).)

⁸ 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).)

⁹ Storm water means “storm water runoff, snow melt runoff, and surface runoff and drainage.” (40 C.F.R. § 122.26 (b)(13).)

¹⁰ *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

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:

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).¹¹

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.)¹²

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.

¹¹ *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

¹² *Id.* at page 621. State and regional board permits allowing discharges into state waters are called “waste discharge requirements.” (Wat. Code, § 13263).

Federal Law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants¹³ from point sources¹⁴ to waters of the United States, since discharges of pollutants are illegal except under a permit.¹⁵ 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 limitations¹⁶ 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

¹³ According to the federal regulations, “Discharge of a pollutant” means: (a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or (b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.” (40 C.F.R. § 122.2.)

¹⁴ 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).

¹⁵ 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.

¹⁶ *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.)

boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)¹⁷

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California's permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a Regional Board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to “enforce any effluent limitation” that is not “*less stringent*” than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent* than required by federal law- from taking into account the economic effects of doing so.¹⁸

Actions that dischargers must implement as prescribed in permits are commonly called “best management practices” or BMPs.¹⁹

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:

¹⁷ *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).

¹⁸ *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th 613, 627-628.

¹⁹ 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.)

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.²⁰

NPDES permits are required for “A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.”²¹ 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.²²

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.²³

General State-Wide Permits

²⁰ *Environmental Defense Center, Inc. v. U.S. E.P.A.*, *supra*, 344 F.3d 832, 841-842.

²¹ 33 USCA section 1342 (p)(2)(C).

²² 33 USCA section 1342 (p)(3)(B).

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

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,²⁴ 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.²⁵

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 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.”²⁶

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.

²⁴ 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.)

²⁵ Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

²⁶ California Code of Regulations, title 23, section 2235.4.

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 copermittees 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 copermittees 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 copermittees. 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.²⁷ 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.²⁸

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 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

²⁷ *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880.

²⁸ *Id.* at page 870.

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 pollutants²⁹ from the MS4 to the MEP, and prevent urban runoff³⁰ discharges from the MS4 from causing or contributing to a violation of water quality standards.³¹ The Regional Urban Runoff Management Program shall, at a minimum: [¶]...[¶]

2. Develop the standardized fiscal analysis method required in section G of this Order.³²

3. Facilitate the assessment of the effectiveness of jurisdictional, watershed,³³ and regional programs.

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

²⁹ 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.”

³⁰ 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).”

³¹ 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.”

³² 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).

³³ 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).”

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 Permittee³⁴ and Lead Watershed Permittees;³⁵

(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.

³⁴ The Principal Permittee is the County of San Diego.

³⁵ 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. Hydromodification³⁶

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,³⁷ where such increased rates and durations are

³⁶ 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 .

³⁷ 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

likely to cause increased erosion³⁸ of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses³⁹ and stream

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 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.

³⁸ 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."

³⁹ 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

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]⁴⁰ 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 durations⁴¹ shall not exceed pre-project runoff flow rates and durations,⁴² 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 flow⁴³ that produces the critical shear

goals. ... "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

⁴⁰ 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."

⁴¹ 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.

⁴² 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."

⁴³ 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

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.

of channel banks. When measuring Q_c [critical channel flow], it should be based on the weakest boundary material – either bed or bank.”

(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 Projects⁴⁴ 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.⁴⁵

(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

⁴⁴ 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."

⁴⁵ 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.

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%).

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 Development⁴⁶ (“LID”) and Standard Urban Storm Water Mitigation Plan (“SMUSP”)

⁴⁶ 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.”

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 BMP⁴⁷ requirements that meet or exceed the requirements of sections D.1.d.(4)⁴⁸ and D.1.d.(5),⁴⁹ 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.⁵⁰ In addition, the update shall 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

⁴⁷ 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.”

⁴⁸ 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.”

⁴⁹ 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.

⁵⁰ 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, filtration, biological uptake, media absorption or any other physical, biological, or chemical process.”

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.

(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)v 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 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) 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).⁵¹

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.

II. Jurisdictional Urban Runoff Management Program

A. Street Sweeping

⁵¹ See footnote 50, page 21.

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 Copermittee 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 Copermittee 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 year⁵² 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 litter⁵³ 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.

⁵² According to Attachment C of the permit, May 1 through September 30 is the dry season.

⁵³ Attachment C of the permit defines “anthropogenic litter” as “trash generated from human activities, not including sediment.”

- 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.

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 Discharge⁵⁴ 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.

⁵⁴ 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)].”

(3) Utilize outcome levels 1-6⁵⁵ 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,⁵⁶ Water Quality Assessment,⁵⁷ and Integrated Assessment,⁵⁸ where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermitttee shall annually review its jurisdictional activities or BMPs to

⁵⁵ 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.

⁵⁶ Implementation Assessment is defined in Attachment C of the permit as an “Assessment conducted to determine the effectiveness of copermitttee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed.”

⁵⁷ 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.”

⁵⁸ 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.”

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)⁵⁹ 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.

⁵⁹ 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.

(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.⁶⁰ 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.

⁶⁰ Section A is "Prohibitions and Receiving Water Limitations."

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:

Table 3. Education

Laws, Regulations, Permits, & Requirements	Best Management Practices
• 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	• 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

• Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• 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
• 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	• 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 grading⁶¹ 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.

(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

⁶¹ Attachment C of the permit defines grading as “the cutting and/or filling of the land surface to a desired slope or elevation.”

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 Activities⁶²

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA.

⁶² 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.

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. 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,⁶³ which held that if participation in the

⁶³ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727.

underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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 Constitution⁶⁴ recognizes the state constitutional restrictions on the powers of local government to tax and spend.⁶⁵ “Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”⁶⁶ 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.⁶⁷

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.⁶⁸

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.⁶⁹ 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

⁶⁴ Article XIII B, section 6, subdivision (a), provides:

(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

⁶⁵ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 735.

⁶⁶ *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

⁶⁷ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

⁶⁸ *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*).

⁶⁹ *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.)

immediately before the enactment of the test claim legislation.⁷⁰ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”⁷¹

Finally, the newly required activity or increased level of service must impose costs mandated by the state.⁷²

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 6.⁷³ In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”⁷⁴

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.”⁷⁵

⁷⁰ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

⁷¹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

⁷² *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.

⁷³ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

⁷⁴ *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.

⁷⁵ 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

The California Regional Water Board, San Diego Region, is a state agency.⁷⁶ 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, 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 copermittees 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 copermittee 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.⁷⁷

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

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.

⁷⁶ Water Code section 13200 et seq.

⁷⁷ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742.

NPDES permit application in the form of a Report of Waste Discharge.⁷⁸ Submitting it is not discretionary, as shown in the following federal regulation:

a) *Duty to apply.* (1) Any person⁷⁹ 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.⁸⁰

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 ...”⁸¹ Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

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.”⁸²

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).

⁷⁸ The Report of Waste Discharge is attachment 36 of the State Water Resources Control Board comments submitted October 2008.

⁷⁹ *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

⁸⁰ 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.

⁸¹ Water Code section 13376.

⁸² The 2001 Permit is attached to the State Water Resources Control Board, comments submitted October 2008, Attachment 25.

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.⁸³

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."

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"⁸⁴ 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.

⁸³ *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.)

⁸⁴ 33 U.S.C. § 1342(p)(3).

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 permit⁸⁵ 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.”⁸⁶ 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.⁸⁷ 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 Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable.”

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?

⁸⁵ 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.

⁸⁶ *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

⁸⁷ 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.

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.”⁸⁸

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.⁸⁹

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.⁹⁰ 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.”⁹¹

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*,⁹² 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 elements, and taking mandatory steps to involve the community including public hearings. The state argued that its Executive Order did not

⁸⁸ *San Diego Unified School Dist. v. Commission on State Mandates*, *supra*, 33 Cal.4th 859, 879-880, emphasis in original.

⁸⁹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

⁹⁰ *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).

⁹¹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1594.

⁹² *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

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.⁹³ 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.”⁹⁴

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.⁹⁵ 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.⁹⁶

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

⁹³ *Id.* at 173.

⁹⁴ *Ibid.*

⁹⁵ 33 U.S.C. section 1370.

⁹⁶ *City of Burbank v. State Water Resources Control Board*, *supra*, 35 Cal.4th 613, 618, 628.

administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

[S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is 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 program⁹⁷ 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 chosen⁹⁸ 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.

⁹⁷ 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.”

⁹⁸ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

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:

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.⁹⁹

The Commission disagrees. As discussed above, the federal Clean Water Act¹⁰⁰ 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.¹⁰¹ Those state measures that may constitute a state mandate if they "exceed the mandate in ... federal law."¹⁰² 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

⁹⁹ State Board comments submitted January 2010.

¹⁰⁰ 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

¹⁰¹ *City of Burbank v. State Water Resources Control Board*, *supra*, 35 Cal.4th 613, 618, 628.

¹⁰² Government Code section 17556, subdivision (b). *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155, 173.

(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 Administrator¹⁰³ 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.

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 copermittee “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.”¹⁰⁴ Priority

¹⁰³ Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

¹⁰⁴ 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;

development projects can include both private projects, and municipal (city or county) 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

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 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.

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.”¹⁰⁵

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:

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator¹⁰⁶ of a discharge¹⁰⁷ from a large or

¹⁰⁵ 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.

¹⁰⁶ “*Owner or operator* means the owner or operator of any “facility or activity” subject to regulation under the NPDES program.” (40 CFR § 122.2)

¹⁰⁷ “*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.)

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: [¶]...[¶]

(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."¹⁰⁸ As in *Long Beach Unified School Dist. v. State of California*,¹⁰⁹ 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 chosen¹¹⁰ to 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

¹⁰⁸ Government Code section 17556, subdivision (c).

¹⁰⁹ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹¹⁰ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

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.¹¹¹ Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.¹¹² 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.*,¹¹³ 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.¹¹⁴

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:

¹¹¹ 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.”

¹¹² 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.”

¹¹³ *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

¹¹⁴ *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.¹¹⁵

(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

¹¹⁵ 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.

(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 copermitees 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.¹¹⁶

The Regional Board prepared a Fact Sheet/Technical Report¹¹⁷ 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

¹¹⁶ *Building Industry Assoc. of San Diego County v. State Water Resources Control Board, supra*, 124 Cal.App.4th 866, 870.

¹¹⁷ The Fact Sheet/Technical Report was attached to the test claim.

from modification. While the Model SUSMP¹¹⁸ [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 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

¹¹⁸ According to the Fact Sheet/Technical Report, the Model SUSMP was completed and adopted in 2002.

Water Mitigation Plans)¹¹⁹ 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 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.

¹¹⁹ 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.”

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.”¹²⁰ As in *Long Beach Unified School Dist. v. State of California*,¹²¹ 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 chosen¹²² 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.

(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

¹²⁰ Government Code section 17556, subdivision (c).

¹²¹ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹²² *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

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.¹²³
 - ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.¹²⁴
 - iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.¹²⁵
 - 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)

¹²³ 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.”

¹²⁴ Part D.1.d.(5) of the permit lists source control BMP requirements.

¹²⁵ Part D.1.d.(6) of the permit lists treatment control BMP requirements.

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)v 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 copermitees 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 copermitees determine what constitutes high, moderate, and low trash generation.

In addition, section J.3.a.(3)(c) x-xv requires the copermitees, 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 copermitees 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*:¹²⁶ “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.”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 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.”¹²⁹ As in *Long Beach 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.(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

¹²⁶ *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564.

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).

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.

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.

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, copermitees 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, copermitees 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.”¹³² 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...”¹³³

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.”¹³⁴ As in *Long Beach Unified School Dist. v. State of California*,¹³⁵ 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 chosen¹³⁶ 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.

¹³² 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

¹³³ 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

¹³⁴ Government Code section 17556, subdivision (c).

¹³⁵ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹³⁶ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

(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.
- 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 copermitttee to ‘implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges. By contrast, the 2007 permit requires each copermitttee 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 copermitttees 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 Copermitttees 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 Copermitttees will be required to inspect all storm drain inlets and catch basins. This change will assist the Copermitttees in determining which basins/inlets need to be cleaned and at what priority. Removal of trash has been identified by the copermitttees as a priority issue in their long-term effectiveness assessment. To address this issue, wording has been added to require the Copermitttees, 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 copermitees to perform the activities on pages 25-28 above, which can be summarized as:

- Implement an educational program so that copermitees' 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 copermitees' 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 copermitees to implement public education programs. According to the State Board, the regulations apply to copermitees 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."¹³⁷ As in *Long Beach Unified School Dist. v. State of California*,¹³⁸ 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 chosen¹³⁹ 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:

¹³⁷ Government Code section 17556, subdivision (c).

¹³⁸ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹³⁹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

- 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:

Table 3. Education

Laws, Regulations, Permits, & Requirements	Best Management Practices
• 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)	• 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
• 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)	• 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

• Non-storm water discharge prohibitions • How to conduct a storm water inspections	• 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 grading¹⁴⁰ 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.

(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

¹⁴⁰ Attachment C of the permit defines grading as “the cutting and/or filling of the land surface to a desired slope or elevation.”

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 copermitttee’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 copermitttee’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 activities¹⁴¹ and watershed education activities.¹⁴²
 - 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.¹⁴³

¹⁴¹ 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).

¹⁴² Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA (Part E.2.f).

¹⁴³ 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.

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 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.”¹⁴⁴ As in *Long Beach Unified School Dist. v. State of California*,¹⁴⁵ 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 chosen¹⁴⁶ 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:

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 Activities¹⁴⁷

(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.

¹⁴⁴ Government Code section 17556, subdivision (c).

¹⁴⁵ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁴⁶ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹⁴⁷ 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.

(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. 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.¹⁴⁸

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

¹⁴⁸ 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.

effectively addressed at a regional level. ... However, significant flexibility has been provided to the Copermittees for new regional requirements.”¹⁴⁹

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.¹⁵⁰ [§]...[§]

(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.¹⁵¹ [§]...[§]

(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: [§]...[§]

¹⁴⁹ San Diego Regional Water Quality Control Board, “Fact Sheet/Technical Report for Order No. R9-2007-0001.”

¹⁵⁰ 40 Code of Federal Regulations section 122.26 (a)(3)(v).

¹⁵¹ 40 Code of Federal Regulations section 122.26 (a)(5).

(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

(iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. ...¹⁵³

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 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."¹⁵⁴ As in *Long Beach Unified School Dist. v. State of California*, the permit "requires specific actions ... [that are] required acts."¹⁵⁵ In adopting part F.1, the state has freely chosen¹⁵⁶ 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

¹⁵² 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

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

¹⁵⁴ Government Code section 17556, subdivision (c).

¹⁵⁵ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155, 173.

¹⁵⁶ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

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.

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;¹⁵⁷

The State Board also quotes section 122.26 (a)(3)(v) of the federal regulations as follows:

¹⁵⁷ 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

(v) Permits for all or a portion of all discharges from large¹⁵⁸ or medium¹⁵⁹ 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.

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

¹⁵⁸ "(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).]

¹⁵⁹ "(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).]

Commission finds that these RURMP activities “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 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 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.

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.

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."¹⁶³

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."¹⁶⁴ The

¹⁶³ 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.

¹⁶⁴ 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 submit an annual report by the

State Board quotes a lengthy portion of the 2001 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,”

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.

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 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.”¹⁶⁵ As in *Long Beach Unified School Dist. v. State of California*,¹⁶⁶ 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 chosen¹⁶⁷ 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 copermittees to do all of the following:

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermitee 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 Discharge¹⁶⁸ Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

¹⁶⁵ Government Code section 17556, subdivision (c).

¹⁶⁶ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁶⁷ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹⁶⁸ 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)].”

(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 1-6¹⁶⁹ 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,¹⁷⁰ Water Quality Assessment,¹⁷¹ and Integrated Assessment,¹⁷² 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.

¹⁶⁹ See footnote 50, page 21.

¹⁷⁰ 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.”

¹⁷¹ 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.”

¹⁷² 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.”

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)¹⁷³ 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

¹⁷³ 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.

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.¹⁷⁴ 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.

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

¹⁷⁴ Section A is “Prohibitions and Receiving Water Limitations.”

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.¹⁷⁵ This is a higher level of service than “pollutant loading estimations” to be used as an effectiveness strategy in the 2001 permit.¹⁷⁶ Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

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

¹⁷⁵ 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.”

¹⁷⁶ See Fact Sheet/Technical Report for Order No. R9-2007-0001.

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.¹⁷⁷

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

¹⁷⁷ 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.

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 Copermittees’ 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 copermittees, addressing specified objectives or outcome levels, or addressing jurisdictional, watershed, and regional programs. These requirements “exceed the mandate in that federal law or regulation.”¹⁷⁸ As in *Long Beach Unified*

¹⁷⁸ Government Code section 17556, subdivision (c).

School Dist. v. State of California,¹⁷⁹ 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 chosen¹⁸⁰ 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)¹⁸¹ 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

¹⁷⁹ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁸⁰ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹⁸¹ 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.

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 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;¹⁸²

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;”¹⁸³ 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.

¹⁸² 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

¹⁸³ 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

Thus, this permit activity “exceed[s] the mandate in that federal law or regulation.”¹⁸⁴ As in *Long Beach Unified School Dist. v. State of California*,¹⁸⁵ 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 chosen¹⁸⁶ 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:

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 Permittee¹⁸⁷ and Lead Watershed Permittees;¹⁸⁸
 - (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;

¹⁸⁴ Government Code section 17556, subdivision (c).

¹⁸⁵ *Long Beach Unified School Dist. v. State of California*, *supra*, 225 Cal.App.3d 155.

¹⁸⁶ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593-1594.

¹⁸⁷ The Principal Permittee is the County of San Diego.

¹⁸⁸ According to the permit: “Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area].”

- (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.

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,¹⁸⁹ 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.

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

¹⁸⁹ *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

Activity	Cost FY 2007-08
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,¹⁹⁰ 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 Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.¹⁹¹

¹⁹⁰ The County and city declarations are attached to the test claim.

¹⁹¹ 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.

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*.¹⁹² 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 declares that the

¹⁹² *County of Fresno v. State of California, supra*, 53 Cal.3d 482.

“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 6.¹⁹³

In another case about subdivision (d) of section 17556, *Connell v. Superior Court*,¹⁹⁴ 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.¹⁹⁵

¹⁹³ *County of Fresno v. State of California*, *supra*, 53 Cal.3d 482, 487. Emphasis in original.

¹⁹⁴ *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

¹⁹⁵ *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*,¹⁹⁶ 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."¹⁹⁷ 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

¹⁹⁶ *Howard Jarvis Taxpayers Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

¹⁹⁷ *Id.* at page 1358-1359.

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.¹⁹⁸ The regulatory and development fees are discussed below in the context of 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.”¹⁹⁹

Water pollution prevention is also a valid exercise of government police power.²⁰⁰

In *Sinclair Paint v. State Board of Equalization*,²⁰¹ 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.

¹⁹⁸ *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874.

¹⁹⁹ *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.

²⁰⁰ *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

²⁰¹ *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

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.²⁰² [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.”²⁰³ The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.²⁰⁴

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.²⁰⁵

Other cases have defined a regulatory fee as an imposition that funds a regulatory program²⁰⁶ or that distributes the collective cost of a regulation²⁰⁷ 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.”²⁰⁸ 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

²⁰² *Sinclair Paint v. State Board of Equalization*, *supra*, 15 Cal.4th 866, 877.

²⁰³ *Sinclair Paint v. State Board of Equalization*, *supra*, 15 Cal.4th 866, 875-877.

²⁰⁴ *Id.* at page 875.

²⁰⁵ *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.”

²⁰⁶ *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

²⁰⁷ *Id.* at 952.

²⁰⁸ *Ibid.*

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.”²⁰⁹ [Emphasis added.]

In *Tahoe Keys Property Owner’s Assn. v. State Water Resources Control Board*,²¹⁰ 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 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].”²¹¹

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,²¹² art in public places,²¹³ remedying substandard housing,²¹⁴ recycling,²¹⁵ administrative hearings under a rent-control ordinance,²¹⁶ signage,²¹⁷ air pollution mitigation,²¹⁸ and

²⁰⁹ *California Assn. of Prof. Scientists v. Dept. of Fish and Game*, *supra*, 79 Cal.App.4th 935, 945.

²¹⁰ *Tahoe Keys Property Owner’s Assn. v. State Water Resources Control Board* (1993) 23 Cal.App.4th 1459.

²¹¹ *Id.* at page 1480.

²¹² *Mills v. County of Trinity*, *supra*, 108 Cal.App.3d 656, 662.

²¹³ *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886.

²¹⁴ *Apartment Assoc. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830.

²¹⁵ *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264.

²¹⁶ *Pennell v. City of San Jose* (1986) 42 Cal.3d 365.

²¹⁷ *United Business Communications v. City of San Diego* (1979) 91 Cal.App.3d 156.

²¹⁸ *California Building Industry Ass’n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120.

replacing converted residential hotel units.²¹⁹ Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.²²⁰

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 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.

²¹⁹ *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892.

²²⁰ *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018.

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.”²²¹

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*,²²² 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.”²²³ 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 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

²²¹ *County of San Diego, supra*, 15 Cal.4th 68, 81.

²²² *Connell v. Superior Court, supra*, 59 Cal.App.4th 382.

²²³ *Id.* at page 401.

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.”²²⁴

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.”²²⁵ 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.”²²⁶

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 decision to seek a government benefit are not.²²⁷ Thus, fees imposed as a

²²⁴ *Connell v. Superior Court*, *supra*, 59 Cal.App.4th 382, 401.

²²⁵ 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.

²²⁶ California Constitution, article XIII D, section 1, subdivision (b).

²²⁷ 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*,

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.²²⁸

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

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.

²²⁸ 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/rsr/water_primer/water_primer_102208.pdf> as of October 22, 2008.

surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

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)²²⁹ and D.1.d.(5).²³⁰ Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

²²⁹ 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.”

²³⁰ 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

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.

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.²³¹ 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.²³² 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 approvals ²³³ [Emphasis added.]

"Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

²³¹ *California Building Industry Assoc. v. Governing Board* (1988) 206 Cal.App.3d 212, 234.

²³² *Sinclair Paint, supra*, 15 Cal.4th at page 875.

²³³ Government Code section 66000, subdivision (b).

Public facilities are defined in the Act as “public improvements, public services, and community amenities.”²³⁴

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.²³⁵ A fee imposed “as a condition of approval of a proposed development or development project” is limited to the estimated reasonable cost of providing the service or facility.²³⁶ This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.²³⁷

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

²³⁴ Government Code section 66000, subdivision (d).

²³⁵ 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 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.

²³⁶ Government Code section 66005, subdivision (a).

²³⁷ *Sinclair Paint, supra*, 15 Cal.4th at page 875.

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.²³⁸

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.”²³⁹

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.²⁴⁰ Moreover, the California Supreme Court stated that the Act “concerns itself with development fees; that is, fees imposed on development projects in order to finance public improvements or programs that bear a ‘reasonable relationship’ to the development at issue.”²⁴¹ 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

²³⁸ *California Building Industry Ass’n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th, 130, 131.

²³⁹ Government Code section 66000, subdivision (d).

²⁴⁰ Government Code section 66000, subdivision (d).

²⁴¹ *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191.

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)).

- 3. Claimants’ fee authority under Public Resources Code section 40059 is sufficient within the meaning of Government Code section 17556(d) to pay for street sweeping; however, 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.²⁴² Other local agencies, e.g., the County of Fresno²⁴³ and the City of La Quinta,²⁴⁴ 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 which is not hazardous waste, manure,

²⁴² 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.”

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.

vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.²⁴⁵

“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 refuse²⁴⁶ 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)).

The Third District Court of Appeal in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, found that the street sweeping condition expressly requires permittees to collect refuse. Thus, a fee for collecting refuse and charged pursuant to Public Resources Code section 40059 is exempt from article XIII D’s voter approval requirement, and only the voter protest provisions apply.²⁴⁷ Consistent with its ruling in *Paradise Irrigation Dist.*, the court concluded that the permittees have the right, power, and authority sufficient to levy a fee for the street sweeping condition in part D.3.a.(5) of the test claim permit within the meaning of

²⁴⁵ This definition also excludes hazardous waste, radioactive waste and medical waste, as defined.

²⁴⁶ “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.

²⁴⁷ Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583.

Government Code section 17556(d) and thus, there are no costs mandated by the state for the street sweeping condition.²⁴⁸ The court held as follows:

We agree the State has the burden of establishing that permittees have fee authority, but that burden does not require the State also to prove permittees as a matter of law and fact are able to promulgate a fee that satisfies article XIII D's substantive requirements. The sole issue before us is whether permittees have "the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program." (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) The inquiry is an issue of law, not a question of fact. (*Ibid.*)

[¶]

The State has established that permittees have the right or power to levy a fee for the street cleaning condition pursuant to Public Resources Code section 40059.²⁴⁹

As a result, the street sweeping condition does not trigger the subvention requirement under article XIII B, section 6 of the California Constitution.²⁵⁰

Fees for street sweeping reports: However, 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.

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

²⁴⁸ Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595; *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

²⁴⁹ Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 584-585.

²⁵⁰ Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595.

(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).

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 entity²⁵¹ 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

²⁵¹ 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).

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 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.²⁵² 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 copermittee 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.

²⁵² Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 310 (2009-2010 Reg. Sess.) as amended August 31, 2009, page 4.

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, 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*,²⁵³ 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 2007-2008 alone.²⁵⁴ 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 Public Resources Code section 40059 and 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));
- Street Sweeping (part D.3.a.(5)).

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:

²⁵³ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859.

²⁵⁴ The County and city declarations are attached to the test claim.

- The fee authority in Public Resources Code section 40059 for part 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- 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.

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, 2012.²⁵⁵ 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.²⁵⁶

I. Jurisdictional Urban Runoff Management Program and Reporting (parts D & J)

Street sweeping reporting (J.3.a.(3)(c)x-xv): Report annually on the following:

²⁵⁵ 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.”

²⁵⁶ 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 copermittees' 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 Discharge²⁵⁷ Detection and Elimination, and Education); and

²⁵⁷ 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)].”

- (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 1-6²⁵⁸ 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.

²⁵⁸ 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.

(5) Utilize Implementation Assessment,²⁵⁹ Water Quality Assessment,²⁶⁰ and Integrated Assessment,²⁶¹ 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)²⁶² shall annually assess the effectiveness of its Watershed Urban Runoff

²⁵⁹ 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.”

²⁶⁰ 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.”

²⁶¹ 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.”

²⁶² 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.

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 necessary to achieve compliance with section A of this Order.²⁶³ The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education

²⁶³ Section A is "Prohibitions and Receiving Water Limitations."

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.

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)²⁶⁴ 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).

²⁶⁴ 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.

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 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 Public Resources Code section 40059 and 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));
- Street Sweeping (part D.3.a.(5)).

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 part 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- 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.

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 May 26, 2023, I served the:

- **Amended Decision on Remand adopted May 26, 2023**

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, 07-TC-09-R
On Remand Pursuant to *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS, Issued May 11, 2023

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

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 May 26, 2023 at Sacramento, California.



Jill L. Magee
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/17/23

Claim Number: 07-TC-09-R

Matter: 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.

Claimants: City of Carlsbad
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City of La Mesa
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City of Santee
City of Solana Beach
City of Vista

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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COMMISSION ON STATE MANDATES

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**Exhibit B**

July 6, 2010

Mr. Timothy Barry
County of San Diego
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Proposed Parameters and Guidelines*Discharge of Stormwater Runoff, 07-TC-09*

California Regional Water Quality Control Board, San Diego Region,

Order No. R9-2007-001, (NPDES No. CAS0108758)

Waste Discharge Requirements for Discharges of Urban Runoff from the
Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the
County of San Diego, the Incorporated Cities of San Diego County,
Adopted on January 24, 2007

Dear Mr. Barry:

The Commission on State Mandates received the proposed parameters and guidelines on June 28, 2010. Staff reviewed the proposal and deemed it to be complete and timely filed.

Review and Comments. All state agencies and interested parties in receipt of this letter are invited to comment on the proposed parameters and guidelines. Recommendations and comments must be submitted to the Commission by **August 5, 2010**. The claimant and interested parties may file rebuttals with the Commission by **September 6, 2010**. The claimant, state agencies, and interested parties are required to submit an original and two (2) copies of written responses or rebuttals to the Commission and to simultaneously serve copies on the test claimant, state agencies, and interested parties on the mailing list.

Hearing. If requested, Commission staff will conduct a prehearing conference. A hearing on this matter will be set when the record closes.

Please contact Heidi Palchik at (916) 323-8218 if you have any questions.

Sincerely,

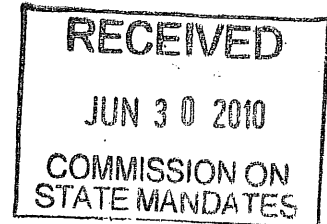
A handwritten signature in black ink, appearing to read 'Nancy Patton'.

NANCY PATTON

Assistant Executive Director

J:\mandates\2007\07tc09\corres\ps&gscompleteltr

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA



IN RE TEST CLAIM ON:

San Diego Regional 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

PROPOSED PARAMETERS AND
GUIDELINES PURSUANT TO
GOVERNMENT CODE SECTION 17557
AND TITLE 2, CALIFORNIA CODE OF
REGULATIONS, SECTION 1183.12

Parameters and Guidelines

San Diego Regional 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.

Discharge of Stormwater Runoff

I. SUMMARY OF THE MANDATE

On March 26, 2010, the Commission on State Mandates ("Commission") adopted its Statement of Decision that San Diego Regional Quality Control Board Order No. R9-2007-0001, Permit CAS108758 (the "Permit") imposes reimbursable state-mandated programs and activities upon the Co-permittees¹ under the Permit within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

A. Jurisdictional Urban Runoff Management Program and Reporting (parts D & J)

Street Sweeping (part D.3.a.(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.

Street Sweeping Reporting (part J.3.a.(3)(c)x-xv):

Report annually on the following:

¹ Co-permittees under the Permit include the County of San Diego, the San Diego Unified Port District, the San Diego County Regional Airport Authority and the cities of 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.

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 (part 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 (part J.3.a.(3)(c)(iv)-(viii)):

Update and revise the Copermittees' 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):

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: (i) Erosion prevention, (ii) Non storm water discharge prohibitions, and (iii) BMP types: facility or activity specific, LID, source control, and treatment control.

(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.

B. 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 the 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 the 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. 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.

C. Regional Urban Runoff Management Program (parts F.1, F.2 & F.3)

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 part 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.

D. 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 Discharge² 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 1-6³ to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

² 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)]."

³ 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 the 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

(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,⁴ Water Quality Assessment,⁵ and Integrated Assessment,⁶ 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 the 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.

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 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 measurable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed.”

⁵ 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.”

⁶ 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.”

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)⁷ 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.

⁷ 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.

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 the Order.⁸ 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.

.....

E. Long Term Effectiveness Assessment (part I.5)

a. Collaborate with the other Copermittees to develop a Long Term 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 the Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)⁹ of this Order, and to serve as a

⁸ Section A is "Prohibitions and Receiving Water Limitations."

⁹ 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

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.

F. All Copermittee Collaboration (part L)

1. Each Copermittee shall 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.

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: [¶]...[¶]

(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;

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.

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement.

II. ELIGIBLE CLAIMANTS

Eligible claimants are the County of San Diego, the San Diego Unified Port District, the San Diego County Regional Airport Authority and the cities of 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.

III. PERIOD OF REIMBURSEMENT

The term of the Permit is from January 24, 2007 – January 23, 2012.¹⁰ 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.¹¹

Government Code section 17557, subdivision (e), provides that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. The Co-permittees filed their Test Claim in this matter on June 20, 2008. Therefore the period of reimbursement began January 24, 2007.

Actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent years may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial year's costs shall be submitted to the Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given year do not exceed \$1,000, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

¹⁰ 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."

¹¹ 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."

IV. REIMBURSABLE ACTIVITIES

For each eligible claimant the following are costs incurred in performing the activities mandated by the Permit and are reimbursable:

Street Sweeping (part D.3.a.(5))

- Street Sweeping Operations. The claimant's Personnel Costs¹² to perform street sweeping.¹³
- Equipment. The actual cost of purchasing, renting, leasing, or contracting for equipment to perform street sweeping and related functions. This includes one-time costs for equipment purchases and corresponding equipment depreciation costs.
- Equipment Maintenance. Annual equipment maintenance costs, including parts, supplies (e.g., water), and Personnel Costs. This also includes the cost of operating, renting, leasing, or contracting for facilities to store and maintain equipment and supplies.
- Materials Disposal. The costs, including Personnel Costs, to dispose of material collected from street sweeping, including the removal of materials from street sweeping vehicles, and the transport, storage, and disposal of these materials. This includes the cost of operating, renting, leasing, or contracting for facilities to store or dispose of collected materials, and all applicable disposal fees or charges.
- Fuel. The actual cost of the fuel necessary to run the street sweeping equipment and equipment used to transport and dispose of collected materials.
- Program Development. The costs, including Personnel Costs, to develop and update the claimant's internal street sweeping program including specific criteria, policies, procedures, manuals, and forms. This includes the development and utilization of criteria to determine which roads, streets, highways, and parking facilities have high, moderate, and low volumes of trash and/or debris.¹⁴ Program development tasks are generally one-time costs with annual reviews and periodic updates.

¹² Unless otherwise stated in these Parameters and Guidelines, "Personnel Costs" will be determined using the claimant's loaded hourly rates; all other costs will be actual and will include only that part of the cost that is related to the reimbursable mandate. Some of the actual costs may be incurred through the use of vendors, contractors, consultants, or other service providers, and should be claimed as described in the last bullet point of this section.

¹³ "Street sweeping" includes sweeping of improved roads, streets, highways, and parking facilities subject to the reimbursable mandate.

¹⁴ Under the Permit the Copermittees are individually responsible to define high, moderate, and low categories of trash generation, and to implement their sweeping activities accordingly within their jurisdictions.

- Employee and Vendor Training. The costs, including Personnel Costs, to develop, update, and conduct training on street sweeping policies, procedures, and documentation (manuals, forms, etc.). The costs include training of all claimant and vendor employees who perform tasks necessary to implement street sweeping and related functions during the life of the Permit.
- Parking Signage and Enforcement. The costs, including Personnel Costs, to purchase and install street sweeping signage and to enforce parking prohibitions in areas where street sweeping is scheduled. This includes the purchase, installation, or replacement of signage to inform the public of applicable parking restrictions, as well as their surveillance and enforcement.
- Employee Supervision and Management. Time spent by supervisory and management personnel supervising personnel directly responsible for performing the mandated activities. (Hereinafter referred to as "Employee Supervision and Management".)
- Contracted Services. Any of the costs described above may be incurred through the use of vendors, contractors, consultants, or other service providers. In such case, only actual costs to the claimant will be claimed, and will only include that portion of the cost that is related to the reimbursable mandate. Claimants may also include the costs of preparing requests for proposals or requests for bids, negotiating and drafting third party contracts, and subsequently administering service contracts for the time they are performing these tasks using the claimant's loaded hourly rates. (Hereinafter referred to as "Contracted Services".)

Street Sweeping – Reporting (part J.3.a.(3)(c) x-xv)

- Reporting and Tracking Policies and Procedures. The costs, including Personnel Costs, to develop, update, and implement street sweeping reporting and tracking policies and procedures.
- Data Tracking and Analysis. The costs, including Personnel Costs, to develop, update, and implement data tracking and analysis methods and procedures. This includes the cost of employees developing or maintaining data tracking methods or systems, and performing data tracking and analysis for reports to the Regional Water Quality Control Board. Also included are the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.
- Report Writing. Personnel Costs to develop and write reports to the Regional Water Quality Control Board.
- Employee Supervision and Management.
- Contracted Services.

Conveyance System Cleaning (D.3.a.(3))

- Conveyance System Inspection. The costs, including Personnel Costs, to inspect the conveyance system for the purposes of assessing the accumulation of trash, debris, or litter, or for verifying the proper operation of structural treatment controls.
- Conveyance System Cleaning Operations. The costs, including Personnel Costs, to clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, to clean accumulated trash and debris from any MS4 facility that is designed to be self cleaning, or to clean open channels of observed anthropogenic litter.
- Vehicles and Equipment. The actual cost of purchasing, renting, leasing, or contracting for vehicles and equipment to perform conveyance system inspection or cleaning (including vector trucks and other cleaning equipment), and to transport and dispose of collected material. This includes one-time costs for equipment purchases and corresponding equipment depreciation costs.
- Vehicle and Equipment Maintenance. Annual maintenance costs, including parts, supplies (e.g., water), and Personnel Costs. This also includes the cost of operating, renting, leasing, or contracting for facilities to store and maintain vehicles, equipment, and supplies.
- Materials Disposal. The costs, including Personnel Costs, to dispose of material collected from Conveyance System Cleaning Operations. This also includes the removal of materials from vehicles and equipment, and the transport, storage, and disposal of these materials. This includes the cost of operating, renting, leasing, or contracting for facilities to store or dispose of collected materials, and all applicable disposal fees or charges.
- Fuel. The actual cost of the fuel necessary to run the vehicles and equipment, to inspect and clean MS4 facilities, and to transport and dispose of collected materials.
- Program Development. The costs, including Personnel Costs, to develop and update the claimant's internal conveyance system cleaning program including specific criteria, policies, procedures, manuals, and forms. This includes the development and utilization of inspection and maintenance schedules. Program development tasks are generally one-time costs with annual reviews and periodic updates.
- Employee and Vendor Training. The costs, including Personnel Costs, to develop, update, and conduct training on conveyance system inspection, cleaning, and disposal policies and practices. The costs include training of all claimant and vendor employees who perform tasks necessary to implement conveyance system cleaning and related functions during the life of the Permit.
- Parking Signage and Enforcement. The costs, including Personnel Costs, to purchase and install signage and to enforce parking prohibitions in areas where conveyance system cleaning is scheduled. This includes the purchase, installation, or replacement of signage to inform the public of

applicable parking restrictions, as well as their surveillance and enforcement.

- Employee Supervision and Management.
- Contracted Services.

Conveyance System Cleaning – Reporting (J.3.a.(3)(c) iv-viii)

- Reporting and Tracking Policies and Procedures. The costs, including Personnel Costs, to develop, update, and implement conveyance system inspection and cleaning reporting and tracking policies and procedures.
- Data Tracking and Analysis. The costs, including Personnel Costs, to develop, update, and implement data tracking and analysis methods and procedures. This includes the cost of employees to develop or maintain data tracking methods or systems, and to perform data tracking and analysis for reports to the Regional Water Quality Control Board. Also included are the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.
- Report Writing. Personnel Costs, to develop and write reports to the Regional Water Quality Control Board.
- Employee Supervision and Management.
- Contracted Services.

Educational Component (part D.5)¹⁵

- Program Development. The costs, including Personnel Costs, to develop an educational program for the target communities. This includes preparation, collaboration, and development of the educational program, training, policy development, establishment of procedures, and updates to the same. While program development tasks are generally one-time costs, the Permit requires measurable increases in knowledge and measurable changes in behavior, which necessitate annual reviews and periodic updates to the program; therefore these costs are also included.
- Reporting and Tracking Policies and Procedures. The costs, including Personnel Costs, to develop, update, and implement reporting and tracking policies and procedures.
- Data Tracking and Analysis. The costs, including Personnel Costs, to implement and update data tracking and analysis methods and procedures. This includes the cost of maintaining data tracking methods or systems and performing data tracking and analysis for reports to the Regional Water Quality Control Board. Also included are the costs of purchases of

¹⁵ Specifically parts D.5.a.(1); D.5.a.(2); D.5.b.(1)(a)(i) and (ii) for planning boards and elected officials; D.5.b.(1)(a)(iii) - (iv) for all target audiences; D.5.b.(1)(b)(iii) - (vi); D.5.b.(1)(c) and (d); D.5.b.(2) for project applicants, contractors, or community planning groups who are not developers or construction site owners; and D.5.b.(3);

and upgrades to equipment, hardware and software necessary to support data tracking, analysis and reporting of the reimbursable mandate in compliance with the Permit.

- Educational Materials. The costs, including Personnel Costs, to develop, produce and distribute educational materials and related reporting to document the efforts.
- Employee and Vendor Annual Training. The costs, including Personnel Costs, to develop, update, and conduct training of staff responsible for providing education to target communities. The costs include training of all claimant and vendor employees who perform tasks necessary to implement educational functions during the life of the Permit.
- Education of Target Audiences. The costs, including Personnel Costs, to implement and conduct educational programs for the target communities.
- Report Writing. Personnel Costs, to develop and write reports to the Regional Water Quality Control Board.
- Employee Supervision and Management.
- Contracted Services.

Watershed Urban Runoff Management Program (parts E.2.f and E.2.g)

- Working Body Support and Representation. The costs, including Personnel Costs, to organize and administer the Watershed Urban Runoff Management Program ("WURMP") Working Bodies.¹⁶ This includes all costs incurred 1) to perform the responsibilities of chairs¹⁷, co-chairs, and secretaries¹⁸, 2) attend and participate at meetings (including preparation and travel time), and 3) other activities required for planning, discussion, and coordination such as telephone calls, emails, and video conferencing. Required tasks typically also include, but

¹⁶ Permit Part E.2.g requires the collaborative development and implementation of a WURMP for each of the following Watershed Management Areas ("WMAs"): 1) Santa Margarita River; 2) San Luis Rey River; 3) San Dieguito River; 4) Penasquitos; 5) Mission Bay; 6) San Diego River; 7) San Diego Bay, and: 8) Tijuana River.

¹⁷ MOU Section I defines a Chair as follows: "Chair means presiding over and providing leadership and direction to a Working Body. This includes serving as a point of contact to external entities such as Regional Board staff, stakeholders, and industry groups, soliciting group input on and developing meeting content, facilitating meetings, and coordinating with the Secretary or Working Body Support staff to finalize work products for distribution to the Working Body. Chair responsibilities may also be divided between Co-Chairs."

¹⁸ MOU Section I defines a Secretary as follows: "Secretary means a person who takes responsibility for the records, correspondence, minutes or notes of meetings, and related affairs of a Working Body. This includes: maintaining group contact lists; preparing and sending out meeting notifications and agendas; arranging for meeting rooms and equipment; taking, preparing, and finalizing meeting minutes or notes; and, coordinating with the Chair or Working Body Support staff to organize and distribute work products to the Working Body."

are not limited to: 1) developing and distributing meeting agendas and notes, and 2) distributing, presenting, reviewing, and approving any of the Watershed Work Products described below.

- Collaborative Watershed Work Product Development. The costs, including Personnel Costs, to develop and update WURMP Work Products. This includes, but is not limited to, the following:
 - Watershed Urban Runoff Management Programs ("WURMPs"). A WURMP that includes all of the elements described in Permit Part E.2;
 - Watershed Activities Lists. Any Watershed Water Quality Activity¹⁹ or Watershed Education Activity²⁰ necessary to meet the requirements of Permit Part E.2.f.(2), to include any or all of the minimum information identified in Permit Part E.2.f.(3);
 - Annual WURMP Work Plans and Budgets. Any Work Plan or Budget developed to support the implementation of a WURMP;
 - WURMP Annual Reports. Both the annual report content provided by individual Watershed Copermittees and the completion of the consolidated WURMP Annual Report;
 - Watershed-Specific Standards. 1) Watershed reporting, assessment, and program data and information management standards; and 2) standards and approaches for watershed-level management of specific source categories or types. It applies to work products developed by individual Copermittees, their consolidation into comprehensive, watershed standards documents, and periodic updates as necessary for each;
 - Working Body Status Reports. Watershed Working Body status reports developed for dissemination to Copermittees and interested parties. Status reports typically describe Watershed Working Body activities and accomplishments, success in completing scheduled tasks, and key issues, activities, and tasks to be addressed; and
 - Other Watershed Work Products. Any Watershed Working Body Work Product not specifically identified above, but required to achieve or maintain compliance with Permit Part E.2.
- Watershed Implementation of Programs and Activities. The costs, including Personnel Costs, for the ongoing implementation of programs and activities funded and/or conducted at the watershed level. Watershed programs and activities include, but are not limited to:
 - Watershed Water Quality Activities
 - Watershed Education Activities
 - Other programs and activities required to implement the WURMP

¹⁹ Activities other than education that address high priority water quality problems in the WMA.

²⁰ Outreach and training activities that address high priority water quality problems in the WMA.

As applicable implementation costs associated with these programs and activities may include, but are not limited to:

- Materials production and distribution, equipment, supplies, fees, media purchases, and other costs associated with program implementation.
- Equipment. The actual cost of purchasing, renting, leasing, or contracting for vehicles and equipment to perform watershed activities mandated by the Permit. This includes one-time costs for vehicle and equipment purchases and corresponding equipment depreciation costs.
- Vehicle and Equipment Maintenance. Annual vehicle and equipment maintenance costs, including parts, supplies (e.g., water), and Personnel Costs. This also includes the cost of operating, renting, leasing, or contracting for facilities to store and maintain the vehicles and/or equipment and supplies.
- Fuel. The actual cost of the fuel for the vehicles and equipment performing watershed activities mandated by the Permit.
- Reporting and Tracking Policies and Procedures. The cost, including Personnel Costs, to develop, update, and implement each WMA activity and tracking policies and procedures.
- Data Tracking and Analysis. The cost, including Personnel Costs, to develop, update, and implement data tracking and analysis methods and procedures for reports to the Regional Water Quality Control Board. Also included are the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.
- Report Writing. Personnel Costs to develop and write reports to the Regional Water Quality Control Board.
- Employee and Vendor Annual Training. The costs, including Personnel Costs, to develop, update, and conduct training of staff responsible for developing or conducting WMA activities. The costs include training of all claimant and vendor employees who perform tasks necessary to implement these functions during the life of the Permit.
- Cost Accounting and Documentation. The costs, including Personnel Costs, to monitor and conduct cost accounting for all expenditures incurred in accordance with WURMP development and implementation. This includes all costs associated with documenting and monitoring expenditures incurred (e.g., developing and distributing budget balance and expenditure reports, claim submittal forms, etc.). It also includes the individual Copermittee costs of developing or maintaining data tracking methods or systems, and of performing data tracking and analysis (including staff training), as well as the costs of purchases and upgrades to equipment, hardware, and software necessary to support expenditure tracking, analysis, and reporting.

- External Coordination. The costs, including Personnel Costs, to coordinate WURMP Working Body content, issues, programs, and activities with external organizations and parties. This includes, but is not limited to, coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies.
- Employee Supervision and Management.
- Contracted Services.

All Copermittee [Regional] Collaboration (part L), Regional Urban Runoff Management Program (parts F.1, F.2, and F.3), and, Long Term Effectiveness Assessment (I.5)²¹

In general, part L requires the establishment of a regional management structure and the implementation of collaborative activities under that structure to "address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate [required] activities..." Part F requires Copermittee collaboration, but specifically focuses on the development, implementation, and updating of a Regional Urban Runoff Management Program ("RURMP").²² Part I.5 is similar to part F.3 in its requirement for collaboration on effectiveness assessment, but specifically requires the completion of a Long Term Effectiveness Assessment ("LTEA") in the fifth year of Permit implementation.

In practice, parts L, F, and I.5 are all carried out through the same regional structure, i.e., a defined set of Working Bodies²³ with responsibilities corresponding to specific subject areas (e.g., Regional Management Committee, Municipal Sources Workgroup, or Fiscal, Reporting, and Assessment Workgroup). With limited exception²⁴, all Copermittee collaboration and coordination is carried out through these Working Bodies. Working Body meetings typically address regional, jurisdictional, and

²¹ The Long Term Effectiveness Assessment must be submitted to the Regional Board no later than 210 days prior to the expiration of the Permit. It is a one-time requirement.

²² In particular parts F.1 through F.3 require 1) development and implementation of a Regional Residential Education Program, 2) development of a standardized fiscal analysis method, and 3) facilitation of the assessment of effectiveness of jurisdictional, watershed, and regional programs.

²³ MOU Section I defines Working Body as "... Committees, Subcommittees, Workgroups, Sub-workgroups, or any other group of Copermittees assembled to conduct work required by, for, or in furtherance of, compliance with the Permit." The MOU also identifies specific Working Bodies and the general and specific responsibilities of each. MOU Section, III.B.4.e also allows that the Copermittees' Regional Management Committee may "[e]stablish or modify Working Bodies to review specific issues, make recommendations, or conduct work in support of shared regional priorities or objectives."

²⁴ As Principal Permittee, the County of San Diego is also responsible to carry out the functions defined in part M (Principal Permittee Responsibilities). These functions are necessary to support the general mandates of parts F and L.

watershed issues or functions concurrently because a clear separation between them does not exist. The types of costs presented below therefore apply to parts L, F, and I.5.

- Regional Coordination of Copermittees and Regional Working Bodies. The costs, including Personnel Costs, to develop, distribute, review, and present work products necessary for regional planning, coordination, and collaboration amongst Copermittees and Regional Working Bodies. This includes written work products, presentations at meetings, and other means of coordination and review such as e-mail.
- Working Body Support and Representation.²⁵ The costs, including Personnel Costs, to organize and administer the Regional Working Bodies. This includes costs incurred 1) to perform the responsibilities of chairs, co-chairs, and secretaries, 2) attend and participate in meetings (including preparation and travel time), and 3) other activities required for planning, discussion, and coordination such as telephone calls, emails, and video conferencing. Required tasks typically also include, but are not limited to: 1) developing and distributing meeting agendas and notes, and 2) distributing, presenting, reviewing, and approving any of the Regional Work Products described below.
- Regional Work Product Development. The costs, including Personnel Costs, to develop and update any regional work product identified in an approved Regional Working Body Work Plan and Budget. This includes, but is not limited to, the following:
 - Working Body Status Reports. Regional Working Body status reports developed for dissemination to Copermittees and interested parties. Status reports typically describe Regional Working Body activities and accomplishments, success in completing scheduled tasks, and key issues, activities, and tasks to be addressed;
 - Annual Work Plans and Budgets. Both individual Regional Working Body Work Plans and Budgets and the Copermittees' Annual Regional Work Plan and Regional Shared Costs Budget;
 - Regional URMP Annual Reports. Both the annual report content provided by individual Regional Working Bodies and the completion of the consolidated Regional URMP Annual Report;
 - Regional Standards. 1) Regional reporting, assessment, and program data and information management standards; and 2) regional standards and approaches for the management of specific source categories or types. It applies to work products developed by individual Regional Working

²⁵ MOU Section I defines Representation as "... serving as a Copermittee point of contact [for a Working Body], and, as applicable, receiving, reviewing, and providing input on correspondence, meeting materials, and work products." It also defines Participation as "regularly attending meetings, participating in the development, review, and finalization of work products, and carrying out the responsibilities of the Working Body." For the purposes of the MOU and these Parameters and Guidelines, Participants are considered to be a subset of Representatives.

Bodies, their consolidation into comprehensive, regional standards documents, and periodic updates as necessary for each; and

- Other Regional Work Products. Any Regional Working Body Work Product not specifically identified above, but required by the Permit or necessary to achieve or maintain Permit compliance. This includes, but is not limited to:

- A formal agreement between the Copermittees that provides a management structure for meeting the requirements of the Permit.²⁶
- A Report of Waste Discharge.²⁷
- By-laws for the conduct of Copermittee Working Bodies.
- A standardized method and format for annually conducting and reporting fiscal analyses of urban runoff management programs.²⁸
- A Long Term Effectiveness Assessment ("LTEA") that addresses at least the following: review and assessment of jurisdictional, watershed, and regional program effectiveness (including analysis of outcome levels 1-6); assessment of the effectiveness of the Receiving Waters Monitoring Program in meeting its ability to answer the five core management questions, and; evaluation of the relationship of program implementation to changes in water quality. This may also include shared or individual Copermittee costs of collaboratively developing assessment methods and approaches, developing or maintaining data tracking methods or systems, and of performing data collection, tracking, management, analysis, and reporting (including staff training), as well as purchases and upgrades to equipment, hardware, and software necessary to support these data management functions.

- Regional Implementation of Programs and Activities. The costs, including Personnel Costs, for the ongoing implementation of regionally-funded and/or conducted programs. Also included are materials production and distribution, equipment, supplies, fees, media purchases, and other costs associated with program implementation. Regional programs and activities include, but are not limited to:

²⁶ An executed formal agreement must be submitted to the Regional Board no later than 180 days after adoption of the Permit. It is a one-time requirement that was initially satisfied through the July 24, 2007 amendment of the Copermittees' Dec. 3, 2001 Memorandum of Understanding ("MOU"). A new MOU was executed on January 29, 2008 and amended in June 2010.

²⁷ A Report of Waste Discharge must be submitted to the Regional Board no later than 210 days prior to the expiration of the Permit. It is a one-time requirement.

²⁸ The standardized fiscal method must be submitted to the Regional Board by January 31, 2009. It is a one-time requirement.

- Education of Residential Target Audiences
- Annual Regional Effectiveness Assessments
- Other Programs and Activities Included as Part of the Regional URMP
- Cost Accounting and Documentation. The costs, including Personnel Costs, to monitor and conduct cost accounting for all expenditures incurred in accordance with Regional Working Body Work Plans and Budgets and the Copermittees' Annual Regional Work Plan and Regional Shared Costs Budget. This includes all costs associated with documenting and monitoring expenditures (e.g., developing and distributing budget balance and expenditure reports, claim submittal forms, etc.) incurred pursuant to approved Regional Working Body Work Plans and Budgets. It also includes the individual Copermittee costs of developing or maintaining data tracking methods or systems, and of performing data tracking and analysis (including staff training), as well as the costs of purchases and upgrades to equipment, hardware, and software necessary to support expenditure tracking, analysis, and reporting.
- External Coordination. The costs, including Personnel Costs, to coordinate Regional Working Body content, issues, programs, and activities with external organizations and parties. This includes, but is not limited to, coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies.
- Employee Supervision and Management.
- Contracted Services.

Program Effectiveness Assessment (I.1 and I.2)

- Program Development. The costs, including Personnel Costs, to develop and annually update JURMP and WURMP effectiveness assessment methods, approaches, and documentation (e.g., policies, procedures, manuals and forms), as well as data management systems and tools necessary to support the implementation of effectiveness assessments.
- Program Implementation. The costs, including Personnel Costs, to conduct the annual JURMP and WURMP effectiveness assessments in accordance with the Copermittee's effectiveness assessment program and the requirements of Parts I.1 and I.2 of the Permit. Also included are the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting.
- Employee and Vendor Annual Training. The costs, including Personnel Costs, to develop, update, and conduct training of staff responsible for developing or conducting effectiveness assessments. The costs include training of all claimant and vendor employees who perform tasks necessary to implement assessment functions during the life of the Permit.
- JURMP and WURMP Modifications. The costs, including Personnel Costs, to modify the JURMP and WURMP based upon the results of effectiveness assessments in accordance with the requirements of Parts I.1.b and I.2.b of the Permit. This includes the development and

implementation of plans and schedules to address the identified modifications and improvements.

- Report Writing. Personnel Costs, to develop and write reports required by Parts I.1.c and I.2.c of the Permit.
- Employee Supervision and Management.
- Contracted Services.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursement activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee to perform the reimbursable activities, as specified in Section IV of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1, Salaries and Benefits, and A.2, Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3, Contracted Services.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget ("OMB") Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal ("ICRP") if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later.

However, if no funds are appropriated or no payments are made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING SAVING AND REIMBURSEMENTS

Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds and other state funds shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines adopted by the Commission, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the Test Claim. The administrative record, including the Statement of Decision, is on file with the Commission.

Discharge of Stormwater Runoff, 07-TC-09
California Regional Water Quality Control Board, San Diego Region,
Order No. R9-2007-001, (NPDES No. CAS0108758)

PROOF OF SERVICE BY MAIL
(C.C.P. 1013a and 2015.5(b))

I, NANCY BELTRAN, declare:

I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the mailing occurs; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On June 25, 2010, I caused to be served the following document(s): **PROPOSED PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557 AND TITLE 2, CALIFORNIA CODE OF REGULATIONS, SECTION 1183.12** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

SEE ATTACHED SERVICE LIST

I then sealed placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on June 25, 2010, at San Diego, California.

NANCY BELTRAN

SERVICE LIST

Ms. Paula Higashi, Executive Director Commission on State Mandates 980 Ninth Street, Suite 300 Sacramento, CA 95814 Tel. (916) 323-3562 Fax. (916) 445-0278	
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Mr. Jeff Carosone Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814 Tel. (916) 445-8913; Fax.	Ms. Dorothy Rice State Water Resources Control Board P.O. Box 2815 Sacramento, CA 95812-2815 Tel. (916) 341-5615; Fax. (916) 341-5621
Mr. Allan Burdick Maximus 3130 Kilgore Road, Suite 400 Rancho Cordova, CA 95670 Tel. (916) 471-5538; Fax. (916) 366-4838	Ms. Juliana F. Gmur Maximus 2380 Houston Avenue Clovis, CA 93611 Tel. (916) 485-8102; Fax. (916) 485-0111
Mr. Glen Everroad City of Newport Beach 3300 Newport Blvd. P.O. Box 1768 Newport Beach, CA 92659-1768 Tel. (949) 644-3127; Fax. (949) 644-3339	Ms. Annette Chinn Cost Recovery Systems, Inc. 705-2 East Bidwell Street, # 294 Folsom, CA 95630 Tel. (916) 939-7901; Fax. (916) 939-7801
Ms. Harmeet Barkschat Mandate Resource Services 5325 Elkhorn Blvd. # 307 Sacramento, CA 95842 Tel. (916) 727-1350; Fax. (916) 727-1734	Ms. Catherine George Hagan Senior Staff Counsel State Water Resources Control Board 9174 Sky Park Court, Suite 100 San Diego, CA 92123-4340

Commission on State Mandates

Original List Date: 7/8/2008
Last Updated: 3/22/2010
List Print Date: 07/06/2010
Claim Number: 07-TC-09
Issue: California Water Quality Control Board San Diego Region

Agenda Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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, § 1181.2.)

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Mr. Glen Everroad City of Newport Beach 3300 Newport Blvd. P. O. Box 1768 Newport Beach, CA 92659-1768	Tel: (949) 644-3127 Fax: (949) 644-3339
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Ms. Catherine George Hagan San Diego Regional Water Quality Control Board Office of Chief Counsel 9174 Sky Park Court, Suite 100 San Diego, CA 92123-4340	Tel: chagan@waterboards.ca.gov Fax:



September 3, 2010

Exhibit C

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

The Department of Finance (Finance) has reviewed the proposed parameters and guidelines (Ps & Gs) submitted by the claimants for Claim No. CSM-07-TC-09 "Discharge of Stormwater Runoff—Order No. R9-2007-0001."

Finance believes the proposed Ps & Gs lack adequate specificity related to the costs of the proposed activities, and, therefore, notes the following comments to be consistent with the scope of the approved mandate:

- The Ps & Gs should clearly indicate that the costs associated with implementing the higher level of service or new program are specifically those costs imposed by the test claim permit as opposed to those costs incurred under the previous permit. For example, the costs incurred for purchasing street sweeping equipment under the prior permit are not reimbursable under the test claim permit. Finance, however, notes that some costs associated with the street sweeping equipment may be attributable to the test claim permit (e.g., maintenance of the equipment).
- The Ps & Gs should distinguish the costs of activities (e.g., the purchase of parking signs used to enforce activities related to various programs within a local agency) alleged to be reimbursable from the costs of activities associated with programs not required by the test claim permit. The costs of the alleged activities must be required by the approved mandate program to be reimbursable. Those costs related to purchasing the parking signs, for example, should be prorated for the approved mandated program.
- The Ps & Gs should clearly identify the three categories of fees referenced as offsetting revenues in the statement of decision (see pages 132-133). Each applicable fee and its statutory authority should be listed in the boilerplate language of, "Section VII. Offsetting Saving and Reimbursements" on page 29, of the proposed Ps & Gs.

As required by the Commission's regulations, a "Proof of Service" has been enclosed indicating that the parties included on the mailing list, which accompanied your July 6, 2010 letter, have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

Received
September 3, 2010
Commission on
State Mandates

If you have any questions regarding this letter, please contact Carla Shelton, Associate Finance Budget Analyst at (916) 445-8913.

Sincerely,



NONA MARTINEZ
Assistant Program Budget Manager

Enclosure

ICC: MARTINEZ, FEREBEE, GEANACOU, CAROSONE, SHELTON, FILE

I:\Mandates (other issues)\Pending\Water Board Test Claims\San Diego-07-TC-09 Discharge of Stormwater Runoff\Waterboard San Diego Ps&Gs Comments.doc

Enclosure A

DECLARATION OF CARLA SHELTON
DEPARTMENT OF FINANCE
CLAIM NO. CSM-07-TC-09

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

September 3, 2010
at Sacramento, CA

Carla Shelton
Carla Shelton

PROOF OF SERVICE

Test Claim Name: Discharge of Stormwater Runoff - Order No. R9-2007-0001
Test Claim Number: CSM-07-TC-09

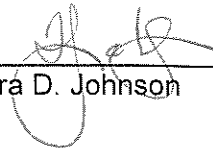
I, the undersigned, declare as follows:

I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8 Floor, Sacramento, CA 95814.

On September 3, 2010, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8 Floor, for Interagency Mail Service, **as addressed on the attachment** and as addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

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 3, 2010 at Sacramento, California.



Tamara D. Johnson

Commission on State Mandates

Original List Date: 7/8/2008
Last Updated: 7/16/2010
List Print Date: 07/20/2010
Claim Number: 07-TC-09
Issue: California Water Quality Control Board San Diego Region

Mailing Information: Final Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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, § 1181.2.)

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Mr. Jay Lal State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: (916) 324-0256 Fax: (916) 323-6527
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Received
September 3, 2010
Commission on
State Mandates

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Ms. Catherine George Hagan San Diego Regional Water Quality Control Board Office of Chief Counsel 9174 Sky Park Court, Suite 100 San Diego, CA 92123-4340	Tel: chagan@waterboards.ca.gov Fax:



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>



Arnold Schwarzenegger
Governor

Exhibit D

VIA HAND DELIVERY

September 13, 2010

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814



Dear Ms. Higashi:

Re: **Proposed Parameters and Guidelines**

Discharge of Stormwater Runoff, 07-TC-09

California Regional Water Quality Control Board, San Diego Region Order No. R9-2007-001, (NPDES No. CAS0108758) Waste Discharge Requirements for Discharges of Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority, adopted on January 24, 2007

Comments of the State Water Resources Control Board and the California Regional Water Quality Control Board, San Diego Region, on Proposed Parameters and Guidelines

By letter dated July 6, 2010, the Commission on State Mandates (Commission) notified the Claimants in the above proceeding that the proposed parameters and guidelines filed June 28, 2010, are complete and timely filed. The Commission's notice invited state agencies to submit comments on or before August 5, 2010. The Commission granted the State Water Resources Control Board's (State Water Board) and San Diego Regional Water Quality Control Board's (San Diego Water Board) request for an extension of time in which to file comments until September 13, 2010. Please accept for filing an original and two copies of the joint comments of the State Water Board and San Diego Water Board on the proposed parameters and guidelines in the above-referenced Test Claim proceeding. As required by the Commission's regulations, the Water Boards enclose a proof of service indicating that the parties included on the Commission's mailing list for this proceeding have been provided with copies of this letter via either United States mail or electronic mail, as appropriate.

Sincerely,

Catherine George Hagan
Senior Staff Counsel

cc: Service List for 07-TC-09
Enclosure



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Office of Chief Counsel
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P.O. Box 100, Sacramento, California 95812-0100
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Arnold Schwarzenegger
Governor

VIA HAND DELIVERY

September 13, 2010

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

Re: **Proposed Parameters and Guidelines**

Discharge of Stormwater Runoff, 07-TC-09

California Regional Water Quality Control Board, San Diego Region Order No. R9-2007-001, (NPDES No. CAS0108758) Waste Discharge Requirements for Discharges of Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority, adopted on January 24, 2007

Comments of the State Water Resources Control Board and the California Regional Water Quality Control Board, San Diego Region, on Proposed Parameters and Guidelines.

The State Water Resources Control Board (State Water Board) and San Diego Regional Water Quality Control Board (San Diego Water Board) (collectively Water Boards) hereby submit the following joint comments on the Test Claimants' Proposed Parameters and Guidelines in the above-referenced Test Claim proceeding.

I. INTRODUCTION

In its Statement of Decision, issued in Test Claim 07-TC-09 on March 30, 2010, the Commission on State Mandates (Commission) determined that numerous provisions of the San Diego Water Board's municipal storm sewer system (MS4) discharge permit (Order No. R9-2007-0001 (NPDES Permit No. CAS0108758)) (San Diego Permit), are state mandates subject to reimbursement by the State of California. In their Test Claim, the Claimants¹ estimated the cost of permit compliance at over \$50 million during the five year permit term. The Water Boards have reviewed the Proposed Parameters and Guidelines, focusing in particular on section IV, Reimbursable Activities, and offer the following comments for Commission consideration.

¹ The Claimants are 19 of 21 San Diego Permit copermittees, including the County of San Diego and 18 cities within the county. The Water Boards use the terms "Claimants" and "copermittees" interchangeably in these comments.

II. GENERAL COMMENTS

A. Claimants Have Not Established The Activities and Costs Associated with the Existing Level of Service in the Prior Permit.

The Water Boards generally are concerned that the Claimants have not made it clear that they will limit their requests for reimbursement to only that level of activities required to implement reimbursable permit provisions² that exceeds the level of activities required to comply with the prior permit the San Diego Water Board issued to the Claimants (2001 Permit or Prior Permit). "Costs mandated by the state" are defined as "any increased costs which a local agency or school district is required to incur after July 1, 1980 as a result of . . . any executive order implemented which mandates a new program or higher level of service. . . ." (Gov. Code § 17514.) "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.[fn] A 'higher level of service' occurs when the new 'requirements were intended to provide an enhanced service to the public.' [Citation omitted.]" (Statement of Decision, p. 32.) Therefore, "[t]o 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.[fn]" (Id., p. 37.) In their Proposed Parameters and Guidelines, the Claimants have not adequately described the activities and associated increased costs required to perform the higher level of service compared to the 2001 permit and should be required to do so.

B. Need for Clarification Regarding Personnel Costs.

The Claimants identify personnel costs as those costs associated with carrying out various reimbursable functions and note that "[u]nless otherwise stated in these Parameters and Guidelines, 'Personnel Costs' will be determined using the claimant's loaded hourly rates; all other costs will be actual and will include only that part of the cost that is related to the reimbursable mandate." (Proposed Parameters and Guidelines, p. 15, fn. 12.) First, this phrase fails to adequately describe what is meant by the term "loaded personnel costs." Under section V., Claim Preparation and Submission (Proposed Parameters and Guidelines, p. 26), it appears that Claimants intend to factor only salary and benefits into Personnel Costs. The Claimants should clarify whether "loaded hourly rates" is limited to a calculation of salaries and benefits or whether instead Claimants are factoring in some amount of overhead and administrative costs. Second, Claimants must clarify the reference in footnote 12, mentioned above, so that it is clear that in addition to pro-rating "all other costs" to carry out reimbursable provisions, they will also similarly pro-rate "loaded personnel costs." The adopted Parameters and Guidelines must be clear that to the extent an employee or vendor is performing work associated with non-permit related activities, or unreimbursable permit-related provisions, those costs are not reimbursable and must be excluded in a transparent manner.

² The Water Boards refer to mandated, reimbursable provisions as "reimbursable provisions" or "reimbursable activities," or with similar terminology, and evaluate the Proposed Parameters and Guidelines according to the Commission's Statement of Decision. The Water Boards' use of that phrase or similar phrases should not be construed as Water Board agreement with the Commission's Statement of Decision finding that the provisions are reimbursable and are not in fact federal mandates.

C. Unspecified Activities and Associated, Unspecified Costs.

Throughout their discussion of reimbursable activities, the Claimants identify general categories of activities but qualify the general descriptions with phrases such as "including but not limited to" or "costs, *including* personnel costs." (See Proposed Parameters and Guidelines, e.g., Street Sweeping Operations and Reporting, pp. 15-16, Conveyance System Cleaning and Reporting, pp. 17-18, Education Component, p. 18, and Watershed Urban Runoff Management Programs, pp. 19-22 (emphasis added).) The Claimants make these vague references in an apparent effort to retain flexibility to later claim as yet unidentified activities for reimbursement.

The Water Boards are not able to comment on unspecified activities and their related costs, and as a result, are not able to evaluate whether the Claimants have indeed identified the most reasonable method of complying with reimbursable permit provisions. Instead of reliance upon phrases such as "including but not limited to," or "costs, including Personnel Costs," without further specifying these costs, the Claimants must be required to describe those actual activities or categories of costs necessary to carry out the reimbursable provisions for which they expect to be reimbursed.

The purpose of the adopted Parameters and Guidelines is to establish the framework for identification of activities for which associated costs will be reimbursed. The Adopted Parameters and Guidelines are required to include: "A description of the specific costs and types of costs that are reimbursable, including one-time costs and on-going costs, and a description of the most reasonable methods of complying with the mandate. 'The most reasonable methods of complying with the mandate' are those methods not specified in statute or executive order that are necessary to carry out the mandated program." (Cal. Code Regs., tit. 2, § 1183(a)(4).) The San Diego Permit was adopted on January 24, 2007. The Claimants were required to submit estimated costs of complying with the provisions challenged in the Test Claim over the permit term, and were also required to submit actual cost information for Fiscal Year 2008-2009 when they commented on the Final Staff Analysis of the Test Claim. The Claimants submitted declarations attesting to costs incurred for personnel, contracts and equipment for many if not most of the reimbursable provisions. In this case, not only have the Claimants had over three and one-half years of experience implementing activities they believe are necessary to comply with the reimbursable provisions, they should by now be in a position to adequately describe anticipated changes to those activities over the remainder of the five year term.

Despite the underlying purpose of the Adopted Parameters and Guidelines, the Claimants have not adequately described the specific costs or categories of costs for which they will seek reimbursement to allow the Water Boards to comment fully on the Proposed Parameters and Guidelines. The State should not be expected to reimburse the Claimants for unspecified or vague activities that the Claimants will later claim were necessary and represent the most reasonable method of implementing the reimbursable permit provisions. The Commission should require the Claimants to provide greater specificity in the activities they propose for reimbursement.

D. Vendor Costs.

Vendor training is a common cost category in the Claimants' description of activities they assert are necessary to carry out reimbursable provisions. The Water Boards understand that some or all of the Claimants may contract out to vendors some of their reimbursable activities. And while the Water Boards agree that to the extent a vendor is carrying out a reimbursable activity the associated costs are appropriately recoverable, the Water Boards disagree that training costs for the vendors are appropriate for recovery. To the extent contractors bid on and are successfully selected to perform reimbursable, permit-related work, the Claimants should expect that the vendors are sufficiently well-versed, and perhaps even more expert than the Claimants in some cases, in what is required to carry out the services they were hired to provide. Typically, a vendor bids on a Scope of Work in which the copermittee has outlined the time, place, and manner by which they expect the contracted activity, such as street sweeping, to be performed. Unless Claimants demonstrate otherwise, the Commission should assume that the vendors' costs to perform reimbursable activities already include the vendors' costs to educate themselves so that they are meeting the Claimants' needs and expectations. Similarly, to the extent that a vendor's costs include costs such as for fuel, vehicles or materials storage, for example, the Claimants must accurately account for and pro-rate those costs in their reimbursement requests.

E. Computer, Hardware and Software Purchases and Upgrades.

Throughout their Proposed Parameters and Guidelines, Claimants have identified the costs of "purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate." (Proposed Parameters and Guidelines, e.g., Street Sweeping Reporting, p. 16, Conveyance System Cleaning - Reporting, p. 18, Education Component, pp. 18-19, Watershed Implementation of Programs and Activities, p. 21, Regional Collaboration, RURMP and Long Term Effectiveness Assessment, pp. 24-25, and Program Effectiveness Assessment, p. 25.) Adopted Parameters and Guidelines must limit Claimants to reimbursement for costs of equipment, hardware and software purchased after January 24, 2007. And Claimants must be required to demonstrate why the purchases and upgrades are necessary to comply with the reimbursable provisions but were not necessary to comply with the prior permit. Claimants must also be required to demonstrate how they intend to exclude, in a transparent manner, the percentage of costs of equipment and upgrades used for unreimbursable purposes. It is insufficient for the Claimants merely to promise they will only include reimbursable costs in their reimbursement requests; they must establish how they will demonstrate this commitment to the Commission and the State in a verifiable manner.

III. SPECIFIC COMMENTS

The Water Boards' specific comments, below, follow the order of reimbursable provisions and activities set forth in the Proposed Parameters and Guidelines. In an effort to avoid undue repetition of comments, the Water Boards' refer to General Comments, above, and cross-reference to other specific comments, as applicable.

A. Street Sweeping (part D.3.a.(5)) (Proposed Parameters and Guidelines, pp. 15-16).

- Street Sweeping Operations. See General Comment B.
- Equipment/Equipment Maintenance. Claimants identify for reimbursement "[t]he actual cost of purchasing, leasing, or contracting for equipment to perform street sweeping and related functions. This includes one-time costs for equipment purchases and corresponding equipment depreciation costs." Similarly, Claimants identify "[a]nnual equipment maintenance costs, including parts, supplies (e.g., water), and Personnel Costs. This also includes the cost of operating, renting, leasing, or contracting for facilities to store and maintain equipment and supplies." (Proposed Parameters and Guidelines, p. 15.) To the extent copermittees contract with vendors to perform street sweeping, the Water Boards would expect equipment and equipment maintenance costs to be included in the contract costs. (See General Comment D.) Moreover, to the extent Claimants already owned street sweeping equipment prior to issuance of the San Diego Permit, any cost to purchase that equipment is not reimbursable. (See General Comment A.) Finally, Claimants identify as reimbursable actual costs of equipment and maintenance "to perform street sweeping *and related functions*." (Proposed Parameters and Guidelines, p.15, emphasis added.) Claimants are not entitled to reimbursement for unspecified "related" functions and must identify what those functions are so that the Water Boards may evaluate whether the related functions are necessary to carry out the mandated provisions in the permit. (See General Comment C.)
- Materials Disposal. To the extent copermittees contract with vendors to perform street sweeping, the Water Boards would expect materials disposal costs to be included in the contract costs. Claimants may not recover duplicate costs for materials disposal or storage. (See General Comment D.)
- Fuel. To the extent copermittees contract with vendors to perform street sweeping, the Water Boards would expect fuel costs to be included in the contract cost. (See General Comment D.)
- Program Development. It is unclear what the Claimants mean by "the costs, *including* Personnel Costs, to develop and update the claimant's *internal* street sweeping program, including specific criteria, policies, procedures, manuals, and forms." (Proposed Parameters and Guidelines, p. 15, (emphasis added).) In addition, the Water Boards do not understand what the Claimants mean by "internal" street sweeping program and so cannot evaluate whether it is a necessary activity in order to carry out mandated permit provisions. (See General Comment C.)
- Employee and Vendor Training. As previously mentioned, (see General Comment D, above) the Commission should assume that vendors are adequately trained prior to bidding for the contracted work. In addition, the Claimants assert it is reasonable to recover costs including "training of all claimant and vendor employees who perform tasks necessary to implement street sweeping and related functions during the life of the permit." As with equipment/equipment maintenance categories, the Claimants should

clarify what they mean by "related functions" before such terminology is incorporated into Adopted Parameters and Guidelines.

- Parking Signage and Enforcement. It is unclear what Claimants mean by "costs," where they say "costs, including Personnel Costs, to purchase and install street sweeping signage and to enforce parking prohibitions in areas where street sweeping is scheduled. This includes the purchase, installation, or replacement of signage to inform the public of applicable parking restrictions, as well as their surveillance and enforcement." (Proposed Parameters and Guidelines, p. 16.) The Water Boards are left to guess what the costs in addition to personnel costs and costs for purchase, installation or replacement of signs the Claimants believe they may incur and for which they expect to be reimbursed. (See General Comment C.) The Water Boards also would expect the Claimants to specify costs for the number of signs that have been purchased and installed to date in order to comply with the requirements of the San Diego Permit beyond what was purchased or replaced in compliance with the prior permit. The State should not be expected to reimburse the Claimants for previously purchased signs or to replace signs that may have been inadequately maintained under the prior permit. (See General Comment A.) Moreover, to the extent that a portion of the street sweeping signage and enforcement is not directly associated with storm water pollution prevention but is instead performed for health and safety or aesthetic reasons, the Claimants should not receive reimbursement for those costs.

It is equally important that the Claimants make clear how they will keep track of and exclude costs for parking enforcement related to the street sweeping requirements to ensure that the State is not reimbursing them for unrelated parking enforcement such as for illegal parking in construction zones or violations of time-restricted parking. It is unlikely, although possible, that the Claimants would have personnel monitoring and surveilling only cars parked in violation of street sweeping restrictions while ignoring all other types of parking violations. Allowing personnel to perform multiple functions is likely the more efficient use of the Claimants', and thereby the State's funds, than to have personnel devoted exclusively to enforcement of street sweeping parking restrictions, but it remains unclear how the costs will be accounted for and segregated so that it is transparent that the Claimants are only reimbursed for permit-related, mandated, functions.

Finally, Claimants should be required to offset any reimbursement for street sweeping parking signage enforcement with revenues received from that enforcement.

- Employee Supervision and Management. The Water Boards do not dispute that supervisory and management time spent overseeing personnel directly responsible for performing mandated work is appropriately recoverable. The Water Boards do, however, think the Commission should require the Claimants to clearly demonstrate how their supervisors' and managers' time is spent supervising employees' work on only mandated provisions. To the extent the supervisors' or managers' work is not directly related to overseeing mandated work, or serves dual or multiple purposes, the Claimants must make transparent how they will determine the amount of supervisors' and managers' time directly related to mandated work.

- Contracted Services. See General Comment D, above. Further, Claimants should only be allowed to include costs of preparing requests for bids, negotiating and drafting third party contracts, and subsequently administering the service contracts if the Claimants can demonstrate that these costs, together with the costs for the contracted services, are the most cost-effective and reasonable manner of complying with the street sweeping requirements in lieu of performing the services with employees. The proposed parameters and guidelines fail to mention any cost-benefit analysis on the part of the Claimants in deciding whether to contract for or perform services in-house.

B. Street Sweeping - Reporting (part J.3.a.(3)-(c)x-xv) (Proposed Parameters and Guidelines, p. 16).

- Reporting and Tracking Policies and Procedures. See General Comment C, discussing insufficient detail provided for types of costs other than Personnel Costs.
- Data Tracking and Analysis. See General Comment C, discussing insufficient detail provided for types of costs other than Personnel Costs. See also General Comment E, above, expressing the Water Boards' concern that the costs of purchases and upgrades of equipment, hardware and software must be limited to that necessary to comply with the San Diego Permit, and must be transparently segregated into use for reimbursable and unreimbursable activities.
- Report Writing. See General Comments B and E.
- Employee Supervision and Management. See Specific Comment, III.A.
- Contracted Services. See Specific Comment, III.A.

C. Conveyance System Cleaning (D.3.a.(3)) (Proposed Parameters and Guidelines, pp. 17-18).

In general, the copermitees were required by the prior permit to clean and maintain the conveyance systems. In fact, the Commission's Statement of Decision finds that several provisions related to conveyance system cleaning are not new programs or higher levels of service, and are therefore not state mandates subject to reimbursement. Specifically, the Commission finds that the following provisions are the same as in the prior permit: (1) Annual inspection of MS4 facilities (D.2.a(3)(b)(i)); (2) Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a(3)(b)(iv)); (3) Proper disposal of waste removed pursuant to applicable laws (D.3.a(3)(b)(v)); and (4) Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a(3)(b)(vi)). (Statement of Decision, p. 61.) The Commission also found that part D.3.a.(3)(b)(ii), which allows less frequent inspection and cleaning after two years of inspections, is not a new program or higher level of service and in fact provides Claimants with flexibility to do less intensive work than under the prior permit. (Ibid.) In contrast, the Commission found that part D.3.a.(3)(b)(iii) is a new program or higher level of service because it requires claimants to clean in a timely manner "[a]ny 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." (Statement of Decision, pp. 61-62.) 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." (Id., p. 62.)

While most of the conveyance system cleaning requirements were present in the prior permit, and therefore were not found to be reimbursable mandates, the Claimants appear to be including costs associated with these activities in their Proposed Parameters and Guidelines. To the extent costs are incurred to comply with the 2001 permit standard, those costs are not reimbursable and must not be included in the Proposed Parameters and Guidelines. Only to the extent that the Copermittees incur costs beyond those they incurred to comply with the 2001 permit should they be reimbursed by the State.

- Conveyance System Inspection. Claimants were already required to inspect conveyance systems annually under the prior permit. To the extent Claimants inspect MS4 facilities only annually under the San Diego Permit, the costs of the annual inspection, personnel and associated costs, are not reimbursable. Similarly, for facilities that are inspected more frequently than annually, the costs of one inspection of each facility occurring within each 12 month period are not reimbursable. See also General Comment C, regarding lack of specificity in identification of costs in addition to Personnel Costs.
- Conveyance System Cleaning Operations. See General Comment C, regarding lack of specificity in identification of costs in addition to Personnel Costs.
- Vehicles and Equipment. To the extent that vehicles or other equipment is purchased for materials disposal, these costs are not reimbursable because materials disposal in compliance with applicable laws was required by the prior permit. See discussion under "Materials Disposal," below. In addition, see General Comment A, above, indicating that any allowed costs must clearly be incurred in this permit term, and not already included in the cost of contracts to the extent conveyance system cleaning and inspection operations are contracted out. It is unclear what types of equipment (for example, shovels, rakes or power washers) the Claimants would need to purchase to clean their conveyance systems that they did not already own prior to adoption of the San Diego Permit. Moreover, the Claimants have not made clear that the cost of vehicles, equipment and maintenance and storage thereof will be transparently pro-rated to the extent some or all of it is used for dual or multiple purposes. It is questionable how the Claimants will be able to specify the exact amount of maintenance of a piece of equipment attributable to compliance with reimbursable permit provisions as opposed to maintenance costs for unreimbursable uses. Yet, to be reimbursed, the Claimants must make this demonstration or forfeit reimbursement for equipment maintenance. If the equipment, vehicles and supplies are solely dedicated to conveyance system cleaning, it is likewise questionable whether this single purpose use is the most reasonable method of complying with the mandate. (See Cal. Code Regs, tit. 2, § 1183.1(a)(4).)
- Vehicle and Equipment Maintenance. See immediately preceding comment.

- Materials Disposal. Claimants were required to properly dispose of wastes removed from conveyance systems under the 2001 permit. Therefore, costs for materials disposal identified in the Proposed Parameters and Guidelines are not reimbursable. (See General Comment A.) In the event that the Commission disagrees and allows some portion of materials removal to be reimbursable, the Claimants must describe these costs with greater specificity. (See General Comment C.) In addition, if costs of operating, renting, leasing, or contracting for facilities to store or dispose of collected materials are claimed, the Water Boards question whether the rented facilities to store material from the Conveyance System Cleaning Operations also serve a unreimbursable purpose or serve a duplicative purpose (i.e., it is possible that materials from street sweeping operations also are stored in these same facilities.) If so, the Claimants must ensure they avoid seeking duplicate reimbursement if the Commission allows some or all of these costs.
- Fuel. To the extent copermittees contract with vendors to perform conveyance system inspections and cleaning and those costs are allowed by the Commission, the Water Boards would expect fuel costs to be included in the contract cost. (See General Comment D.)
- Program Development. In this category, Claimants identify "[t]he costs, including Personnel Costs, to develop and update the claimant's internal conveyance system cleaning program" See General Comment C, above, regarding lack of specificity in identification of what costs, other than personnel costs, Claimants may seek to recover to comply with this permit requirement. Second, it is unclear what "internal conveyance system cleaning program" means. The Claimants should be required to provide specificity to this term to allow meaningful evaluation by the Water Boards.
- Employee and Vendor Training. See General Comment C, above, regarding lack of specificity in identification of what costs, other than Personnel costs, Claimants may seek to recover to comply with this activity. See also General Comment D in which the Water Boards believe vendor training costs are not recoverable.
- Parking Signage and Enforcement. It is unclear what type of parking signage is needed for conveyance system cleaning. Claimants do not specify whether the conveyance system inspection and cleaning parking signage is the same or different from the street sweeping signage. If one sign communicates two messages, the cost of the sign should be reimbursed only once. To the extent that enforcement of parking signage overlaps with enforcement of other forms of parking restrictions unrelated to the San Diego Permit, the Claimants should be required to provide transparent segregation of costs so that the State can confirm that it is not improperly compensating the Claimants for unreimbursable costs. Finally, as with Street Sweeping enforcement, Claimants should be required to offset any reimbursement for street sweeping parking signage enforcement with revenues received from that enforcement.
- Employee Supervision and Management. See Specific Comment, III.A., Employee Supervision and Management and see also General Comment B.

- Contracted Services. See Specific Comment III.A., Contracted Services and see also General Comment D.

D. Conveyance System Cleaning- Reporting (J.3.a.(3)(c)(iv-viii) (Proposed Parameters and Guidelines, p. 18).

- Reporting and Tracking Policies and Procedures. See General Comment C, above, regarding lack of specificity in identification of what costs, other than Personnel Costs, would be required to perform this activity. Claimants should also be required to show why 2001 permit requirements for tracking policies and procedures are no longer adequate to meet San Diego Permit requirements. (See General Comment A, above, regarding higher level of service.)
- Data Tracking and Analysis. See General Comment C, above, regarding lack of specificity in identification of what costs, other than Personnel Costs, would be required to perform this activity. Claimants have not identified types of upgrades or why they are necessary to perform reimbursable activities. In addition, see General Comment E, above, concerning documentation of the need for purchases and upgrades to equipment, hardware and software exclusively to support the San Diego Permit and General Comment E, concerning the need for Claimants to demonstrate in a transparent fashion how they will segregate costs of computer purchases and upgrades associated only with reimbursable activities. The Claimants are sophisticated municipal entities who the Water Boards would expect have computers that are used for many purposes. To the extent some computers or printers are used to comply with reimbursable permit provisions but also for other purposes, the Claimants should be required to demonstrate in a transparent fashion what percentage is used or attributable exclusively to reimbursable permit provision. The Claimants must also demonstrate what computer equipment and upgrades are necessary to comply with the San Diego Permit above and beyond the prior permit. (See General Comment A.)
- Report Writing. Claimants must pro-rate the costs of report writing to exclude unreimbursable activities. (See General Comments C and E.)
- Employee Supervision and Management. See Specific Comment III.A., Employee Supervision and Management and see also General Comment B.
- Contracted Services. See Specific Comment III.A., Contracted Services and see also General Comment D, above.

E. Educational Component (part D.5.) (Proposed Parameters and Guidelines, p. 18).

- Program Development. See General Comment C, above, regarding a lack of specificity in identification of activities and associated costs, other than Personnel Costs, to develop an educational program for target communities. Claimants must pro-rate personnel and "other costs" to ensure that they are reimbursed only for costs directly associated with implementation of reimbursable provisions. See also General Comment A regarding the need to determine what activities were already being performed and do

not represent a higher level of service. In addition, to the extent the Program Development incorporates hydromodification management plan or low impact development elements, the copermittees must transparently segregate those costs to avoid seeking improper reimbursement.

- Reporting and Tracking Policies and Procedures. See immediately preceding comment.
- Data Tracking and Analysis. See Specific Comment III.D, Data Tracking and Analysis.
- Educational Materials. See General Comment C, above, regarding a lack of specificity in identification of activities and associated costs, other than Personnel Costs, to develop educational materials for target communities. Claimants must pro-rate personnel and "other costs" to ensure that they are reimbursed only for costs directly associated with implementation of reimbursable provisions. To the extent the education materials incorporate hydromodification management plan or low impact development elements, the copermittees must transparently segregate those costs to avoid seeking improper reimbursement. (See also General Comment B.)
- Employee and Vendor Annual Training. See General Comments C and D, above.
- Education of Target Audiences. See General Comment C, above.
- Report Writing. Claimants must pro-rate the costs of report writing to exclude unreimbursable activities. (See General Comments C and E.)
- Employee Supervision and Management. See Specific Comment III.A., Employee Supervision and Management. See also General Comment B.
- Contracted Services. See Specific Comment III.A., Contracted Services. See also General Comment D.

F. Watershed Urban Runoff Management Program (parts E.2.f. and E.2.g.) (Proposed Parameters and Guidelines, pp. 19-22).

With regard to many of the categories under the heading Watershed Urban Runoff Management Program (WURMP), identified in the Proposed Parameters and Guidelines, the Claimants describe costs, including Personnel Costs, associated with organizing and administering the WURMP Working Bodies. In describing these costs, Claimants use vague phrases including, "such as telephone calls, emails, and video conferencing," and "[r]equired tasks typically also include, but are not limited to:" (See Proposed Parameters and Guidelines, e.g., pp. 19-20.) With regard to the Collaborative Watershed Work Product Development, Claimants again describe a variety of tasks comprising "WURMP Work Products" as "includes, but is not limited to" (Ibid.) The Claimants also set forth what appears to be a catch-all category of other watershed work products, described as "Any Watershed Working Body Work Product not specifically identified above, but required to achieve or maintain compliance with Permit Part E.2." (Id., p. 20.) Similarly, Claimants propose the catch-all phrase "Other programs and

activities required to implement the WURMP." (Ibid.) These are examples of similar phrasing that appears throughout the WURMP and other sections of the Proposed Parameters and Guidelines.

As discussed in General Comment C, above, the Water Boards are concerned with the lack of specificity in the Claimants' uses of the vague phrases concerning the WURMP. Claimants are nearing the end of the fourth year of San Diego Permit implementation and should be in a position to describe the tasks necessary to perform the WURMP requirements with greater specificity and to describe anticipated changes in these activities over the remainder of the permit term so that the Water Boards can evaluate whether the tasks are necessary to implement the permit provisions and whether the tasks represent the "most reasonable methods of complying with the mandate." (See Cal. Code Regs., tit. 2, § 1183.1(a)(4).) Moreover, for the categories and subcategories Claimants identify, see also General Comment D regarding vendor training and General Comment E, regarding computer, hardware and software upgrades.

In an effort to avoid repetition, the Water Boards identify below, as applicable, only those additional specific comments associated with some of the identified activities in the Proposed Parameters and Guidelines.

- Watershed Implementation of Programs and Activities. [¶] . . . [¶]
 - Vehicle and Equipment Maintenance. Among the specific implementation costs Claimants do identify for WURMP provisions are for the categories "Equipment" and "Vehicle and Equipment Maintenance." Claimants propose parameters and guidelines that will allow them to be reimbursed for the "actual cost of purchasing, renting, leasing, or contracting for vehicles and equipment to perform watershed activities mandated by the permit." (Proposed Parameters and Guidelines, p. 21.) They also will seek reimbursement for the costs of facilities to store and maintain the vehicles and/or equipment and supplies. (Ibid.) The activities Claimants describe under the WURMP provisions do not appear to require vehicles to implement, other than perhaps to attend meetings. It is unlikely that cars have been purchased and are used exclusively for WURMP activities. If they are dedicated to WURMP activities, it is questionable whether such single-use purchases are the most reasonable methods of complying with the mandate from a cost and efficiency standpoint. The Claimants must demonstrate with specificity what activities they undertake to implement WURMP activities that require vehicles and must also segregate costs associated with other uses of the vehicles so that it is transparent what percentage of vehicle purchase and maintenance costs are reasonably attributable to WURMP activities.

G. All Copermitttee [Regional] Collaboration (part L), Regional Urban Runoff Management Program (parts F.1., F.2., and F.3.), and Long Term Effectiveness Assessment (I.5.) (Proposed Parameters and Guidelines (pp. 22--25)).

Claimants use similar, if not identical, qualifying language as in the WURMP discussion to describe activities in the Regional Collaboration discussion. For example, they use the phrase

"costs, including Personnel Costs[,] and for Regional Work Product Development, costs "to develop and update any regional work product identified in an approved Regional Working Body Work Plan and Budget. This includes, but is not limited to, the following" (Proposed Parameters and Guidelines, p. 23.) They also identify as "Other Regional Work Products" "Any Regional Working Body Work Product not specifically identified above, but required by the Permit or necessary to achieve or maintain Permit compliance. This includes, but is not limited to" (Id., p. 24.)

As with the Water Boards' comments on the WURMP activities and in General Comment C, above, the Water Boards are concerned with the lack of specificity in the Claimants' use of the vague phrases cited above for Regional Collaboration and the Regional Urban Runoff Management Program. Claimants are nearing the end of the fourth year of San Diego Permit implementation and should be in a position to describe the regional tasks they are performing with greater specificity and to describe anticipated changes to these activities for the remainder of the permit term so that the Water Boards can evaluate whether the tasks are necessary to implement the permit provision and whether the tasks represent the "most reasonable methods of complying with the mandate." (See Cal. Code Regs., tit. 2, § 1183.1(a)(4).) Moreover, for the additional categories and subcategories identified in the Proposed Parameters and Guidelines, see also General Comment D, regarding vendor costs and Comment E, regarding computer, hardware and software upgrades. The Water Boards' general comments on those topics are equally applicable to the Regional Collaboration discussion.

The Water Boards incorporate General Comments C, D., and E in the comments on the regional activities and in an effort to avoid repetition, the Water Boards identify below, as applicable, only those additional specific comments associated with some of the identified activities in the Proposed Parameters and Guidelines.

- Regional Work Product Development. [¶] . . . [¶]
 - Other Regional Work Products includes but is not limited to: [¶] . . . [¶]
 - A Report of Waste Discharge.

The Water Boards specifically object to identification of the Report of Waste Discharge (ROWD) as a Regional Work Product required by reimbursable provisions of the San Diego Permit. The requirement to submit a ROWD is set forth in the San Diego Permit at section J.2., but that requirement merely reflects the legal requirement that exists in federal law to submit an ROWD. The Claimants' obligation to prepare and submit a ROWD is imposed directly by federal mandate in the Clean Water Act and the Commission itself recognizes the Claimants' obligation to obtain a permit under the federal law in its Statement of Decision wherein the Commission states: "NPDES permits are required for 'A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.'" (Statement of Decision, p. 6, citing 33 USCA § 1342(p)(2)(C).) The obligation to submit a ROWD for permit renewal arises directly from the federal requirement that NPDES permits are limited to 5 year terms. (40 C.F.R. § 122.46(a) ("NPDES permits shall be effective for a fixed term not to exceed 5 years.")). The Commission's Statement of Decision did not determine otherwise. Therefore, the costs of preparing and submitting a ROWD are not reimbursable.

H. Program Effectiveness Assessment (I.1. and I.2) (Proposed Parameters and Guidelines, pp. 25-26).

Similar to other descriptions of activities and costs Claimants assert should be included in the Adopted Parameters and Guidelines, Claimants again use language and phrases to allow for the later identification of specific activities and associated costs. For example, as with other permit provisions, the Claimants identify "costs, including Personnel Costs," without describing what other "costs" they intend to reference. (Proposed Parameters and Guidelines, p. 25.) See Water Boards' General Comment C, above, applicable to these unspecified categories of activities. Similarly, the Claimants identify costs of purchases and upgrades to equipment, hardware and software necessary to support data tracking, analysis and reporting (Program Implementation) as costs associated with reimbursable requirements. The Water Boards are concerned that the Claimants have not adequately demonstrated why purchases and upgrades are necessary to support the Program Effectiveness Assessment functions and how they will distinguish activities and costs incurred to comply with the higher level of service identified by the Commission as compared to the prior permit. (See General Comments A and E and Specific Comment III.E.) In addition, the Claimants have not made clear how they will effectively exclude, in a transparent way, costs for computers and associated upgrades that are incurred in connection with unreimbursable provisions such as hydromodification management plan and low impact development elements. Finally, the Claimants assert that training of staff, including vendor employees, is necessary to comply with the mandated provisions and costs for such training should be reimbursed. The Water Boards disagree. (See Water Boards' General Comment D, above.) The Water Boards' General Comments are generally applicable as well to the categories and subcategories identified for Program Effectiveness Assessment listed in the Proposed Parameters and Guidelines, although the Water Boards do not have any additional specific comments applicable to these categories at this time.

IV. OTHER ISSUES**A. Offsetting Revenues.**

The Statement of Decision finds that certain types of fees "would be identified as offsetting revenue in the parameters and guidelines." (Statement of Decision, p. 2.) The Claimants' Proposed Parameters and Guidelines do not address whether there are or they anticipate there will be, any offsetting revenues for inclusion in the Parameters and Guidelines. Claimants should be required to identify offsetting revenues prior to the Commission's adoption of Parameters and Guidelines. Moreover, the Claimants have not, but should be to, identify and include offsetting revenues derived from street sweeping and conveyance system cleaning parking sign enforcement. Finally, the Claimants have not identified any general fund revenues available to apply to reimbursable provisions for purposes of offsetting reimbursement amounts.

B. Reasonable Reimbursement Methodology.

In their transmittal letter for the Proposed Parameters and Guidelines, Claimants state that they "believe it would be appropriate to include a reasonable reimbursement methodology, as defined in Government Code section 17518.5, for a number of the activities found to be reimbursable by the Commission" To the Water Boards' knowledge, neither Claimants nor any state agency has submitted a proposed reasonable reimbursement methodology. The

Ms. Paula Higashi

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September 13, 2010

Water Boards reserve the right to comment on any such methodology that may be proposed in the future in this proceeding.

Sincerely,

A handwritten signature in cursive script that reads "Catherine George Hagan".

Catherine George Hagan
Senior Staff Counsel

cc: Service List for 07-TC-09

PROOF OF SERVICE

I, Joanne Griffin, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 22nd Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, September 13, 2010 I served the within documents:

Proposed Parameters and Guidelines, Discharge of Stormwater Runoff, 07-TC-09 California Regional Water Quality Control Board, San Diego Region Order No. R9-2007-001, (NPDES No. CAS0108758) Waste Discharge Requirements for Discharges of Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority, adopted on January 24, 2007:

Comments of the State Water Resources Control Board and the California Regional Water Quality Control Board, San Diego Region, on Proposed Parameters and Guidelines

	BY FACSIMILE: I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
X	BY ELECTRONIC MAIL: I caused a true and correct copy of the document(s) to be transmitted by electronic mail compliant with section 1010.6 of the California Code of Civil Procedure to the person(s) as shown.
	BY HAND DELIVERY: I caused a true and correct copy of the document(s) to be hand-delivered to the person(s) as shown.
	BY OVERNIGHT MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of overnight mail packages. Under that practice, packages would be deposited with an overnight mail carrier that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
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By placing a true copy thereof in first class mail and/or electronic mail addressed to:

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(Continued next page)

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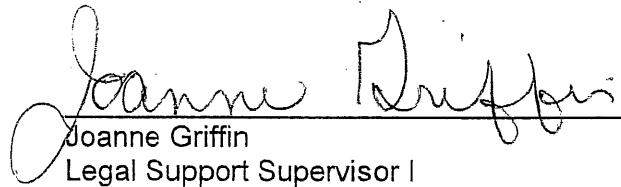
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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on September 13, 2010 at Sacramento, California.


Joanne Griffin
Legal Support Supervisor I

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STATE MANDATES**
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November 15, 2010

Exhibit E

Paula Higashi, Executive Director
Commission on State Mandates
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Re: Claimants' Reply to State Agency Comments on Proposed Parameters and
Guidelines for Discharge of Storm Water Runoff Permit Order No. R9-2007-
0001, Commission's Test Claim No. 07-TC-09

Dear Ms. Higashi:

On March 30, 2010, the Commission on State Mandates (Commission) determined that numerous provisions of the San Diego's Water Board's municipal separate storm sewer system (MS4) discharge permit (Order No. R9-2007-0001 (Permit No. CAS0108758)) (the "2007 Permit") are State mandates subject to reimbursement under article XIII B, section 6 of the California Constitution.

To date, Claimants¹ have received comments from the State Department of Finance ("Finance") and comments jointly filed by the State Water Resources Control Board ("State Water Board") and the San Diego Regional Water Quality Control Board ("San Diego Board"). (Collectively referred to as the "Water Boards.")

Claimants' reply to the comments received from Finance and the Water Boards are detailed below. Following this review of State agency comments is a revised set of Ps&Gs which incorporate changes arising from this collaborative effort.

¹ The claimants are the County of San Diego and the cities of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, National City, Oceanside, San Diego and Vista.

Reply to Comments by Finance

Finance's comments were filed with the Commission on September 3, 2010 by Ms. Nona Martinez, Assistant Program Budget Manager. Ms. Martinez provides three specific comments regarding the costs of proposed activities. The first is that:

"The Ps & Gs should clearly indicate that the costs associated with implementing the higher level of service or new program are specifically those costs imposed by the test claim permit as opposed to those costs incurred under the previous permit. For example, the costs incurred for purchasing street sweeping equipment under the prior permit are not reimbursable under the test claim permit. Finance, however, notes that some costs associated with the street sweeping equipment may be attributable to the test claim permit (e.g., maintenance of the equipment)."

The parties agree that equipment maintenance costs attributable to the test claim permit are reimbursable. However, Claimants disagree with Finance's assertion that "... the costs incurred for purchasing street sweeping equipment under the prior permit are not reimbursable under the test claim permit." In this circumstance, a portion of the prior period equipment purchase costs may be reimbursable under the present period as depreciation costs or as use allowance costs. This is permitted under the State Controller's Office (SCO)² Mandated Cost Manual for Local Agencies (revised 01/09, Chapter 961/92), on page 3. Claimants have revised Section V.A.4. of the Ps&Gs governing claiming reimbursement for fixed assets and equipment to include SCO's rules for claiming depreciation costs and use allowance costs.

Finance's second comment is that:

"The Ps & Gs should distinguish the costs of activities (e.g., the purchase of parking signs used to enforce activities related to various programs within a local agency) alleged to be reimbursable from the costs of activities associated with programs not required by the test claim permit. The costs of the alleged activities must be required by the approved mandate program to be reimbursable. Those costs related to purchasing the parking signs, for example, should be prorated for the approved mandated program."

Claimants acknowledge that if a capital asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed. However, in this case, parking signs typically provide notification of the day and time when street sweeping will occur and when parked vehicles must be moved in order to perform the mandated sweeping, so no proration of costs may be necessary. Nevertheless, the pro-rata rule was included in Claimants' original Ps&Gs and remains in the revised Ps&Gs as follows:

If the capital asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

² SCO is the cognizant State agency for reviewing and auditing State mandated cost claims.

Finance's third and final comment is that:

"The Ps & Gs should clearly identify the three categories of fees referenced as offsetting revenues in the statement of decision (see pages 132-133). Each applicable fee and its statutory authority should be listed in the boilerplate language of, "Section VII. Offsetting Saving and Reimbursements" on page 29, of the proposed Ps & Gs."

Claimants have revised Section VIII (formerly Section VII) of their Ps&Gs (Offsetting Savings and Reimbursements) to include Commission's offsetting fee language, cited by Finance.

Reply to General Comments by Water Boards

On September 13, 2010, the Water Boards filed joint comments. Their commentary addresses Claimants' costs in performing State mandated activities found to be reimbursable by the Commission.

A. Higher Level of Service

The Water Boards' first general comment is:

"The Water Boards generally are concerned that the Claimants have not made it clear that they will limit their requests for reimbursement to only that level of activities required to implement reimbursable permit provisions[fn] that exceeds the level of activities required to comply with the prior permit the San Diego Water Board issued to the Claimants (2001 Permit or Prior Permit"

Claimants acknowledge that their claims for reimbursement are limited to those activities required to implement reimbursable permit provisions which were not included in the prior permit issued in 2001 (the "2001 Permit). To avoid confusion, Claimants have incorporated the portions of the Commission's Statement of Decision setting forth those activities found not to be reimbursable into their revised Ps&Gs immediately after the reference to the related activity that was found to be reimbursable.

B. Personnel Costs

The Water Boards' second general comment is:

"The Claimants identify personnel costs as those costs associated with carrying out various reimbursable functions and note that '[u]nless otherwise stated in these Parameters and Guidelines, 'Personnel Costs' will be determined using the claimant's loaded hourly rates; all other costs will be actual and will include only that part of the cost that is related to the reimbursable mandate.' (Proposed Parameters and Guidelines, p. 15, fn. 12.) First, this phrase fails to adequately describe what is meant by the term 'loaded personnel costs.' Under section V, Claim Preparation and Submission (Proposed Parameters and Guidelines, p. 26), it appears that Claimants intend to factor only salary and benefits into Personnel Costs. The Claimants should clarify whether 'loaded hourly rates' is limited to a calculation of salaries and benefits or whether instead Claimants are factoring in

some amount of overhead and administrative costs. Second, Claimants must clarify the reference in footnote 12, mentioned above, so that it is clear that in addition to pro-rating 'all other costs' to carry out reimbursable provisions, they will also similarly pro-rate 'loaded personnel costs.' The adopted Parameters and Guidelines must be clear that to the extent an employee or vendor is performing work associated with non-permit related activities, or unreimbursable permit-related provisions, those costs are not reimbursable and must be excluded in a transparent manner."

Claimants' term "loaded hourly rate" refers to reimbursable personnel costs including salary, employee benefit and indirect (overhead and administrative) costs, as defined in the State Controller's Office (SCO) Mandated Cost Manual for Local Agencies(revised 01/09). Claimants have revised the Ps&Gs to now expressly refer to SCO's personnel cost components. Hereinafter, the term "Personnel Costs" refers to "salary, employee benefit, and indirect costs" as those terms are defined in SCO's Mandated Cost Manual for Local Agencies."

C. Unspecified Activities and Costs

The Water Boards' third general comment is:

"Throughout their discussion of reimbursable activities, the Claimants identify general categories of activities but qualify the general descriptions with phrases such as 'including but not limited to' or 'costs, *including* personnel costs.' (See Proposed Parameters and Guidelines, e.g., Street Sweeping Operations and Reporting, pp. 15-16, Conveyance System Cleaning and Reporting , pp. 17-18, Education Component, p. 18, and Watershed Urban Runoff Management Programs, pp. 19-22 (emphasis added).) The Claimants make these vague references in an apparent effort to retain flexibility to later claim as yet unidentified activities for reimbursement.

"The Water Boards are not able to comment on unspecified activities and their related costs, and as a result, are not able to evaluate whether the Claimants have indeed identified the most reasonable method of complying with reimbursable permit provisions. Instead of reliance upon phrases such as 'including but not limited to,' or 'costs, including Personnel Costs,' without further specifying these costs, the Claimants must be required to describe those actual activities or categories of costs necessary to carry out the reimbursable provisions for which they expect to be reimbursed.

....

"Despite the underlying purpose of the Adopted Parameters and Guidelines, the Claimants have not adequately described the specific costs or categories of costs for which they will seek reimbursement to allow the Water Boards to comment fully on the Proposed Parameters and Guidelines. The State should not be expected to reimburse the Claimants for unspecified or vague activities that the Claimants will later claim were necessary and represent the most reasonable method of implementing the reimbursable permit provisions. The Commission should require the Claimants to provide greater specificity in the activities they propose for reimbursement."

Claimants have reformatted and modified their Ps&Gs to address the Water Boards' concerns that the costs of activities which are not identified in the Ps&Gs will be reimbursed. Pertinent revisions in the revised Ps&Gs submitted herewith are:

1. The specific mandated activities found to be reimbursable by the Commission are moved from Section I. Summary of the Mandate to Section IV. Reimbursable Activities.
2. The specific related activities which were found not to be reimbursable by the Commission are now included under their appropriate reimbursable activity category to prevent claiming costs which are not reimbursable.
3. Reasonably necessary activity descriptions and their associated costs in Section IV. of Claimants' Ps&Gs filed with the Commission on June 25, 2010, which are not explicitly specified in the 2007 Permit, are now more specific, in accordance with the Water Boards' comments.
4. The costs of reasonably necessary activities in Section IV. of Claimants' Ps&Gs filed with the Commission on June 25, 2010 have been rephrased to utilize cost descriptions found in SCO's Mandated Cost Manual for Local Agencies.
5. The reimbursable activities and associated costs found under Section IV. of Claimants' Ps&Gs are no longer qualified by phrases such as "including but not limited to" or "costs, *including* personnel costs."

Claimants' revised language for Section IV. Reimbursable Activities of their Ps&Gs is discussed further in this Review of State Agency Comments when considering the Water Boards' specific comments.

Regarding the Water Boards' request that Claimants now provide anticipated changes to those activities which may become reasonably necessary in completing the term of the 2007 Permit, Claimants believe that they will be ready to do so when the Long Term Effectiveness Assessment ("LTEA") is submitted, no later than 210 days in advance of the expiration of the current Order.

D. Vendor Costs

The Water Boards' fourth general comment addresses vendor costs:

".... To the extent contractors bid on and are successfully selected to perform reimbursable, permit-related work, the Claimants should expect that the vendors are sufficiently well-versed, and perhaps even more expert than the Claimants in some cases, in what is required to carry out the services they were hired to provide. Unless Claimants demonstrate otherwise, the Commission should assume that the vendors' costs to perform reimbursable activities already include the vendors' costs to educate themselves so that they are meeting the Claimants' needs and expectations. Similarly, to the extent that a vendor's costs include costs such as for fuel, vehicles or materials storage, for example, the Claimants must accurately account for and pro-rate those costs in their reimbursement requests."

The parties agree that "... to the extent a vendor is carrying out a reimbursable activity, the associated costs are appropriately recoverable." Claimants further acknowledge that to the extent that a vendor's costs includes costs such as for fuel, vehicles or materials storage, for example, the vendors must accurately account for those costs in their reimbursement requests as limited by the specific language for claiming vendor costs, found in SCO's Mandated Cost Manual for Local Agencies, on pages 10-11, which has been incorporated in the revised Ps&Gs.

While vendors' employees do not generally require additional training to meet the Claimants' needs, if this is not the case, Claimants may recover such additional training costs as may be necessary in utilizing new types of equipment and/or protocols.

E. Computer Costs

The Water Boards' fifth general comment addresses reimbursement for "computer, hardware and software purchases and upgrades":

" Adopted Parameters and Guidelines must limit Claimants to reimbursement for costs of equipment, hardware and software purchased after January 24, 2007. And Claimants must be required to demonstrate why the purchases and upgrades are necessary to comply with the reimbursable provisions but were not necessary to comply with the prior permit. Claimants must also be required to demonstrate how they intend to exclude, in a transparent manner, the percentage of costs of equipment and upgrades used for unreimbursable purposes. It is insufficient for the Claimants merely to promise they will only include reimbursable costs in their reimbursement requests: they must establish how they will demonstrate this commitment to the Commission and the State in a verifiable manner."

The reimbursement requirements for computer, hardware and software purchases and upgrades which are "capital outlays" are found in SCO's Mandated Cost Manual for Local Agencies, on pages 10-11. These requirements have been incorporated in Claimants' revised Ps&Gs.

If computer, hardware and software purchases and upgrades are obtained through a vendor contract, the Water Boards' concern that only the costs of reimbursable activities will be paid is accommodated, as SCO's reimbursement rules for vendor contract costs requires that an "itemized list of (reimbursable) activities performed" under the contract be provided before payment is made.

If computer, hardware and software purchases and upgrade costs are obtained without using a vendor contract, only the pro rata portion of the purchase price used to implement the reimbursable activities may be claimed.

Reply to Specific Comments by the Water Boards

A. Street Sweeping

The Water Boards provide an extensive commentary on the Street Sweeping reimbursement components by activity as set forth in the Ps&Gs. Claimants have tailored their reply to conform to this format.

1. Street Sweeping Operations

Comment: "See General Comment B."

Reply: See Reply to General Comment B.

2. Street Sweeping Equipment and Maintenance

Comments:

"To the extent copermittees contract with vendors to perform street sweeping, the Water Boards would expect equipment and equipment maintenance costs to be included in the contract costs."

".... [T]o the extent Claimants already owned street sweeping equipment prior to issuance of the San Diego Permit, any cost to purchase that equipment is not reimbursable. (See General Comment A.) "

and

".... Claimants are not entitled to reimbursement for unspecified 'related' functions and must identify what those functions are so that the Water Boards may evaluate whether the related functions are necessary to carry out the mandated provisions in the permit. (See General Comment C.)"

Reply:

Claimants disagree with the Water Boards' assumption that equipment and equipment maintenance costs are always included in street sweeping contract costs. Claimants agree that, where this is the case, it will be disclosed. As indicated in Claimants' reply to the Water Boards' General Comment D, Claimants' revised Ps&Gs now incorporate language found on pages 10-11 of SCO's Mandated Cost Manual which provides, in pertinent part, that the Claimant must provide SCO with contractors' invoices which include an "an itemized list of costs for activities performed." SCO can then compare these contract costs with those claimed elsewhere to ensure that duplicate payments for street sweeping equipment and equipment maintenance are not made.

See Reply to General Comment A and the Reply to Finance's first comment.

In response to the Water Boards' comment that reimbursement for equipment and maintenance costs incurred "to perform street sweeping *and related functions*" is not appropriate, Claimants have deleted the phrase "*and related functions*" from the revised Ps&Gs. In its place,

Claimants have now included the phrase "reasonably necessary" to identify reimbursable activities which are not explicitly identified in the Commission's decision. This change is based on the use of "reasonably necessary" activities in proposing reimbursable activities permitted in Government Code Section 17557(a), as recently amended by the Statutes of 2010, Chapter 719, on October 19, 2010.

Section 17757(a) now provides, in pertinent part, that:

"If the commission determines there are costs mandated by the state pursuant to Section 17551, it shall determine the amount to be subvended to local agencies and school districts for reimbursement. In so doing it shall adopt parameters and guidelines for reimbursement of any claims relating to the statute or executive order. The successful test claimants shall submit proposed parameters and guidelines within 30 days of adoption of a statement of decision on a test claim. The proposed parameters and guidelines may include proposed reimbursable activities that are reasonably necessary for the performance of the state-mandated program." (Emphasis added.)

In accordance with Commission's regulations, Claimants also proposed reimbursable activities which are the most reasonable methods of complying with the mandate. These methods are necessary to carry out the mandated program and are not specified in statute or executive order. (See Cal Code Regs, tit. 2, § 1183.1 (a)(4).)

Moreover, Claimants' proposed reimbursable activities are specific and reasonably necessary in carrying out the newly State-mandated portions of the 2007 Permit. Consider the street sweeping component. The Commission examined the street sweeping requirements in the 2007 Permit and found them to be reimbursable. Commission's list of reimbursable activities found in the 2007 Permit is a short one:

"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."

Claimants examined Commission's list and proposed additional reimbursable activities, which are detailed in the Ps&Gs, and which are 'reasonably necessary' in performing the street sweeping component. The Water Boards do not contest that the claimed activities and costs are reimbursable. Rather, the Water Boards question how the costs will be accounted for.

Claimants' "reasonably necessary" activities are grouped by program component under Section IV. Reimbursable Activities of Claimants' revised Ps&Gs.

3. Street Sweeping Materials Disposal

Comment:

"... To the extent copermittees contract with vendors to perform street sweeping, the Water Boards would expect materials disposal costs to be included in the contract costs. Claimants may not recover duplicate costs for materials disposal or storage. (See General Comment D.)"

Reply: Claimants disagree with the Water Boards' assumption that street sweeping materials disposal costs are always included in street sweeping contract costs. Claimants maintain that contract costs may not always include disposal costs. The principal requirement here is that disposal costs need to be sufficiently disclosed to permit SCO to compare itemized contract costs with those claimed elsewhere and thus avoid duplicate payments.

4. Street Sweeping Fuel

Comment:

"... To the extent copermittees contract with vendors to perform street sweeping, the Water Boards would expect fuel costs to be included in the contract cost. (See General Comment D.)"

Reply: Claimants disagree with the Water Boards' assumption that street sweeping fuel costs are always included in street sweeping contract costs. As previously discussed, Claimants maintain that contract costs need to be sufficiently disclosed to permit SCO to compare contract costs with those claimed elsewhere and thus avoid duplicate payments.

5. Street Sweeping Program Development

Comment:

"It is unclear what the Claimants mean by 'the costs, *including* Personnel Costs, to develop and update the claimant's *internal* street sweeping program, including specific criteria, policies, procedures, manuals, and forms.' (Proposed Parameters and Guidelines, p. 15, (emphasis added).) In addition, the Water Boards do not understand what the Claimants mean by 'internal' street sweeping program and cannot evaluate whether it is a necessary activity in order to carry out mandated permit provisions. (See General Comment C.)"

Reply: Claimants understand the difficulty the Water Boards have in accepting the term "*internal* street sweeping program." Claimants' revised Ps&Gs now use the phrase "street sweeping program" in its place.

See Reply to General Comment C.

6. Street Sweeping Employee and Vendor Training

Comment:

“As previously mentioned, (see General Comment D, above) the Commission should assume that vendors are adequately trained prior to bidding for the contracted work. In addition, the Claimants assert it is reasonable to recover costs including ‘training of all claimant and vendor employees who perform tasks necessary to implement street sweeping and related functions during the life of the permit.’ As with equipment/equipment maintenance categories, the Claimants should clarify what they mean by ‘related functions’ before such terminology is incorporated into Adopted Parameters and Guidelines.”

Reply: See Reply to General Comment D. In addition, Claimants eliminated the term “related function” in their revised Ps&Gs. Instead, as previously discussed, Claimants specify reimbursable activities which are not explicitly expressed in Commission’s decision but are ‘reasonably necessary’ in carrying out the reimbursable activities which are explicitly stated in Commission’s decision.

7. Street Sweeping Parking Signage and Enforcement

Comment:

“It is unclear what Claimants mean by ‘costs,’ where they say ‘costs, including Personnel Costs, to purchase and install street sweeping signage and to enforce parking prohibitions in areas where street sweeping is scheduled. This includes the purchase, installation, or replacement of signage to inform the public of applicable parking restrictions, as well as their surveillance and enforcement.’ (Proposed Parameters and Guidelines, p. 16.) The Water Boards are left to guess what the costs in addition to personnel costs and costs for purchase, installation or replacement of signs the Claimants believe they may incur and for which they expect to be reimbursed. (See General Comment C.) The Water Boards also would expect the Claimants to specify costs for the number of signs that have been purchased and installed to date in order to comply with the requirements of the San Diego Permit beyond what was purchased or replaced in compliance with the prior permit. The State should not be expected to reimburse the Claimants for previously purchased signs or to replace signs that may have been inadequately maintained under the prior permit. (See General Comment A.) Moreover, to the extent that a portion of the street sweeping signage and enforcement is not directly associated with storm water pollution prevention but is instead performed for health and safety or aesthetic reasons, the Claimants should not receive reimbursement for those costs.

It is equally important that the Claimants make clear how they will keep track of and exclude costs for parking enforcement related to the street sweeping requirements to ensure that the State is not reimbursing them for unrelated parking enforcement such as for illegal parking in construction zones or violations of time-restricted parking: It is unlikely, although possible, that the Claimants would have personnel monitoring and surveilling [sic] only cars parked in violation of street sweeping restrictions while ignoring all other types of parking

violations. Allowing personnel to perform multiple functions is likely the more efficient use of the Claimants', and thereby the State's funds, than to have personnel devoted exclusively to enforcement of street sweeping parking restrictions, but it remains unclear how the costs will be accounted for and segregated so that it is transparent that the Claimants are only reimbursed for permit-related, mandated, functions."

Finally, Claimants should be required to offset any reimbursement for street sweeping parking signage enforcement with revenues received from that enforcement.

Reply: Claimants address the Water Boards' concerns about reimbursement for parking signage and enforcement costs in the order presented.

1. Claimants no longer refer to "the costs, including Personnel Costs" to address the Water Boards' concerns about "unspecified costs" expressed in General Comment C, as previously discussed.
2. Claimants will specify costs for the number of signs that have been purchased and installed to date in order to comply with the requirements of the 2007 Permit beyond what was purchased or replaced in compliance with the 2001 Permit but do so when their reimbursement claims are submitted to SCO for payment. This occurs after Ps&Gs have been adopted.
3. The Water Boards are speculating that the Claimants would attempt to claim street sweeping activities that are not required by the 2007 Permit but rather performed for health and safety or aesthetic reasons. Such speculation is unwarranted and should not be addressed in the Ps&Gs. The Commission found that street sweeping activities required to comply with the 2007 Permit were reimbursable and the presumption should be that street sweeping activities carried out by the Claimants are reasonably necessary to comply with the 2007 Permit. Claimants cannot claim reimbursement for additional street sweeping activities over and above what is required by the 2007 Permit. If the State believes that Claimants have claimed reimbursement for activities not required by the 2007 Permit, the remedy is to audit the Claimants' street sweeping activities and disallow costs for activities that exceed what was reasonably necessary to comply with the 2007 Permit.
4. Claimants acknowledge that reimbursement for street sweeping parking enforcement costs should only be for parking enforcement related to the street sweeping requirements and that unrelated parking enforcement costs such as those incurred for enforcement of illegal parking in construction zones or violations of time-restricted parking should not be claimed.
5. Revenues generated from parking enforcement by public safety officers cannot be used to offset the costs of street sweeping activities and costs. On November 2, 2010, voters approved Proposition 26. Proposition 26 amended sections of the California Constitution and added new provisions relating to the ability of the state and local agencies to assess a fee. Specifically, Proposition 26 amended Section 1 of Article XIII C of the California Constitution, which now defines a "tax" as "any levy, charge, or exaction of any kind imposed by a local government, except the following:

“

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

But Article XIII C Section 1 now also includes the following language:

“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.”

The cost of signage to enforce the street sweeping requirements mandated by the 2007 Permit is not a cost that bears “a fair or reasonable relationship to the payor’s burdens on, or benefits received from the government activity,” i.e. parking enforcement, and the revenue generated from parking enforcement cannot be used to offset the costs of signage required by the 2007 Permit.

8. Street Sweeping Employee Supervision and Management

Comment:

“The Water Boards do not dispute that supervisory and management time spent overseeing personnel directly responsible for performing mandated work is appropriately recoverable. The Water Boards do, however, think the Commission should require the Claimants to clearly demonstrate how their supervisors’ and managers’ time is spent supervising employees’ work on only mandated provisions. To the extent the supervisors’ or managers’ work is not directly related to overseeing mandated work, or serves dual or multiple purposes, the Claimants must make transparent how they will determine the amount of supervisors’ and managers’ time directly related to mandated work.”

Reply: The parties agree that supervisory and management time spent overseeing personnel directly responsible for performing mandated work is appropriately recoverable. Claimants intend to follow SCO’s guidance in their Mandated Cost Manual for Local Agencies in identifying only the time spent on employee supervision and management of mandated street sweeping activities. Also, care will be taken to ensure that if supervisory and management costs are claimed as indirect costs, that the same costs will not be claimed as direct costs.

9. Street Sweeping Contracted Services

Comment:

See General Comment D, above. Further, Claimants should only be allowed to include costs of preparing requests for bids, negotiating and drafting third party contracts, and subsequently administering the service contracts if the Claimants can demonstrate that these costs, together with the costs for the contracted services, are the most cost-effective and reasonable manner of complying with the street sweeping requirements in lieu of performing the services with employees. The proposed parameters and guidelines fail to mention any cost-benefit analysis on the part of the Claimants in deciding whether to contract for or perform services in-house.” 9

Reply: See Reply to General Comment D. In addition, Claimants disagree with the Water Boards’ assertion that the Claimants should be required to conduct cost-benefit analyses “... in deciding whether to contract for or perform services in-house” before “... costs of preparing requests for bids, negotiating and drafting third party contracts, and subsequently administering the service contracts” are allowed. Instead Claimants follow SCO’s requirements, found in their Mandated Cost Manual for Local Agencies, on pages 10-11, which provides that:

“The cost of contract services is allowable if the local agency lacks the staff resources or necessary expertise, or it is economically feasible to hire a contractor to perform the mandated activity.”

Claimants further disagree with the Water Boards’ contract cost reimbursement requirement that Claimants demonstrate that contracting for street sweeping services is “... the most cost-effective and reasonable manner of complying with the street sweeping requirements in lieu of performing the services with employees.” The Water Boards do not reference any authority to support this standard. Instead Claimants intend to use SCO’s criteria in deciding on whether to contract for mandated activities or provide them directly. This criteria is that “[t]he costs of contract services is allowable if the local agency lacks the staff resources and necessary expertise, or is it economically feasible to hire a contractor to perform the mandated activity.”

B. Street Sweeping Reporting

Reporting and Tracking Policies and Procedures.

Comment: See General Comment C, discussing insufficient detail provided for types of costs other than Personnel Costs.

Reply: See Reply to General Comment C. In addition, Claimants have addressed the Water Boards’ concerns that street sweeping reporting and tracking policies and procedures are not sufficiently detailed by eliminating broad phrases like “costs other than personnel costs” and by including a identifying specific reimbursable activities, which are “reasonably necessary” in carrying out Commission’s street sweeping reporting reimbursable activities, in their revised Ps&Gs. These reasonably necessary activities and their associated costs are:

- Reporting and Tracking Policies and Procedures. Claimant's personnel costs and/or contracted services costs, to develop, update, and implement street sweeping reporting and tracking policies and procedures.
- Data Tracking and Analysis. Claimant's costs and/or contracted services costs, to update, and implement data tracking and analysis methods and procedures. This includes the cost of employees developing or maintaining data tracking methods or systems, and performing data tracking and analysis for reports to the Regional Water Quality Control Board. Also included are the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.
- Report Writing. The costs, including employee salary, benefit and indirect costs and/or contracted services costs, to develop and write reports to the Regional Water Quality Control Board.
- Employee Supervision and Management. Personnel costs for time spent by supervisory and management personnel supervising personnel directly responsible for performing the mandated activities. (Hereinafter referred to as "Employee Supervision and Management.")
- Contracted Services. Where specified above, costs may be incurred through the use of vendors, contractors, consultants, or other service providers. In such case, only actual costs to the claimant will be claimed, and will only include that portion of the cost that is related to the reimbursable mandate. Claimants may also include the costs of preparing requests for proposals or requests for bids, negotiating and drafting third party contracts, and subsequently administering service contracts for the time they are performing these tasks. (Hereinafter referred to as "Contracted Services.")

Data Tracking and Analysis

Comment: See General Comment C, discussing insufficient detail provided for types of costs other than Personnel Costs. See also General Comment E, above, expressing the Water Boards' concern that the costs of purchases and upgrades of equipment, hardware and software must be limited to that necessary to comply with the San Diego Permit, and must be transparently segregated into use for reimbursable and unreimbursable activities.

Reply: See Reply to General Comments C and E. Claimants have addressed the Water Boards' concerns that the street sweeping data tracking and analysis costs are not sufficiently detailed when referring to "costs other than Personnel Costs" by eliminating the phrase "costs other than personnel costs" and by identifying specific reimbursable activities and costs which are 'reasonably necessary' in carrying out its newly mandated provisions in the revised Ps&Gs. In response to the Water Boards' concerns that the costs of purchases and upgrades of equipment, hardware and software be limited to that necessary to comply with the 2007 Permit and be transparently segregated into use for reimbursable and unreimbursable activities the Claimants have revised their Ps&Gs to incorporate reference to those sections of the SCO's Mandated Cost Manual relating to "capital outlays"

Report Writing

Comment: See General Comments B and E.

Reply: See Reply to General Comments B and E. Claimants have addressed the Water Boards' concerns relating to Report Writing General Comment B by eliminating the term "loaded hourly rate" and instead using the term "personnel costs" which includes salary, employee benefit and indirect (overhead and administrative) costs, as defined in the SCO's Mandated Cost Manual. Claimants have addressed the Water Boards' concerns relating to Report Writing General Comment E and the need to demonstrate proper cost allocations of computer, hardware and software purchases and upgrades by incorporating reference to the SCO's Mandated Cost Manual which requires that an itemized list of reimbursable costs be disclosed in the reimbursement claim. If these costs are not included in a vendor contract, SCO requires that Claimants pro rate claimed costs.

Employee Supervision and Management

Comment: See Specific Comment, III.A.

Reply: See Reply to Specific Comment, III.A.

Contracted Services

Comment: See Specific Comment, III.A.

Reply: See Reply to Specific Comment III.A.

C. Conveyance System Cleaning

Comment:

".... To the extent costs are incurred to comply with the 2001 permit standard, those costs are not reimbursable and must not be included in the Proposed Parameters and Guidelines. Only to the extent that the Copermittees incur costs beyond those they incurred to comply with the 2001 permit should they be reimbursed by the State."

Reply: Claimants acknowledge that they may not claim reimbursement for conveyance system cleaning activities that were required by the 2001 Permit. Claimants have revised the Ps&Gs to include a list of the nonreimbursible conveyance system cleaning activities to ensure that erroneous claims are not filed with SCO. Specifically, the parts of the 2007 Permit's conveyance system cleaning requirements that the Commission found are not reimbursable, are:

Part D.3.a.(3)(a) of the 2007 Permit is the same as part F.3.a.(5)(b) and (c) of the 2001 Permit, both of which permits require maintenance and inspection activities.

Part D.3.a.(3)(b)(i),(iv)-(vi) of the 2007 Permit is the same as part 3.a.(5)(c)(i)(iii) - (v) in the 2001 Permit, both of which require:

1. Annual inspection of MS4 facilities (D.3.a.(3)(b)(i));
2. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a.(3)(b)(iv));
3. Proper disposal of waste removed pursuant to applicable laws (D.3.a.(3)(b)(v));
4. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a.(3)(b)(vi)).

Part D.3.a.(3)(b)(ii) of the 2007 Permit gives 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), imposes potentially less frequent inspections than those imposed under part F.3.a.(5)(b) and (c) of the 2001 Permit, which requires that 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. The 2007 Permit requires less frequent inspections than those required under the 2001 Permit and therefore does not impose a new program or higher level of service.

1. Conveyance System Inspection

Comment:

"Claimants were already required to inspect conveyance systems annually under the prior permit. To the extent Claimants inspect MS4 facilities only annually under the San Diego Permit, the costs of the annual inspection, personnel and associated costs, are not reimbursable. Similarly, for facilities that are inspected more frequently than annually, the costs of one inspection of each facility occurring within each 12 month period are not reimbursable. See also General Comment C, regarding lack of specificity in identification of costs in addition to Personnel Costs."

Reply: Claimants acknowledge that costs related to annual inspections of MS4 facilities are not reimbursable. See also, Reply to General Comment C.

2. Conveyance System Cleaning Operations

Comment: "See General Comment C"

Reply: See Reply to General Comment C.

3. Vehicles and Equipment

Comment:

“To the extent that vehicles or other equipment is purchased for materials disposal, these costs are not reimbursable because materials disposal in compliance with applicable laws was required by the prior permit. See discussion under “Materials Disposal,” below. In addition, see General Comment A, above, indicating that any allowed costs must clearly be incurred in this permit term and not already included in the cost of contracts to the extent conveyance system cleaning and inspection operations are contracted out. It is unclear what types of equipment (for example, shovels, rakes or power washers) the Claimants would need to purchase to clean their conveyance systems that they did not already own prior to adoption of the San Diego Permit. Moreover, the Claimants have not made clear that the cost of vehicles, equipment and maintenance and storage thereof will be transparently pro-rated to the extent some or all of it is used for dual or multiple purposes. It is questionable how the Claimants will be able to specify the exact amount of maintenance of a piece of equipment attributable to compliance with reimbursable permit provisions as opposed to maintenance costs for unreimbursable uses. Yet, to be reimbursed, the Claimants must make this demonstration or forfeit reimbursement for equipment maintenance. If the equipment vehicles and supplies are solely dedicated to conveyance system cleaning, it is likewise questionable whether this single purpose use is the most reasonable method of complying with the mandate. (See Cal Code Regs, tit. 2, § 1183.1 (a)(4).)”

Reply: Claimants disagree with the Water Boards’ comments on vehicles and equipment necessary to carry out reimbursable conveyance system cleaning activities.

Regarding the “most reasonable methods of complying with the mandate”, Claimants’ revised Ps&Gs closely follow Commission’s regulations:

“Reimbursable Activities. A description of the specific costs and types of costs that are reimbursable, including one-time costs and on-going costs, and a description of the most reasonable methods of complying with the mandate. ‘The most reasonable methods of complying with the mandate’ are those methods not specified in statute or executive order that are necessary to carry out the mandated program.” (Cal Code Regs, tit. 2, § 1183.1 (a)(4).)

Simply put, Claimants’ “most reasonable methods” are not specified in the 2007 Permit and “are necessary to carry out the mandated program.” The Water Boards have not claimed otherwise. Accordingly, Claimants’ activities are, by definition, reimbursable.

Claimants acknowledge the Water Boards’ comments on the need to prorate the costs of vehicles and equipment as well as maintenance and storage costs for vehicles and equipment used for dual or multiple purposes and Claimants understand that these pro-rations need to be computed in accordance with SCO’s Mandated Cost Manual for Local Agencies.

Claimants acknowledge that claims for reimbursement for items such as shovels, rakes, power washers, etc. must be made in accordance with the SCO’s Mandated Cost Manual for

Local Agencies and be limited to costs incurred during in the term of the 2007 Permit with the proviso that Claimants can claim depreciation and use allowance costs are also allowable even if the initial purchase was made in a prior period and accounting requirements found in SCO's Mandated Cost Manual for Local Agencies are met.

Claimants acknowledge that material disposal costs incurred in conveyance system cleaning are not reimbursable. Claimants note that material disposal costs incurred in street sweeping are reimbursable, as previously discussed.

4. Vehicle and Equipment Maintenance

Comment: "See immediately preceding comment."

Reply: Claimants incorporate their Reply to the Water Boards' comments in Section C.3 above.

5. Materials Disposal

Comment:

"Claimants were required to properly dispose of wastes removed from conveyance systems under the 2001 permit. Therefore, costs for materials disposal identified in the Proposed Parameters and Guidelines are not reimbursable. (See General Comment A.) In the event that the Commission disagrees and allows some portion of materials removal to be reimbursable, the Claimants must describe these costs with greater specificity. (See General Comment C.) In addition, if costs of operating, renting, leasing, or contracting for facilities to store or dispose of collected materials are claimed, the Water Boards question whether the rented facilities to store material from the Conveyance System Cleaning Operations also serve a unreimbursable purpose or serve a duplicative purpose (i.e., it is possible that materials from street sweeping operations also are stored in these same facilities.) If so, the Claimants must ensure they avoid seeking duplicate reimbursement if the Commission allows some or all of these costs."

Reply: Claimants acknowledge that material disposal costs incurred in conveyance system cleaning are not reimbursable. Claimants note that material disposal costs incurred in street sweeping are reimbursable, as previously discussed.

The Water Boards' comment to the effect that the costs of operating, renting, leasing, or contracting for facilities to store or dispose of collected materials should be prorated if a duplicative purpose and/or a nonreimbursable purpose is not relevant as the costs of material disposal are not reimbursable.

6. Fuel

Comment:

"To the extent copermittees contract with vendors to perform conveyance system inspections and cleaning and those costs are allowed by the Commission, the

Water Boards would expect fuel costs to be included in the contract cost. (See General Comment D.)”

Reply: See Reply to General Comment D.

7. Program Development

Comment:

“In this category, Claimants identify ‘[t]he costs, including Personnel Costs, to develop and update the claimant’s internal conveyance system cleaning program . . .’ See General Comment C, above, regarding lack of specificity in identification of what costs, other than personnel costs, Claimants may seek to recover to comply with this permit requirement. Second, it is unclear what ‘internal conveyance system cleaning program’ means. The Claimants should be required to provide specificity to this term to allow meaningful evaluation by the Water Boards.”

Reply: Claimants acknowledge the Water Boards’ difficulty in accepting the term “internal conveyance system cleaning program.” Claimants have eliminated “internal” and now use the term “conveyance system cleaning program” in its place.

8. Employee and Vendor Training

Comment:

“See General Comment C, above, regarding lack of specificity in identification of what costs, other than Personnel costs, Claimants may seek to recover to comply with this activity. See also General Comment D in which the Water Boards believe vendor training costs are not recoverable.”

Reply: See Reply to General Comments C and D.

9. Parking Signage and Enforcement

Comment:

“.... If one sign communicates two messages, the cost of the sign should be reimbursed only once. To the extent that enforcement of parking signage overlaps with enforcement of other forms of parking restrictions unrelated to the San Diego Permit, the Claimants should be required to provide transparent segregation of costs so that the State can confirm that it is not improperly compensating the Claimants for unreimbursable costs. Finally, as with Street Sweeping enforcement, Claimants should be required to offset any reimbursement for street sweeping parking signage enforcement with revenues received from that enforcement.”

Reply: Regarding the two types of necessary parking signage for conveyance system cleaning and for street sweeping, both types of signs are reimbursable as both inform the public of applicable parking restrictions and their surveillance and enforcement. Claimants acknowledge that if one sign communicates two reimbursable messages, the cost of the sign

should be reimbursed only once. Further, Claimants agree with the Water Boards' contention that unrelated parking enforcement costs should not be claimed.

Regarding the Water Boards' generalization that Claimants be required to offset street sweeping parking signage enforcement costs with revenue received from that enforcement, see Claimants' reply 5, on pages 11-12, to Water Board's comment 7, "Street Sweeping Parking Signage and Enforcement," on page 9.

10. Employee Supervision and Management

Comment:

"See Specific Comment, III.A., Employee Supervision and Management and see also General Comment B."

Reply: See Reply to Specific Comment, III.A. and General Comment B.

11. Contracted Services

Comment:

"See Specific Comment III.A., Contracted Services and see also General Comment D."

Reply: See Reply to Specific Comment, III.A. and General Comment D.

D. Conveyance System Cleaning-Reporting

The Water Boards' specific comments on the conveyance system cleaning - reporting component in Section IV. Reimbursable Activities of the Ps&Gs are as follows:

1. Reporting and Tracking Policies and Procedures

Comment:

"See General Comment C, above, regarding lack of specificity in identification of what costs, other than Personnel Costs, would be required to perform this activity. Claimants should also be required to show why 2001 permit requirements for tracking policies and procedures are no longer adequate to meet San Diego Permit requirements. (See General Comment A, above, regarding higher level of service.)"

Reply: See Reply to General Comments C and A. In addition, Claimants point out that policies and procedures have been changed in the 2007 Permit and consequently the requirements for tracking them needs to be updated. For example, the 2007 Permit now requires that:

"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.”
(Permit Part D.3.a.(3)b iii)

Further, the Commission found that the 2007 Permit required the Claimants to update and revise the JURMPs conveyance system cleaning - reporting activities 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.”

The Commission also found the (above) activities of updating and revising conveyance system cleaning reports to be reimbursable. Consequently, the reporting activities set forth above, including their updates and revisions, remain in Section IV. Reimbursable Activities of Claimants revised Ps&Gs.

2. Data Tracking and Analysis

Comment:

“See General Comment C, above, regarding lack of specificity in identification of what costs, other than Personnel Costs, would be required to perform this activity. Claimants have not identified types of upgrades or why they are necessary to perform reimbursable activities. In addition, see General Comment E, above, concerning documentation of the need for purchases and upgrades to equipment, hardware and software exclusively to support the San Diego Permit and General Comment E, concerning the need for Claimants to demonstrate in a transparent fashion how they will segregate costs of computer purchases and upgrades associated only with reimbursable activities. The Claimants are sophisticated municipal entities who the Water Boards would expect have computers that are used for many purposes. To the extent some computers or printers are used to comply with reimbursable permit provisions but also for other purposes, the Claimants should be required to demonstrate in a transparent fashion what percentage is used or attributable exclusively to reimbursable permit provision.

The Claimants must also demonstrate what computer equipment and upgrades are necessary to comply with the San Diego Permit above and beyond the prior permit. (See General Comment A.)”

Reply: See Reply to General Comment C. In addition, Computer and software upgrades are necessary to comply with new “updated” data tracking and analysis requirements found in the 2007 Permit, as previously discussed. Computer systems vary among Claimants’ jurisdictions. Consequently, it would be difficult, if not impossible, to develop useful rules in upgrading a Claimant’s particular system. Here, one size does not fit all. Rather, Claimants propose that each jurisdiction claim upgrades which do fit their system. Further, these upgrades would be disclosed and justified on reimbursement claim forms submitted to SCO in accordance with their Mandated Cost Manual for Local Agencies, as previously discussed.

3. Report Writing

Comment:

“Claimants must pro-rate the costs of report writing to exclude unreimbursable activities. (See General Comments C and E.)

Reply: See Reply to General Comments C and E.

4. Employee Supervision and Management

Comment:

“See Specific Comment III.A., Employee Supervision and Management and see also General Comment B.”

Reply: See Reply to Specific Comment III.A and General Comment B.

5. Contracted Services

Comment:

“See Specific Comment III.A., Contracted Services and see also General Comment D, above.”

Reply: See Reply to Specific Comment III.A and General Comment B.

E. Educational Component

1. Program Development

Comment:

“See General Comment C, above, regarding a lack of specificity in identification of activities and associated costs, other than Personnel Costs, to develop an educational program for target communities Claimants must pro-rate personnel and “other costs” to ensure that they are reimbursed only for costs directly

associated with implementation of reimbursable provisions. See also General Comment A, regarding the need to determine what activities were already being performed and do not represent a higher level of service. In addition, to the extent the Program Development incorporates hydromodification management plan or low impact development elements, the copermittees must transparently segregate those costs to avoid seeking improper reimbursement.”

Reply: See Reply to General Comments C and A. Regarding the Water Boards’ concern that Claimants’ proposed reimbursable activities do not represent a higher level of service, Claimants used the listing of educational program development activities found by the Commission to impose a higher level of service. Further, Claimants agree to pro-rate costs to ensure that “... they are reimbursed only for costs directly associated with implementation of reimbursable provisions.” To facilitate the identification and measurement of such reimbursable costs, Claimants have moved specific mandated activities found to be reimbursable by the Commission from Section I. (Summary of the Mandate) of Claimants’ Ps&Gs to Section IV. (Reimbursable Activities).

Also, pending review of Claimants’ appeal, Educational Program Development activities which incorporate hydromodification management plan activities or low impact development elements are now explicitly prohibited in Claimants’ Ps&Gs as reimbursable educational activities and associated costs to avoid seeking improper reimbursement.

2. Educational Reporting and Tracking Policies and Procedures

Under this category, the Water Boards note: “See immediately preceding comment.” Claimants incorporate their response above as though fully set forth here.

3. Educational Data Tracking and Analysis

Comment: “See Specific Comment III.D. Data Tracking and Analysis”

Reply: See Reply to Specific Comment III.D. Data Tracking and Analysis.

4. Educational Materials

Comment:

“See General Comment C, above, regarding a lack of specificity in identification of activities and associated “costs, other than Personnel Costs”, to develop educational materials for target communities. Claimants must pro-rate personnel and “other costs” to ensure that they are reimbursed only for costs directly associated with implementation of reimbursable provisions. To the extent the education materials incorporate hydromodification management plan or low impact development elements, the copermittees must transparently segregate those costs to avoid seeking improper reimbursement. (See also General Comment B.)

Reply: See Reply to General Comments C and B.

5. Employee and Vendor Annual Training

Comment: "See General Comments C and D above."

Reply: See Reply to General Comments C and D.

6. Education of Target Audiences

Comment: "See General Comments C. above."

Reply: See Reply to General Comment C.

7. Report Writing

Comment: "Claimants must pro-rate the costs of report writing to exclude unreimbursable activities. (See General Comments C. and E.)"

Reply: See Reply to General Comments C and E.

8. Employee Supervision and Management

Comment: "See Specific Comment III.A. Employee Supervision and Management." See also General Comment B."

Reply: See Reply to Specific comment III.A and General Comment B.

9. Contracted Services

Comment: "See Specific Comment III.A . Contracted Services. See also General Comment D."

Reply: See Reply to Specific Comment III.A and General Comment D..

F. Watershed Urban Runoff Management Program

Comment:

"With regard to many of the categories under the heading Watershed Urban Runoff Management Program (WURMP), identified in the Proposed Parameters and Guidelines, the Claimants describe costs, including Personnel Costs, associated with organizing and administering the WURMP Working Bodies. In describing these costs, Claimants use vague phrases including, 'such as telephone calls, emails, and video conferencing,' and '[r]equired tasks typically also include, but are not limited to:' (See Proposed Parameters and Guidelines, e.g., pp. 19-20.) With regard to the Collaborative Watershed Work Product Development, Claimants again describe a variety of tasks comprising 'WURMP Work Products' as 'includes, but is not limited to' (*Ibid.*) The Claimants also set forth what appears to be a catch-all category of other watershed work products, described as 'Any Watershed Working Body Work Product not specifically identified above, but required to achieve or maintain compliance with Permit Part E.2.' (*Id.*, p. 20.)

Similarly, Claimants propose the catch-all phrase 'Other programs and activities required to implement the WURMP.' (*Ibid.*) These are examples of similar phrasing that appears throughout the WURMP and other sections of the Proposed Parameters and Guidelines.

.... Claimants are nearing the end of the fourth year of San Diego Permit implementation and should be in a position to describe the tasks necessary to perform the WURMP requirements with greater specificity and to describe anticipated changes in these activities over the remainder of the permit term so that the Water Boards can evaluate whether the tasks are necessary to implement the permit provisions and whether the tasks represent the "most reasonable methods of complying with the mandate." (See Cal. Code Regs., tit. 2, § 1183.1 (a)(4).) Moreover, for the categories and subcategories Claimants identify, see also General Comment D regarding vendor training and General Comment E, regarding computer, hardware and software upgrades."

Reply: Claimants have revised their P&Gs with more specific reimbursable activity description that address each of the concerns raised above. The phrase "such as telephone calls, emails, and video conferencing" has been changed to "telephone calls, emails, and video conferencing." The phrase "[r]equired tasks typically also include, but are not limited to: ..." has been changed to "[r]equired tasks include...." The phrase "includes, but is not limited to ..." has been changed to "includes."

Claimants have eliminated the catch-all category of "other watershed work products" from their Ps&Gs. This category was described as "Any Watershed Working Body Work Product not specifically identified above, but required to achieve or maintain compliance with Permit Part E.2." However, Claimants reserve the right to propose additional specific reimbursable activities necessary to implement Part E.2., prior to Commission's adoption of the Ps&Gs.

Claimants have eliminated the catch-all phrase "Other programs and activities required to implement the WURMP." However, Claimants reserve the right to propose additional specific reimbursable activities necessary to implement the WURMP, prior to Commission's adoption of the Ps&GS.

Claimants disagree with the Water Boards' contention that Claimants have not adequately described the tasks necessary to perform the WURMP requirements and that they are unable to determine whether Claimants' identification of reimbursable tasks necessarily reflect the "most reasonable methods of complying with the mandate." Claimants' Ps&Gs provide detailed listings of such tasks on pages 18-21. Claimants maintain that these listings are sufficient for Parameters and Guidelines, which, as the name implies, are only intended to provide guidance and limitations on reimbursable costs. Moreover, there are no Ps&Gs requirements to predict changes in reimbursable activities over the remainder of the permit term.

Claimants disagree with the Water Boards' assertion that vendor training costs are not recoverable. See Reply to General comment D.

Claimants acknowledge the Water Boards' comment that the costs of purchases and upgrades of equipment, hardware and software must be limited to those necessary to comply

with the San Diego Permit, and must be transparently segregated into use for reimbursable and unreimbursable activities. See Reply to General Comment E.

1. Vehicle and Equipment Maintenance

Comment:

“Among the specific implementation costs Claimants do identify for WURMP provisions are for the categories ‘Equipment’ and ‘Vehicle and Equipment Maintenance.’ Claimants propose parameters and guidelines that will allow them to be reimbursed for the ‘actual cost of purchasing, renting, leasing, or contracting for vehicles and equipment to perform watershed activities mandated by the permit.’ (Proposed Parameters and Guidelines, p. 21.) They also will seek reimbursement for the costs of facilities to store and maintain the vehicles and/or equipment and supplies. (*Ibid.*) The activities Claimants describe under the WURMP provisions do not appear to require vehicles to implement, other than perhaps to attend meetings. It is unlikely that cars have been purchased and are used exclusively for WURMP activities. If they are dedicated to WURMP activities, it is questionable whether such Single-use purchases are the most reasonable methods of complying with the mandate from a cost and efficiency standpoint. The Claimants must demonstrate with specificity what activities they undertake to implement WURMP activities that require vehicles and must also segregate costs associated with other uses of the vehicles so that it is transparent what percentage of vehicle purchase and maintenance costs are reasonably attributable to WURMP activities.

Reply: Claimants agree with the Water Boards’ comments that WURMP provisions do not generally require vehicles to implement, but may in cases where Claimant staff are required to attend meetings. Accordingly, Claimants contend that mileage costs for required travel in attending mandated WURMP meetings are reimbursable at mileage rates authorized by the Claimant’s jurisdiction or the Internal Revenue Service, whichever is less.

G. Regional Collaboration

Comment:

“Claimants use similar, if not identical, qualifying language as in the WURMP discussion to describe activities in the Regional Collaboration discussion. For example, they use the ‘costs, including Personnel Costs[,]’ and for Regional Work Product Development, costs ‘to develop and update any regional work product identified in an approved Regional Working Body Work Plan and Budget. This includes, but is not limited to, the following ...’ (Proposed Parameters and Guidelines, p. 23.) They also identify as ‘Other Regional Work Products’ ‘Any Regional Working Body Work Product not specifically identified above, but required by the Permit or necessary to achieve or maintain Permit compliance. This includes, but is not limited to’ (*Id.*, p. 24.)

As with the Water Boards’ comments on the WURMP activities and in General Comment C, above, the Water Boards are concerned with the lack of specificity in the Claimants’ use of the vague phrases cited above for Regional Collaboration

and the Regional Urban Runoff Management Program. Claimants are nearing the end of the fourth year of San Diego Permit implementation and should be in a position to describe the regional tasks they are performing with greater specificity and to describe anticipated changes to these activities for the remainder of the permit term so that the Water Boards can evaluate whether the tasks are necessary to implement the permit provision and whether the tasks represent the "most reasonable methods of complying with the mandate." (See Cal. Code Regs., tit. 2, § 1183.1 (a)(4).) Moreover, for the additional categories and subcategories identified in the Proposed Parameters and Guidelines, see also General Comment D, regarding vendor costs and Comment E, regarding computer, hardware and software upgrades. The Water Boards' general comments on those topics are equally applicable to the Regional Collaboration discussion.

The Water Boards incorporate General Comments C., D., and E. in the comments on the regional activities and in an effort to avoid repetition, the Water Boards identify below, as applicable only those additional specific comments associated with some of the identified activities in the Proposed Parameters and Guidelines"

Reply: See Reply to General Comment C. In addition, the Regional Work Product Development, costs "to develop and update any regional work product identified in an approved Regional Working Body Work Plan and Budget. This includes, but is not limited to, the following" has been changed to costs "to develop and update regional work products identified in an approved Regional Working Body Work Plan and Budget. This includes the following" In the "Other Regional Work Products" section the language "Any Regional Working Body Work Product not specifically identified above, but required by the 2007 Permit or necessary to achieve or maintain Permit compliance. This includes, but is not limited to" has been changed to "Regional Working Body Work Product not specifically identified above, but required by the Permit or necessary to achieve or maintain 2007 Permit compliance."

Claimants disagree with the Water Boards' contention that Claimants have not adequately described the tasks necessary to perform the Regional Collaboration requirements and that they are unable to determine whether Claimants' identification of reimbursable tasks necessarily reflect the "most reasonable methods of complying with the mandate." Claimants' Ps&Gs provide detailed listings of such tasks on pages 22-25. Claimants maintain that these listings are sufficient for Parameters and Guidelines, which, as the name implies, are only intended to provide guidance and limitations on reimbursable costs. Moreover, there are no Ps&Gs requirements to predict changes in reimbursable activities over the remainder of the permit term.

Claimants disagree with the Water Boards' assertion that vendor training costs are not recoverable. See Reply to General Comment D.

Claimants acknowledge the Water Boards' comment that the costs of purchases and upgrades of equipment, hardware and software must be limited to that necessary to comply with the San Diego Permit, and must be transparently segregated into use for reimbursable and unreimbursable activities. See Reply to General Comment E.

1. Regional Work Product Development

“... Report of Waste Discharge.

The Water Boards specifically object to identification of the Report of Waste Discharge (ROWD) as a Regional Work Product required by reimbursable provisions of the San Diego Permit. The requirement to submit a ROWD is set forth in the San Diego Permit at section J.2., but that requirement merely reflects the legal requirement that exists in federal law to submit an ROWD. The Claimants' obligation to prepare and submit a ROWD is imposed directly by federal mandate in the Clean Water Act and the Commission itself recognizes the Claimants' obligation to obtain a permit under the federal law in its Statement of Decision wherein the Commission states: 'NPDES permits are required for 'A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.' (Statement of Decision, p. 6, citing 33 USCA § 1342(p)(2)(C).) The obligation to submit a ROWD for permit renewal arises directly from the federal requirement that NPDES permits are limited to 5 year terms. (40 C.F.R. § 122.46(a) ('NPDES permits shall be effective for a fixed term not to exceed 5 years.')) The Commission's Statement of Decision did not determine otherwise. Therefore, the costs of preparing and submitting a ROWD are not reimbursable.

Claimants agree with the Water Boards' comment that the costs of preparing and submitting a ROWD are not reimbursable. Accordingly, these activities and costs have been deleted in claimants' revised Ps&Gs.

2. Program Effectiveness Assessment

Comment:

“Similar to other descriptions of activities and costs Claimants assert should be included in the Adopted Parameters and Guidelines, Claimants again use language and phrases to allow for the later identification of specific activities and associated costs. For example, as with other permit provisions, the Claimants identify 'costs, including Personnel Costs,' without describing what other 'costs' they intend to reference. (Proposed Parameters and Guidelines, p. 25.) See Water Boards' General Comment C, above, applicable to these unspecified categories of activities. Similarly, the Claimants identify costs of purchases and upgrades to equipment, hardware and software necessary to support data tracking, analysis and reporting (Program Implementation) as costs associated with reimbursable requirements. The Water Boards are concerned that the Claimants have not adequately demonstrated why purchases and upgrades are necessary to support the Program Effectiveness Assessment functions and how they will distinguish activities and costs incurred to comply with the higher level of service identified by the Commission as compared to the prior permit. (See General Comments A and E and Specific Comment III.E.) In addition, the Claimants have not made clear how they will effectively exclude, in a transparent way, costs for computers and associated upgrades that are incurred in connection with unreimbursable provisions such as hydromodification management plan and low impact development elements. Finally, the Claimants assert that training of staff,

including vendor employees, is necessary to comply with the mandated provisions and costs for such training should be reimbursed. The Water Boards disagree. (See Water Boards' General Comment D, above.) The Water Boards' General Comments are generally applicable as well to the categories and subcategories identified for Program Effectiveness Assessment listed in the Proposed Parameters and Guidelines, although the Water Boards do not have any additional specific comments applicable to these categories at this time."

Reply: The above comments are identical to those previously made and addressed by Claimants. Claimants incorporate by reference their earlier replies to these comments.

Reply to Other Issues Comments by the Water Boards

A. Offsetting Revenues

Comment:

"The Statement of Decision finds that certain types of fees "would be identified as offsetting revenue in the parameters and guidelines." (Statement of Decision, p 2.) The Claimants' Proposed Parameters and Guidelines do not address whether there are or they anticipate there will be any offsetting revenues for Inclusion in the Parameters and Guidelines. Claimants should be required to identify offsetting revenues prior to the Commission's adoption of Parameters and Guidelines. Moreover, the Claimants have not, but should be to, identify and include offsetting revenues derived from street sweeping and conveyance system cleaning parking sign enforcement. Finally, the Claimants have not identified any general fund revenues available to apply to reimbursable provisions for purposes of offsetting reimbursement amounts."

Reply: Claimants have added the following offsetting revenue language to their revised Ps&Gs which was included in Commission's Statement of Decision (SOD) on page 133:

"Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to service fees collected, federal funds, other state funds, and:

- 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.”

Finally, Claimants note that general fund revenues appropriated by the State for the reimbursable portions of the 2007 Permit need to be offset. This is required under the above provisions that “other state funds” for the same executive order’s reimbursable mandates be offset.

B. Reasonable Reimbursement Methodology

Comment:

“In their transmittal letter for the Proposed Parameters and Guidelines, Claimants state that they ‘believe it would be appropriate to include a reasonable reimbursement methodology as defined in Government Code section 17518.5, for a number of the activities found to be reimbursable by the Commission’ To the Water Boards’ knowledge neither Claimants nor any state agency has submitted a proposed reasonable reimbursement methodology. The Water Boards reserve the right to comment on any such methodology that may be proposed in the future in this proceeding.”

Reply: Claimants are developing a ‘reasonable reimbursement methodology’ (RRM), as defined in Government Code section 17518.5, for a number of the activities found to be reimbursable by the Commission. The types of potential RRM activities under study include repetitive street sweeping and conveyance inspection and cleaning activities and periodic meeting activities.

Claimants have found the NPDES Stormwater Cost Survey, prepared for the California State Water Resources Control Board by the Office of Water Programs, California State University Sacramento during January, 2005, to be particularly helpful in selecting appropriate RRM survey techniques and metrics. For example, the NPDES Stormwater Survey provides substantial information on how to develop the street sweeping metric of ‘cost per curb mile swept’.

Claimants hope to file their RRM metrics with the Commission by late January of 2011.

Very truly yours,

JOHN J. SANSONE, County Counsel

By



TIMOTHY M. BARRY, Senior Deputy

TMB:lw
10-90139

**BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA**

IN RE TEST CLAIM ON:

San Diego Regional 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, La Mesa, Lemon
Grove, National City, Oceanside, San
Diego, and Vista, Claimants.

Case No.: 07-TC-09

Discharge of Stormwater Runoff

PROPOSED PARAMETERS AND
GUIDELINES PURSUANT TO
GOVERNMENT CODE SECTION 17557
AND TITLE 2, CALIFORNIA CODE OF
REGULATIONS, SECTION 1183.12

(Revised 11/15/10)

Parameters and Guidelines

San Diego Regional 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.

Discharge of Stormwater Runoff

I. SUMMARY OF THE MANDATE

On March 26, 2010, the Commission on State Mandates (“Commission”) adopted its Statement of Decision (“SOD”) finding that San Diego Regional Quality Control Board Order No. R9-2007-0001, Permit CAS108758 (the “Permit”) imposes reimbursable state-mandated programs and activities upon the Co-permittees¹ under the Permit within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

- 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)).

¹ Co-permittees under the Permit include the County of San Diego, the San Diego Unified Port District, the San Diego County Regional Airport Authority and the cities of 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.

The Commission also found that the following test claim activities are not reimbursable because the claimants have fee authority sufficient (within the meaning of Gov't 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)).

Finally, the Commission determined that 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.

II. ELIGIBLE CLAIMANTS

Eligible claimants are the County of San Diego, the San Diego Unified Port District, the San Diego County Regional Airport Authority and the cities of 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.

III. PERIOD OF REIMBURSEMENT

The term of the Permit is from January 24, 2007 – January 23, 2012.² 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.³

² 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."

³ 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."

Government Code section 17557, subdivision (e), provides that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. The Co-permittees filed their Test Claim in this matter on June 20, 2008. Therefore, the period of reimbursement began January 24, 2007.

Actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent years may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial year's costs shall be submitted to the Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given year do not exceed \$1,000, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, an eligible claimant may file a reimbursement claim which may utilize "reasonable reimbursement methodologies" ("RRMs") specified in Section VI. or actual cost methodologies as specified in Section V. Where an RRM is not provided to claim reimbursable costs, the actual cost method must be used.

A. Street Sweeping (part D.3.a.(5)) - Sweeping of Municipal Areas:

Mandated Activities:

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.

Reimbursable Activities:

Street Sweeping (part D.3.a.(5)) reimbursable activities and costs include:

- Street Sweeping Operations. The claimant's personnel costs⁴ to perform street sweeping.⁵
- Equipment. The actual cost of purchasing, renting, leasing, or contracting for equipment to perform street sweeping and related functions. This includes one-time costs for equipment purchases and corresponding equipment depreciation costs.
- Equipment Maintenance. Annual equipment maintenance costs, including parts, supplies (e.g., water), and Personnel Costs. This also includes the cost of operating, renting, leasing, or contracting for facilities to store and maintain equipment and supplies.
- Materials Disposal. Costs to dispose of material collected from street sweeping, including the removal of materials from street sweeping vehicles, and the transport, storage, and disposal of these materials and the cost of operating, renting, leasing, or contracting for facilities to store or dispose of collected materials, and all applicable disposal fees or charges.
- Fuel. The actual cost of the fuel necessary to run the street sweeping equipment and equipment used to transport and dispose of collected materials.
- Program Development. The claimant's costs to develop and update the claimant's street sweeping program including specific criteria, policies, procedures, manuals, and forms. This includes the development and utilization of criteria to determine which roads, streets, highways, and parking facilities have high, moderate, and low volumes of trash and/or debris.⁶ Program development tasks are generally one-time costs with annual reviews and periodic updates.

⁴ Unless otherwise stated in these Parameters and Guidelines, a claimant's "personnel costs" refer to actual salary, benefit and indirect costs and will be claimed for only that part of the cost that is related to the reimbursable mandate. Some of the actual costs may be incurred through the use of vendors, contractors, consultants, or other service providers, and should be claimed as described in the last bullet point of this section.

⁵ "Street sweeping" includes sweeping of improved roads, streets, highways, and parking facilities subject to the reimbursable mandate.

⁶ Under the Permit, the Copermittees are individually responsible to define high, moderate, and low categories of trash generation, and to implement their sweeping activities accordingly within their jurisdictions.

- Employee and Vendor Training. The claimant's costs to develop, update, and conduct training on street sweeping policies, procedures, to develop and produce documentation (manuals, forms, etc.), and the training costs of all claimant and vendor employees who perform tasks necessary to implement street sweeping and related functions during the life of the Permit.
- Parking Signage and Enforcement. The claimant's costs, to purchase and install street sweeping signage and to enforce parking prohibitions in areas where street sweeping is scheduled and the costs to purchase, installation, or replacement of signage to inform the public of applicable parking restrictions, as well as their surveillance and enforcement.
- Employee Supervision and Management. Time spent by supervisory and management personnel supervising personnel directly responsible for performing the mandated activities. (Hereinafter referred to as "Employee Supervision and Management".)
- Contracted Services. Any of the costs described above may be incurred through the use of vendors, contractors, consultants, or other service providers. In such case, only actual costs to the claimant will be claimed, and will only include that portion of the cost that is related to the reimbursable mandate. Claimants may also include the costs of preparing requests for proposals or requests for bids, negotiating and drafting third party contracts, and subsequently administering service contracts for the time they are performing these tasks using the claimant's Personnel rates. (Hereinafter referred to as "Contracted Services".)

B. Street Sweeping Reporting (part J.3.a.(3)(c)x-xv):

Mandated Activities:

Report annually on 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.

Reimbursable Activities:

Street Sweeping Reporting (part J.3.a.(3)(c)x-xv) reimbursable activities and costs include:

- Reporting and Tracking Policies and Procedures. Claimant's personnel costs to develop, update, and implement street sweeping reporting and tracking policies and procedures.
- Data Tracking and Analysis. Claimant's costs, to develop, update, and implement data tracking and analysis methods and procedures and personnel costs to develop and maintain data tracking methods or systems, and performing data tracking and analysis for reports to the Regional Water Quality Control Board. Also included are the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.
- Report Writing. Claimant's personnel costs to develop and write reports to the Regional Water Quality Control Board.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).

C. Conveyance System Cleaning (part D.3.a.(3)):

Mandated Activities:

(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.

Reimbursable Activities:

Conveyance System Cleaning (part D.3.a.(3)): reimbursable activities and costs include:

- Conveyance System Inspection. Claimant's personnel costs to inspect the conveyance system for the purposes of assessing the accumulation of trash, debris, or litter, or for verifying the proper operation of structural treatment controls.
- Conveyance System Cleaning Operations. Claimant's personnel costs to clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, to clean accumulated trash and debris from any MS4 facility that is designed to be self cleaning, or to clean open channels of observed anthropogenic litter.
- Vehicles and Equipment. Claimant's costs to purchase, rent, lease, or contract for vehicles and equipment to perform conveyance system inspection or cleaning (including vector trucks and other cleaning equipment), and to transport and dispose of collected material. This includes one-time costs for equipment purchases and corresponding equipment depreciation costs.
- Vehicle and Equipment Maintenance. Annual maintenance costs, including parts, supplies (e.g., water), and personnel costs. This also includes the cost of operating, renting, leasing, or contracting for facilities to store and maintain vehicles, equipment, and supplies.
- Fuel. The actual cost of the fuel necessary to run the vehicles and equipment, to inspect and clean MS4 facilities, and to transport and dispose of collected materials.

- Program Development. Claimant's costs to develop and update the claimant's conveyance system cleaning program including specific criteria, policies, procedures, manuals, and forms. This includes the development and utilization of inspection and maintenance schedules. Program development tasks are generally one-time costs with annual reviews and periodic updates.
- Employee and Vendor Training. Claimant's costs to develop, update, and conduct training on conveyance system inspection, cleaning, and disposal policies and practices. The costs include training of all claimant and vendor employees who perform tasks necessary to implement conveyance system cleaning and related functions during the life of the Permit.
- Parking Signage and Enforcement. Claimant's costs to purchase and install signage and to enforce parking prohibitions in areas where conveyance system cleaning is scheduled and costs to purchase, installation, or replacement of signage to inform the public of applicable parking restrictions, as well as their surveillance and enforcement.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).

Nonreimbursable Activities:

Conveyance System Cleaning (part D.3.a.(3)): reimbursable activities and costs do not include:

1. Part D.3.a(3)(a) of the 2007 permit;
2. Part D.3.a.(3)(b)(i),(iv)- (vi) of the 2007 permit;
3. Annual inspection of MS4 facilities (D.3.a(3)(b)(i));
4. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a(3)(b)(iv));
5. Proper disposal of waste removed pursuant to applicable laws (D.3.a(3)(b)(v));
6. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a(3)(b)(vi)). Part D.3.a.(3)(b)(ii) of the 2007 permit.

D. Conveyance System Cleaning – Reporting (J.3.a.(3)(c) iv-viii)

Mandated Activities:

Update and revise the Copermittees' 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.

Reimbursable Activities:

Conveyance System Cleaning – Reporting (J.3.a.(3)(c) iv-viii) reimbursable activities and costs include:

- Reporting and Tracking Policies and Procedures. Personnel Costs, to develop, update, and implement conveyance system inspection and cleaning reporting and tracking policies and procedures.
- Data Tracking and Analysis. Claimant's Costs to develop, update, and implement data tracking and analysis methods and procedures and personnel costs to develop or maintain data tracking methods or systems, and to perform data tracking and analysis for reports to the Regional Water Quality Control Board as well as the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.

- Report Writing. Claimant's personnel costs, to develop and write reports to the Regional Water Quality Control Board.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).

E. Educational Component (part D.5):

Mandated Activities:

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: (i) Erosion prevention, (ii) Non storm water discharge prohibitions, and (iii) BMP types: facility or activity specific, LID,-source control, and treatment control.
- (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.

Reimbursable Activities:

Educational Component (part D.5)⁷ reimbursable activities and costs include:

- Program Development. Claimant's costs to develop an educational program for the target communities and the costs of preparation, collaboration, and development of the educational program, training, policy development, establishment of procedures, and updates to the same. While program development tasks are generally one-time costs, the Permit requires measurable increases in knowledge and measurable changes in behavior, which necessitate annual reviews and periodic updates to the program; therefore these costs are also included.
- Reporting and Tracking Policies and Procedures. Claimant's personnel costs, to develop, update, and implement reporting and tracking policies and procedures.
- Data Tracking and Analysis. Claimant's costs to implement and update data tracking and analysis methods and procedures and personnel costs to develop and maintain data tracking methods or systems and performing data tracking and analysis for reports to the Regional Water Quality Control Board as well as the costs of purchases of and upgrades to equipment, hardware and software necessary to support data tracking, analysis and reporting of the reimbursable mandate in compliance with the Permit.
- Educational Materials. Claimant's personnel and printing costs to develop, produce and distribute educational materials and related reporting to document the efforts.
- Employee and Vendor Annual Training. Claimant's costs to develop, update, and conduct training of staff responsible for providing education to target communities and the costs of training of all claimant and vendor employees who perform tasks necessary to implement educational functions during the life of the Permit.
- Education of Target Audiences. Claimant's personnel and printing costs to implement and conduct educational programs for the target communities.

⁷ Specifically parts D.5.a.(1); D.5.a.(2); D.5.b.(1)(a)(i) and (ii) for planning boards and elected officials; D.5.b.(1)(a)(iii) - (iv) for all target audiences; D.5.b.(1)(b)(iii) - (vi); D.5.b.(1)(c) and (d); D.5.b.(2) for project applicants, contractors, or community planning groups who are not developers or construction site owners; and D.5.b.(3).

- Report Writing. Claimant's personnel costs to develop and write reports to the Regional Water Quality Control Board.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).

Nonreimbursable Activities:

Educational Component (part D.5)⁸ reimbursable activities and costs do not include:

1. 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)
2. 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 minimized 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.
3. 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.

⁸ Specifically parts D.5.a.(1); D.5.a.(2); D.5.b.(1)(a)(i) and (ii) for planning boards and elected officials; D.5.b.(1)(a)(iii) - (iv) for all target audiences; D.5.b.(1)(b)(iii) - (vi); D.5.b.(1)(c) and (d); D.5.b.(2) for project applicants, contractors, or community planning groups who are not developers or construction site owners; and D.5.b.(3).

4. 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.

Claimants are required to educate target communities, except for planning boards and elected officials, on the topics specified in part D.5.b.(1)(a) of the 2007 permit which are the same as those topics specified in part F.4.a. of the 2001 permit. The topics which are not reimbursable for planning boards and elected officials are:

1. Federal, state, and local water quality laws and regulations applicable to construction and grading activities. [The 2001 permit, in F.4.a. (p. 35) which covers "...Federal, state and local water quality regulations that affect development projects."
2. 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."]

Part D.5.b.(1)(b) (Municipal Construction Activities) of the 2007 Permit requires Part D.5.b.(1)(b) (Municipal Construction Activities) of the permit which requires implementing an educational program for municipal "construction, building, code enforcement, and grading review staffs" is not a reimbursable activity. It 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:

1. 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."]
 2. 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." This timing requirement is a new program or higher level of service compared with the 2001 permit.

Part D.5.(b)(2) of the 2007 permit requires educational activities that are not reimbursable. These activities for “project applicants, developers, contractors property owners, community planning groups, and other responsible parties are similar to those required in Parts F.4.a and F4.b. of the 2001 permit.

F. Watershed Urban Runoff Management Program (parts E.2.f & E.2.g.)

Mandated Activities:

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 the 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 the 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. 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.

Reimbursable Activities:

Watershed Urban Runoff Management Program (parts E.2.f and E.2.g) reimbursable activities and costs include:

- Working Body Support and Representation. Claimant's costs to organize and administer the Watershed Urban Runoff Management Program ("WURMP") Working Bodies.⁹ And the costs incurred 1) to perform the responsibilities of chairs¹⁰, co-chairs, and secretaries¹¹, 2) attend and participate at meetings (including preparation and travel time), and 3) other activities required for planning, discussion, and coordination such as telephone calls, emails, and video conferencing. Required tasks include 1) developing and distributing meeting agendas and notes, and 2) distributing, presenting, reviewing, and approving any of the Watershed Work Products described below.
- Collaborative Watershed Work Product Development. Claimant's Personnel costs to develop and update WURMP Work Products and the costs of such activities including:
 - Watershed Urban Runoff Management Programs ("WURMPs"). A WURMP that includes all of the elements described in Permit Part E.2;

⁹ Permit Part E.2.g requires the collaborative development and implementation of a WURMP for each of the following Watershed Management Areas ("WMAs"): 1) Santa Margarita River; 2) San Luis Rey River; 3) San Dieguito River; 4) Peñasquitos; 5) Mission Bay; 6) San Diego River; 7) San Diego Bay, and; 8) Tijuana River.

¹⁰ MOU Section I defines a Chair as follows: "Chair means presiding over and providing leadership and direction to a Working Body. This includes serving as a point of contact to external entities such as Regional Board staff, stakeholders, and industry groups, soliciting group input on and developing meeting content, facilitating meetings, and coordinating with the Secretary or Working Body Support staff to finalize work products for distribution to the Working Body. Chair responsibilities may also be divided between Co-Chairs."

¹¹ MOU Section I defines a Secretary as follows: "Secretary means a person who takes responsibility for the records, correspondence, minutes or notes of meetings, and related affairs of a Working Body. This includes: maintaining group contact lists; preparing and sending out meeting notifications and agendas; arranging for meeting rooms and equipment; taking, preparing, and finalizing meeting minutes or notes; and, coordinating with the Chair or Working Body Support staff to organize and distribute work products to the Working Body."

- Watershed Activities Lists. Any Watershed Water Quality Activity¹² or Watershed Education Activity¹³ necessary to meet the requirements of Permit Part E.2.f.(2), to include any or all of the minimum information identified in Permit Part E.2.f.(3);
- Annual WURMP Work Plans and Budgets. Any Work Plan or Budget developed to support the implementation of a WURMP;
- WURMP Annual Reports. Both the annual report content provided by individual Watershed Copermittees and the completion of the consolidated WURMP Annual Report;
- Watershed-Specific Standards. 1) Watershed reporting, assessment, and program data and information management standards; and 2) standards and approaches for watershed-level management of specific source categories or types. It applies to work products developed by individual Copermittees, their consolidation into comprehensive, watershed standards documents, and periodic updates as necessary for each;
- Working Body Status Reports. Watershed Working Body status reports developed for dissemination to Copermittees and interested parties. Status reports typically describe Watershed Working Body activities and accomplishments, success in completing scheduled tasks, and key issues, activities, and tasks to be addressed; and
- Other Watershed Work Products. Any Watershed Working Body Work Product not specifically identified above, but required to achieve or maintain compliance with Permit Part E.2.
- Watershed Implementation of Programs and Activities. Claimant's costs for the ongoing implementation of programs and activities funded and/or conducted at the watershed level and Watershed programs and activities costs including:
 - Watershed Water Quality Activities
 - Watershed Education Activities
 - Other programs and activities required to implement the WURMP

¹² Activities other than education that address high priority water quality problems in the WMA.

¹³ Outreach and training activities that address high priority water quality problems in the WMA.

Implementation costs associated with these programs and activities including:

- Materials production and distribution, equipment, supplies, fees, media purchases, and other costs associated with program implementation.
- Equipment. The actual cost of purchasing, renting, leasing, or contracting for vehicles and equipment to perform watershed activities mandated by the Permit. This includes one-time costs for vehicle and equipment purchases and corresponding equipment depreciation costs.
- Vehicle and Equipment Maintenance. Annual vehicle and equipment maintenance costs, including parts, supplies (e.g., water), and Personnel Costs. This also includes the cost of operating, renting, leasing, or contracting for facilities to store and maintain the vehicles and/or equipment and supplies.
- Fuel. The actual cost of the fuel for the vehicles and equipment performing watershed activities mandated by the Permit.
- Reporting and Tracking Policies and Procedures. Claimant's personnel costs to develop, update, and implement each WMA activity and tracking policies and procedures.
- Data Tracking and Analysis. Claimant's costs to develop, update, and implement data tracking and analysis methods and procedures for reports to the Regional Water Quality Control Board and costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.
- Report Writing. Claimant's personnel costs to develop and write reports to the Regional Water Quality Control Board.
- Employee and Vendor Annual Training. Claimant's costs to develop, update, and conduct training of staff responsible for developing or conducting WMA activities and costs of training of all claimant and vendor employees who perform tasks necessary to implement these functions during the life of the Permit.
- Cost Accounting and Documentation. Claimant's personnel costs to monitor and conduct cost accounting for all expenditures incurred in accordance with WURMP development and implementation and costs of documenting and monitoring expenditures incurred in developing and

distributing budget balance and expenditure reports, and claim submittal forms. and costs of individual Copermittee activities in developing and maintaining data tracking methods or systems, and of performing data tracking and analysis (including staff training), as well as the costs of purchases and upgrades to equipment, hardware, and software necessary to support expenditure tracking, analysis, and reporting.

- Coordination. Claimant's personnel costs, to coordinate WURMP Working Body content, issues, programs, and activities with organizations and parties outside the claimant's jurisdiction and the costs of coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).

G. Regional Urban Runoff Management Program (parts F.1, F.2 & F.3)

Mandated Activities:

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 part 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.

Reimbursable Activities:

All Copermittee [Regional] Collaboration (part L), Regional Urban Runoff Management Program (parts F.1, F.2, and F.3), and, Long Term Effectiveness Assessment (I.5).¹⁴

In general, part L requires the establishment of a regional management structure and the implementation of collaborative activities under that structure to “address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate [required] activities...”. Part F requires Copermittee collaboration, but specifically focuses on the development, implementation, and updating of a Regional Urban Runoff Management Program (“RURMP”).¹⁵ Part I.5 is similar to part F.3 in its requirement for collaboration on effectiveness assessment, but specifically requires the completion of a Long Term Effectiveness Assessment (“LTEA”) in the fifth year of Permit implementation.

In practice, parts L, F, and I.5 are all carried out through the same regional structure, i.e., a defined set of Working Bodies¹⁶ with responsibilities corresponding to specific subject areas (e.g., Regional Management Committee, Municipal Sources Workgroup, or Fiscal, Reporting, and Assessment Workgroup). With limited exception¹⁷, all Copermittee collaboration and coordination is carried out through these Working Bodies. Working Body meetings typically address regional, jurisdictional, and watershed issues or functions concurrently because a clear separation between them does not exist. The types of costs presented below therefore apply to parts L, F, and I.5.

- Regional Coordination of Copermittees and Regional Working Bodies. Claimant’s costs to develop, distribute, review, and present work

¹⁴ The Long Term Effectiveness Assessment must be submitted to the Regional Board no later than 210 days prior to the expiration of the Permit. It is a one-time requirement.

¹⁵ In particular parts F.1 through F.3 require 1) development and implementation of a Regional Residential Education Program, 2) development of a standardized fiscal analysis method, and 3) facilitation of the assessment of effectiveness of jurisdictional, watershed, and regional programs.

¹⁶ MOU Section I defines Working Body as “... Committees, Subcommittees, Workgroups, Sub-workgroups, or any other group of Copermittees assembled to conduct work required by, for, or in furtherance of, compliance with the Permit.” The MOU also identifies specific Working Bodies and the general and specific responsibilities of each. MOU Section III.B.4.e also allows that the Copermittees’ Regional Management Committee may “[e]stablish or modify Working Bodies to review specific issues, make recommendations, or conduct work in support of shared regional priorities or objectives.”

¹⁷ As Principal Permittee, the County of San Diego is also responsible to carry out the functions defined in part M (Principal Permittee Responsibilities). These functions are necessary to support the general mandates of parts F and L.

products necessary for regional planning, coordination, and collaboration amongst Copermittees and Regional Working Bodies and the costs of written work products, presentations at meetings, and other means of coordination and review such as e-mail.

- Working Body Support and Representation.¹⁸ Claimant's costs to organize and administer the Regional Working Bodies and the costs of activities: 1) to perform the responsibilities of chairs, co-chairs, and secretaries, 2) attend and participate in meetings (including preparation and travel time), and 3) planning, discussion, and coordination telephone calls, emails, and video conferencing. Required tasks include: 1) developing and distributing meeting agendas and notes, and 2) distributing, presenting, reviewing, and approving any of the Regional Work Products described below.
- Regional Work Product Development. Claimant's personnel costs to develop and update any regional work product identified in an approved Regional Working Body Work Plan and Budget and the costs of such activities including:
 - Working Body Status Reports. Regional Working Body status reports developed for dissemination to Copermittees and interested parties. Status reports typically describe Regional Working Body activities and accomplishments, success in completing scheduled tasks, and key issues, activities, and tasks to be addressed;
 - Annual Work Plans and Budgets. Both individual Regional Working Body Work Plans and Budgets and the Copermittees' Annual Regional Work Plan and Regional Shared Costs Budget;
 - Regional URMP Annual Reports. Both the annual report content provided by individual Regional Working Bodies and the completion of the consolidated Regional URMP Annual Report;
 - Regional Standards. 1) Regional reporting, assessment, and program data and information management standards; and 2) regional standards and approaches for the management of specific source categories or types. It applies to work products developed by

¹⁸ MOU Section I defines Representation as "... serving as a Copermittee point of contact [for a Working Body], and, as applicable, receiving, reviewing, and providing input on correspondence, meeting materials, and work products." It also defines Participation as "regularly attending meetings, participating in the development, review, and finalization of work products, and carrying out the responsibilities of the Working Body." For the purposes of the MOU and these Parameters and Guidelines, Participants are considered to be a subset of Representatives.

individual Regional Working Bodies, their consolidation into comprehensive, regional standards documents, and periodic updates as necessary for each; and

- Other Regional Work Products. Any Regional Working Body Work Product not specifically identified above, but required by the Permit or necessary to achieve or maintain Permit compliance. This includes, but is not limited to:
 - A formal agreement between the Copermittees that provides a management structure for meeting the requirements of the Permit.¹⁹
 - By-laws for the conduct of Copermittee Working Bodies.
 - A standardized method and format for annually conducting and reporting fiscal analyses of urban runoff management programs.²⁰
 - A Long Term Effectiveness Assessment (“LTEA”) that addresses at least the following: review and assessment of jurisdictional, watershed, and regional program effectiveness (including analysis of outcome levels 1-6); assessment of the effectiveness of the Receiving Waters Monitoring Program in meeting its ability to answer the five core management questions, and; evaluation of the relationship of program implementation to changes in water quality. This may also include shared or individual Copermittee costs of collaboratively developing assessment methods and approaches, developing or maintaining data tracking methods or systems, and of performing data collection, tracking, management, analysis, and reporting (including staff training), as well as purchases and upgrades to equipment, hardware, and software necessary to support these data management functions.
- Regional Implementation of Programs and Activities. Claimant’s personnel costs for the ongoing implementation of regionally-funded and/or conducted programs and costs of materials production and

¹⁹ An executed formal agreement must be submitted to the Regional Board no later than 180 days after adoption of the Permit. It is a one-time requirement that was initially satisfied through the July 24, 2007 amendment of the Copermittees’ Dec. 3, 2001 Memorandum of Understanding (“MOU”). A new MOU was executed on January 29, 2008 and amended in June 2010.

²⁰ The standardized fiscal method must be submitted to the Regional Board by January 31, 2009. It is a one-time requirement.

distribution, equipment, supplies, fees, and media. Regional programs and activities include:

- Education of Residential Target Audiences
- Annual Regional Effectiveness Assessments
- Programs and Activities Included as Part of the Regional URMP
- Cost Accounting and Documentation. Claimant's personnel costs to monitor and conduct cost accounting for all expenditures incurred in accordance with Regional Working Body Work Plans and Budgets and the Copermittees' Annual Regional Work Plan and Regional Shared Costs Budget and costs associated with documenting and monitoring expenditures (e.g., developing and distributing budget balance and expenditure reports, claim submittal forms.) incurred pursuant to approved Regional Working Body Work Plans and Budgets. It also includes the individual Copermittee costs of developing or maintaining data tracking methods or systems, and of performing data tracking and analysis (including staff training), as well as the costs of purchases and upgrades to equipment, hardware, and software necessary to support expenditure tracking, analysis, and reporting.
- External Coordination. Claimant's personnel costs to coordinate Regional Working Body content, issues, programs, and activities with external organizations and parties and coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).

H. Program Effectiveness Assessment (parts I.1 & I.2)

Mandated Activities:

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 Discharge²¹ 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 1-6²² to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

²¹ 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)].”

²² 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 the 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,²³ Water Quality Assessment,²⁴ and Integrated Assessment,²⁵ 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 the 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.

²³ 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 measurable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

²⁴ 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."

²⁵ 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."

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)²⁶ 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

²⁶ 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.

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 the Order.²⁷ 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.

²⁷ Section A is "Prohibitions and Receiving Water Limitations."

Reimbursable Activities:

Program Effectiveness Assessment (I.1 and I.2) activities and costs which are reimbursable include:

- Program Development. Claimant's costs to develop and annually update JURMP and WURMP effectiveness assessment methods, approaches, and documentation (e.g., policies, procedures, manuals and forms), as well as data management systems and tools necessary to support the implementation of effectiveness assessments.
- Program Implementation. Claimant's personnel costs to conduct the annual JURMP and WURMP effectiveness assessments in accordance with the Copermittee's effectiveness assessment program and the requirements of Parts I.1 and I.2 of the Permit and the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting.
- Employee and Vendor Annual Training. Claimant's costs to develop, update, and conduct training of staff responsible for developing or conducting effectiveness assessments and the costs of training claimant and vendor employees who perform tasks necessary to implement assessment functions during the life of the Permit.
- JURMP and WURMP Modifications. Claimant's personnel costs to modify the JURMP and WURMP based upon the results of effectiveness assessments in accordance with the requirements of Parts I.1.b and I.2.b of the Permit and the costs of the development and implementation of plans and schedules to address the identified modifications and improvements.
- Report Writing. Claimant's personnel costs, to develop and write reports required by Parts I.1.c and I.2.c of the Permit.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).

I. Long Term Effectiveness Assessment (part I.5)

Mandated Activities:

- a. Collaborate with the other Copermittees to develop a Long Term 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 the Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)²⁸ 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.

Reimbursable Activities:

Long Term Effectiveness Assessment (I.5) reimbursable activities and costs are described under Section G. Regional Urban Runoff Management Program.

²⁸ 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.

J. All Copermittee Collaboration (part L)

Mandated Activities:

1. Each Copermittee shall 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.

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) Establishes a management structure to promote consistency and develop and implement regional activities;

(2) Establishes standards for conducting meetings, decisions-making, and cost-sharing;

(3) Provides guidelines for committee and workgroup structure and responsibilities;

(4) Lays out a process for addressing Copermittee non-compliance with the formal agreement.

Reimbursable Activities:

All Copermittee Collaboration (part L) reimbursable activities and costs are described under Section G. Regional Urban Runoff Management Program.

Nonreimbursable Activities:

All Permittee Collaboration activities which are not reimbursable include those in Part L.1.a in the 2007 San Diego Permit requiring a memorandum of understanding (MOU) which:

- a. Identifies and defines the responsibilities of the principal Permittee and Lead Watershed Permittees;
- b. Identifies Copermittees and defines their individual and joint responsibilities;
- c. Includes any and all other collaborative arrangements for compliance with this order.

V. CLAIM PREPARATION AND SUBMISSION

Claims for reimbursable activities specified in Section IV. must be supported by source documentation for actual costs as set forth below, except for those reimbursable activities claimed using a 'reasonable reimbursable methodology' (RRM) specified in Section VI.

Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts. Evidence corroborating the source documents may include worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

Claimants may use time studies to support personnel costs when an activity is task repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office (SCO)). SCO's time study guidelines are available at www.sco.ca.gov/Files-ARD-Local/mancost_timestudyguidelines.pdf.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies

that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Reimbursable costs may be incurred through the use of vendors, contractors, consultants, or other service providers. In such cases, only actual costs to the claimant will be claimed. If the contract services are also used for purposes other than the reimbursement activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Claimants may also include the costs of preparing requests for proposals or requests for bids, negotiating and drafting third party contracts, and subsequently administering service contracts for the time they are performing these tasks.

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for capital assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the capital asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed. Compensation for fixed asset costs are reimbursable utilizing the procedure provided in the Office and Management Budget Circular A-87 (OMB A-87). Example: Compensation for the use of equipment. The claimant may be compensated for the equipment use through a use allowance or depreciation. A use allowance may be computed at an annual rate not to exceed 6 2/3% of acquisition cost. This is reported and claimed through the agency's service-wide cost allocation plan under the cost element "Use Allowance". Where a depreciation method followed, adequate property records must be maintained and any generally accepted method of computing depreciation may be used. However, the method of computing depreciation must be consistently applied for any specific class of assets for all affected programs.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Mileage reimbursement shall be at the rate set by the local jurisdiction or as permitted by the IRS, whichever is lower. Report employee

travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee to perform the reimbursable activities, as specified in Section IV of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1, Salaries and Benefits, and A.2, Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3, Contracted Services.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include (1) the overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan. Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the 2 CFR Part 225 (Office of Management and Budget (OMB) Circular A-87). Claimants have the option of using 10% of labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%. If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) and the indirect shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B).) However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable. The distributions base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution. In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to

mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

2. The allocation of allowable indirect costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) shall be accomplished by (1) separate a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. REASONABLE REIMBURSEMENT METHODOLOGIES

(Under development.)

VII. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later.

However, if no funds are appropriated or no payments are made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed no later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VIII. OFFSETTING SAVING AND REIMBURSEMENTS

Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, claimants shall deduct from the costs claimed reimbursements for this mandate from any source, including but not limited to service fees collected, federal funds, other state funds, and:

- 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.

IX. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

X. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines adopted by the Commission, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

XI. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the Test Claim. The administrative record, including the Statement of Decision, is on file with the Commission.



July 27, 2023

Exhibit F

Mr. Thomas Deak
County of San Diego
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

Ms. Natalie Sidarous
State Controller's Office
Local Government Programs and
Services Division
3301 C Street, Suite 740
Sacramento, CA 95816

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Draft Proposed Decision and Parameters and Guidelines, Schedule for Comments, and Notice of Hearing

San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6), 07-TC-09-R County of San Diego, Cites 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

Dear Mr. Deak and Ms. Sidarous:

The Draft Proposed Decision and Proposed Parameters and Guidelines for the above-captioned matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the Draft Proposed Decision and Proposed Parameters and Guidelines **by 5:00 pm on August 17, 2023**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be 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 an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.¹

You are advised that comments filed with the Commission are required to be electronically filed (e-filed) in an unlocked legible and searchable PDF file, using the Commission's Dropbox. (Cal. Code Regs., tit. 2, § 1181.3(c)(1).) Refer to

¹ Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. If e-filing would cause the filer undue hardship or significant prejudice, filing may occur by first class mail, overnight delivery or personal service only upon approval of a written request to the executive director. (Cal. Code Regs., tit. 2, § 1181.3(c)(2).)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

Hearing

This matter is set for hearing on **Friday, October 27, 2023** at 10:00 a.m. The Proposed Decision will be issued on or about October 13, 2023.

Please notify Commission staff not later than the Wednesday prior to the hearing that you or a witness you are bringing plan to testify and please specify the names of the people who will be speaking for inclusion on the witness list and so that detailed instructions regarding how to participate can be provided to them. When calling or emailing, please identify the item you want to testify on and the entity you represent. The Commission Chairperson reserves the right to impose time limits on presentations as may be necessary to complete the agenda.

If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,



Heather Halsey
Executive Director

ITEM ____

DRAFT PROPOSED DECISION AND PARAMETERS AND GUIDELINES

San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6)

07-TC-09-R

Period of Reimbursement is January 24, 2007 through December 31, 2017

EXECUTIVE SUMMARY

I. Summary of the Mandate

On March 26, 2010, the Commission on State Mandates (Commission) adopted the Test Claim Decision. The parties litigated the Decision and, in 2017 and 2022, the court affirmed the Commission's Decision except for the street sweeping requirement in part D.3.a.(5) of the test claim permit.¹ The court found that the copermittees² have sufficient authority to levy a fee for the street sweeping requirement within the meaning of Government Code section 17556(d), so it imposes no costs mandated by the state.³

On May 26, 2023, the Commission adopted the Amended Decision on Remand, pursuant to the court's judgment and writ.⁴ The Decision states that the test claim permit (Order No. R9-2007-0001, Permit CAS0108758) imposes a reimbursable state-mandated program on the local agency copermittees within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The

¹ *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595.

² In this summary and Decision, 'copermittee' and 'claimant' are used interchangeably.

³ *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595.

⁴ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023.

Commission partially approved the Test Claim, finding only the following activities to be reimbursable:

- Reporting on street sweeping and conveyance system cleaning (Part J.3.a.(3)(c) (iv)-(viii), (x)-(xv));
- Conveyance system cleaning (Part D.3.a.(3)(b)(iii));
- Educational component (D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), 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)).⁵

The Commission found that street sweeping (part D.3.a.(5)), a hydromodification management plan (part D.1.g), and low-impact development (parts D.1.d.(7) & D.1.d.(8)) are not reimbursable because the copermittees have fee authority sufficient (within the meaning of Gov. Code § 17556(d)) to pay for them.⁶

The Commission also found that 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- 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

⁵ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 5-6, 139-151.

⁶ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, page 6, 151.

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.⁷

II. Procedural History

On March 26, 2010, the Commission adopted the original Test Claim Decision and served it on March 30, 2010. The claimants filed Proposed Parameters and Guidelines on June 28, 2010.⁸ The Department of Finance (Finance) filed comments on the Proposed Parameters and Guidelines on September 3, 2010.⁹ The State Water Resources Control Board and San Diego Regional Water Quality Control Board (Water Boards) filed joint comments on the Proposed Parameters and Guidelines on September 16, 2010.¹⁰ The claimants filed rebuttal comments and the Revised Proposed Parameters and Guidelines on November 16, 2010.¹¹

On July 20, 2010, Finance and the Water Boards filed a petition for a writ of mandate, requesting to set aside the Commission's Decision. On October 11, 2010, the claimants filed a cross petition for writ of mandate and complaint for declaratory relief. In 2017, the Third District Court of Appeal agreed with the Commission that the contested permit provisions are mandated by the state and not by federal law.¹² In 2022, the Third District Court of Appeal affirmed the remaining portion of the Commission's Decision, except for street sweeping (Permit Part D.3.a.(5)), which does not impose costs mandated by the state pursuant to Government Code section 17556(d) because of the copermittees' fee authority.¹³ On May 26, 2023, the Commission adopted the Amended

⁷ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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*, 07-TC-09-R, adopted May 26, 2023, page 6, 151.

⁸ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010.

⁹ Exhibit C, Finance's Comments on the Proposed Parameters and Guidelines, filed September 3, 2010, page 1.

¹⁰ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010.

¹¹ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010.

¹² *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661.

¹³ *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581-586. See also, *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th at 192-195.

Decision on Remand consistent with the Court of Appeal's decision pursuant to the judgment and writ.¹⁴

Pursuant to section 1183.13 of the Commission's regulations, Commission staff issued the Draft Proposed Decision and Parameters and Guidelines on July 21, 2023.

III. Positions of the Parties

A. County of San Diego and Cities, Claimants

In their originally submitted Proposed Parameters and Guidelines filed June 28, 2010, the claimants proposed reasonably necessary costs for each category of activities the Commission approved.¹⁵

The claimants state that three parts of the permit the Commission found are subject to reimbursement: (1) all copermittee collaboration (permit part L), (2) Regional Urban Runoff Management Program (RURMP) (permit part F.1.-F.3) and (3) the Long Term Effectiveness Assessment (part I.5.), are all carried out through the same regional structure as a defined set of working bodies. They propose costs and combined activities for these permit parts.¹⁶

In rebuttal comments filed November 16, 2010, the claimants disagree with Finance that purchasing equipment is not reimbursable under the test claim permit, and state that the State Controller's Office (Controller's) Mandated Cost Manual for Local Agencies (hereafter Mandated Cost Manual) allows a portion of the prior period equipment purchase to be reimbursable as depreciation or allowance costs. Regarding prorated costs, the claimants acknowledge that they are appropriate, and agree with including offsetting revenues in the Parameters and Guidelines.¹⁷ Regarding personnel costs that the claimants originally proposed to include as indirect (overhead and administrative costs), the claimants revised their definition of these costs in accordance with the Mandated Cost Manual. The claimants also removed their originally proposed

¹⁴ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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*, 07-TC-09-R, adopted May 26, 2023.

¹⁵ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010, pages 16-22.

¹⁶ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010, pages 22-25.

¹⁷ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 2-3.

qualifying phrases such as ‘including but not limited to’ and ‘costs including personnel costs.’¹⁸

The claimants respond to the Water Boards’ specific comments, acknowledging some and rejecting others, as discussed in the Decision below.

B. Department of Finance

In comments filed on September 3, 2010, Finance commented that the Proposed Parameters and Guidelines lack adequate specificity related to the costs of the proposed activities.¹⁹ Finance first argues the Parameters and Guidelines should clearly indicate that the costs to implement the higher level of service or new program are specifically the costs imposed by the test claim permit and not the prior permit, such as, for example, for equipment.²⁰ Second, the Parameters and Guidelines should distinguish the cost of activities alleged to be reimbursable from the costs associated with programs not required by the test claim permit, and costs should be prorated if necessary. Third, the Parameters and Guidelines (in “Section VII. Offsetting Savings and Reimbursement”) should identify the categories of fees that are specified as offsetting revenue in the test claim decision.²¹

C. State Water Resources Control Board and Regional Water Quality Control Board

In comments filed September 16, 2010, the Water Boards state that the request for reimbursement in the Proposed Parameters and Guidelines is not clearly limited to the level of activities that exceed what was required under the prior (2001) permit and the higher level of service should be compared to the 2001 permit.²² Further, the Water Boards state that the claimants fail to adequately explain whether “loaded personnel costs” includes overhead and administrative costs or not, and whether they will pro rate their ‘loaded personnel costs’ to cover only the new activities. The Water Boards also criticize the lack of specificity, i.e., the proposed general activities qualified by phrases such as “including but not limited to” and “costs, including personnel costs” because

¹⁸ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 3-5.

¹⁹ Exhibit C, Finance’s Comments on the Proposed Parameters and Guidelines, filed September 3, 2010, page 1.

²⁰ Exhibit C, Finance’s Comments on the Proposed Parameters and Guidelines, filed September 3, 2010, page 1.

²¹ Exhibit C, Finance’s Comments on the Proposed Parameters and Guidelines, filed September 3, 2010, page 1.

²² Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 4.

they are vague as to whether the claimants are identifying the most reasonable method of complying with the reimbursable permit provisions. According to the Water Boards,

[N]ot only have the Claimants had over three and one-half years of experience implementing the activities they believe are necessary to comply with the reimbursable provisions, they should by now be in a position to adequately describe anticipated changes to those activities over the remainder of the five year term.²³

The Water Boards also disagree that training for vendors should be reimbursable because vendors that bid and carry out contracted activities should be well-versed or expert in the services they provide. And to the extent that vendors charge for other costs, those costs should be prorated to only the reimbursable activities in the permit. The Water Boards point to the claimants' proposed costs "to purchase upgrades to equipment, hardware and software to support data analysis, tracking and reporting," saying such costs should be limited to those incurred after January 24, 2007 and that claimants should be required to demonstrate that the purchases are necessary to comply with the test claim permit but not necessary to comply with the prior permit. According to the Water Boards, the claimants should be required to "demonstrate how they intend to exclude, in a transparent manner, the percentage of costs of equipment and upgrades used for unreimbursable purposes . . . in a verifiable manner."²⁴

The Water Boards further assert that the claimants should identify offsetting revenues that were anticipated when the Commission adopted its Statement of Decision, as well as revenues from conveyance system cleaning, parking sign enforcement, and any general fund revenues available for reimbursable provisions to offset reimbursement. And the Water Boards reserve the right to comment on any reasonable reimbursement methodology if one is proposed.²⁵

IV. Discussion

A. Eligible Claimants (Section II. of the Parameters and Guidelines)

The following copermittees are eligible to claim reimbursement, provided they are subject to the taxing restrictions of articles XIII A and XIII C of the California Constitution, and the spending limits of article XIII B of the California Constitution, and incur increased costs as a result of this mandate that are paid from their local proceeds of taxes:

²³ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 5.

²⁴ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 6.

²⁵ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 16

The County of San Diego and the Cities of 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.²⁶

As discussed in the Decision below, the San Diego Unified Port District and the San Diego County Regional Airport Authority are copermittees, but are not eligible to claim reimbursement under article XIII B, section 6 because they do not receive proceeds of taxes, and the expenditure of their funds are not subject to the appropriations limit. The Airport Authority cannot levy taxes,²⁷ and the Port District did not levy taxes in fiscal year 1977-1978, and has not levied any taxes since 1970.²⁸

B. Period of Reimbursement (Section III. of the Parameters and Guidelines)

Government Code section 17557(e) requires a test claim to be “submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year.” Because this Test Claim was filed on June 20, 2008,²⁹ the potential period of reimbursement under Government Code section 17557 begins on July 1, 2006. However, since the permit has a later effective date, the period of reimbursement begins on the permit’s effective of January 24, 2007.³⁰

Beginning January 1, 2018,³¹ based on Government Code sections 57350 and 57351 as amended by Statutes 2017, chapter 536 (SB 231, which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state because the claimants’ fee authority is subject only to a voter protest provisions of article XIII D and Government Code section 17556(d)

²⁶ Exhibit X, Test Claim, filed June 20, 2008, page 256 (Order No. R9-2007-0001).

²⁷ California Public Utilities Code, section 17000, et seq. (especially §170064 (a) – (c)). Statutes 2001, chapter 946.

²⁸ California Constitution article XIII B, section 9(c), Government Code section 7901(e). Exhibit X, Port of San Diego, California, Annual Comprehensive Financial Report, Fiscal Years Ended June 30, 2022 and 2021, page 8.

<https://pantheonstorage.blob.core.windows.net/administration/2022-ACFR-final.pdf> (accessed on June 15, 2023), page 8.

²⁹ Exhibit X, Test Claim, filed June 20, 2008, page 3.

³⁰ Exhibit X, Test Claim, filed June 20, 2008, page 331 (Order No. R9-2007-0001).

³¹ Government Code sections 57350 and 57351 as amended by Statutes 2017, chapter 536 (SB 231), overturning *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351.

applies.³² Pursuant to Government Code section 17556(d) and the court’s decision in *Paradise Irrigation Dist.*, there are no costs mandated by the state when a local government has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service and that are subject only to a voter protest.³³ The 2018 statute (SB 231, Stats. 2017, ch. 536) amended the Government Code’s definition of “sewer” to include stormwater sewers within the meaning of article XIII D, thereby allowing local governments to use their constitutional police powers to impose stormwater fees on property owners subject only to the voter protest provisions of article XIII D.³⁴ Therefore, reimbursement for this state-mandated program ends on December 31, 2017.

C. Reimbursable Activities (Section IV. of the Parameters and Guidelines)

The Parameters and Guidelines identify the reimbursable state-mandated activities approved in the Amended Test Claim Decision on Remand.³⁵

The claimants request reimbursement for numerous additional reasonably necessary activities to comply with the mandated program.³⁶ However, there is no evidence in the record supporting the claimants’ requests. Any proposed reasonably necessary activity must be supported by substantial evidence in the record explaining why the activity is necessary to perform the state mandate.³⁷ In addition, section 1187.5 of the Commission’s regulations requires that oral or written representations of fact shall be under oath or affirmation, and that all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so. The

³² *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

³³ *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

³⁴ Government Code sections 53750; 53751 (Stats. 2017, ch. 536); see also *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408, holding that water pollution prevention is a valid exercise of government police power.

³⁵ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023.

³⁶ Exhibit B, Claimants’ Proposed Parameters and Guidelines, filed June 28, 2010. Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010.

³⁷ Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

record lacks any evidence that the activities the claimants propose are reasonably necessary to comply with the state-mandated program.

D. Sections V. and VII. of the Parameters and Guidelines

Section V. of the Parameters and Guidelines (Claim Preparation and Submission) identifies the direct costs that are eligible for reimbursement, including training and travel costs, which are supported by the state-mandated program.

In addition, Section VII. of the Parameters and Guidelines (Offsetting Revenues and Reimbursements) identifies the potential offsetting revenues identified in the Commission's Amended Test Claim Decision on Remand.

V. Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision and Parameters and Guidelines and authorize staff to make any technical, non-substantive changes to the Proposed Decision and Parameters and Guidelines following the hearing.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES

San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6)

The period of reimbursement is January 24, 2007 through December 31, 2017.

Case No.: 07-TC-09-R

DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(Adopted October 27, 2023)

DECISION

The Commission on State Mandates (Commission) heard and decided this Decision and Parameters and Guidelines during a regularly scheduled hearing on October 27, 2023. [Witness list will be included in the adopted Decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified/rejected] the Decision and Parameters and Guidelines by a vote of [vote will be included in the adopted Decision and Parameters and Guidelines], as follows:

Member	Vote
Lee Adams, County Supervisor	
Jennifer Holman, Representative of the Director of the Office of Planning and Research	
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	
Renee Nash, School District Board Member	

Member	Vote
Sarah Olsen, Public Member	
Lynn Paquin, Representative of the State Controller, Vice Chairperson	
Spencer Walker, Representative of the State Treasurer	

I. Summary of the Mandate

On March 26, 2010, the Commission on State Mandates (Commission) adopted the Test Claim Decision. The parties litigated the Decision and, in 2017 and 2022, the court affirmed the Commission's Decision, except for the street sweeping requirement in part D.3.a.(5) of the test claim permit, finding that the copermitees have sufficient authority to levy a fee for street sweeping within the meaning of Government Code section 17556(d), so it imposes no costs mandated by the state.³⁸

On May 26, 2023, the Commission adopted the Amended Decision on Remand pursuant to the court's judgment and writ.³⁹ The Decision states that the test claim permit (Order No. R9-2007-0001, Permit CAS0108758) imposes a reimbursable state-mandated program on the local agency copermitees within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission partially approved the Test Claim for the following reimbursable activities:

- Reporting on street sweeping and conveyance system cleaning (Part J.3.a.(3)(c)(iv)-(viii), (x)-(xv));
- Conveyance system cleaning (Part D.3.a.(3)(b)(iii));
- Educational component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), 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.);

³⁸ *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595.

³⁹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 4-6.

- Long-term effectiveness assessment (Part I.5.) and
- All permittee collaboration (Part L.1.a.(3)-(6)).⁴⁰

The Commission also found that street sweeping (part D.3.a.(5)), hydromodification management plan (part D.1.g), and low-impact development (parts D.1.d.(7) & D.1.d.(8)) are not reimbursable because the copermitees have fee authority sufficient (within the meaning of Gov. Code § 17556(d)) to pay for them.⁴¹

Further, the Commission found that 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- 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.⁴²

II. Procedural History

On March 26, 2010, the Commission adopted the original Test Claim Decision and served it on March 30, 2010. The claimants filed Proposed Parameters and Guidelines

⁴⁰ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 5-6.

⁴¹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, page 6.

⁴² Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, page 6.

on June 28, 2010.⁴³ The Department of Finance (Finance) filed comments on the Proposed Parameters and Guidelines on September 3, 2010.⁴⁴ The State Water Resources Control Board and San Diego Regional Water Quality Control Board (Water Boards) filed joint comments on the Proposed Parameters and Guidelines on September 16, 2010.⁴⁵ The claimants filed rebuttal comments and the Revised Proposed Parameters and Guidelines on November 16, 2010.⁴⁶

On July 20, 2010, Finance and the Water Boards filed a petition for a writ of mandate, requesting to set aside the Commission's Decision. On October 11, 2010, the claimants filed a cross petition for writ of mandate and complaint for declaratory relief. In 2017, the Third District Court of Appeal agreed with the Commission that the contested permit provisions are mandated by the state and not by federal law.⁴⁷ In 2022, the Third District Court of Appeal affirmed the remaining portion of the Commission's Decision, except for street sweeping (Permit Part D.3.a.(5)), which does not impose costs mandated by the state pursuant to the copermittees' fee authority under Government Code section 17556(d).⁴⁸ On May 26, 2023, the Commission amended the Decision consistent with the Court of Appeal's decision pursuant to the judgment and writ.⁴⁹

Pursuant to section 1183.13(a) of the Commission's regulations, Commission staff issued the Proposed Decision and Parameters and Guidelines on July 21, 2023.

III. Positions of the Parties

A. County of San Diego and Cities, Claimants

⁴³ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010.

⁴⁴ Exhibit C, Finance's Comments on the Proposed Parameters and Guidelines, filed September 3, 2010, page 1.

⁴⁵ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010.

⁴⁶ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010.

⁴⁷ *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661.

⁴⁸ *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581-586. See also, *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th at 192-195.

⁴⁹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023.

In their originally submitted Proposed Parameters and Guidelines filed June 28, 2010, the claimants proposed reasonably necessary costs for each category of activities the Commission approved. For reporting on street sweeping and conveyance system cleaning, the claimants propose “reporting and tracking policies and procedures,” “data tracking and analysis,” “report writing,” “employee supervision and management,” and “contracted services.”⁵⁰ Included in these are personnel costs “using claimants loaded hourly rates”⁵¹ (which they define in its rebuttal comments to include salary, benefit, and indirect or overhead costs).⁵² For conveyance system cleaning, the claimants propose “conveyance system inspection,” “conveyance system cleaning operations,” “vehicles and equipment,” “vehicle and equipment maintenance,” “materials disposal,” “fuel,” “program development,” “employee and vendor training,” “parking signage and enforcement,” “employee supervision and management,” and “contracted services.”⁵³ Under the educational component, the claimants propose costs for “program development,” “reporting and tracking policies and procedures,” “data tracking and analysis,” “educational materials,” “employee and vendor annual training,” “education of target audiences,” “report writing,” “employee supervision and management,” and “contracted services.”⁵⁴

For the Watershed Urban Runoff Management Program (WURMP), the claimants allege activities and costs for “working body support and representation,” “collaborative watershed work product development,” (to include: Watershed Urban Runoff Management Programs, watershed activities lists, annual WURMP work plans and budgets, WURMP annual reports, watershed-specific standards, working body status reports, and other watershed work products). The claimants also propose “watershed implementation of programs and activities (including, watershed water quality activities, watershed education activities, and other programs and activities required to implement the WURMP). Other WURMP-related costs and activities the claimants propose are, materials, equipment, vehicle and equipment maintenance, fuel, reporting and tracking policies and procedures, data tracking and analysis, report writing, employee and

⁵⁰ Exhibit B, Claimants’ Proposed Parameters and Guidelines, filed June 28, 2010, page 16, 18.

⁵¹ Exhibit B, Claimants’ Proposed Parameters and Guidelines, filed June 28, 2010, page 15, footnote 12.

⁵² Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 4.

⁵³ Exhibit B, Claimants’ Proposed Parameters and Guidelines, filed June 28, 2010, pages 17-18.

⁵⁴ Exhibit B, Claimants’ Proposed Parameters and Guidelines, filed June 28, 2010, pages 18-19.

vendor annual training, cost accounting and documentation, external coordination, employee supervision and management, and contracted services..⁵⁵

The claimants state that three parts of the permit the Commission found are subject to reimbursement: (1) all copermittee collaboration (permit part L), (2) Regional Urban Runoff Management Program (RURMP) (permit part F.1.-F.3) and (3) the Long Term Effectiveness Assessment (LTEA, part I.5.), are all carried out through the same regional structure as a defined set of working bodies.⁵⁶ The claimants' proposed costs and combined activities for these parts include "regional coordination of copermittees and regional working bodies," "working body support and representation," "regional work product development," (including status reports, annual work plans, RURMP annual reports, regional standards, and other regional work products, such as a formal agreement, report of waste discharge, by-laws, a standardized method for annually conducting and reporting fiscal analyses of urban runoff management programs, and a long-term effectiveness assessment). The claimants further allege "regional implementation of programs and activities," "cost accounting and documentation," "external coordination," "employee supervision and management," and "contracted services."⁵⁷

For the program effectiveness assessment (part I.1.-I.2.), the claimants propose "program development," program implementation," employee and vendor annual training," "Jurisdictional Urban Runoff Management Program (JURMP) and Watershed Urban Runoff Management Program (WURMP) modifications," "report writing," "employee supervision and management," and "contracted services."⁵⁸

In rebuttal comments filed November 16, 2010, the claimants disagree with Finance that purchasing equipment is not reimbursable under the test claim permit, and state that the State Controller's Office Mandated Cost Manual for Local Agencies (hereafter Mandated Cost Manual) allows a portion of the prior period equipment purchase to be reimbursable as depreciation or allowance costs. Regarding prorated costs, the claimants acknowledge that they are appropriate, and agree with including offsetting revenues in the Parameters and Guidelines.⁵⁹

⁵⁵ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010, pages 19-22.

⁵⁶ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010, page 24.

⁵⁷ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010, pages 22-25.

⁵⁸ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010, pages 25-26.

⁵⁹ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 2-3.

The claimants also acknowledge the Water Boards point that reimbursement should be limited to only the level of activities required to comply with the test claim permit that exceeds the prior permit. Thus, the claimants specified some activities found to be non-reimbursable by the Commission in their Revised Proposed Parameters and Guidelines to prevent claiming of costs that are not reimbursable.⁶⁰ Regarding personnel costs that the claimants originally proposed to include as indirect (overhead and administrative costs), the claimants revised their definition of personnel costs in accordance with the Mandated Cost Manual.⁶¹ As to the Water Boards' criticism regarding the lack of specificity in the Proposed Parameters and Guidelines, the claimants revised their proposed reimbursable activities in Section IV. to make the reasonably necessary activities more specific, rephrase reasonably necessary activities to utilize cost descriptions from the Mandated Cost Manual, and remove qualifying phrases such as 'including but not limited to' and 'costs including personnel costs.'⁶² Regarding training for vendors that the Water Boards argue is unnecessary, the claimants state:

While vendors' employees do not generally require additional training to meet the Claimants' needs, if this is not the case, Claimants may recover such additional training costs as may be necessary in utilizing new types of equipment and/or protocols.⁶³

As to computer hardware and software, which the Water Boards argue is only reimbursable if purchased after January 24, 2007, and must be demonstrated necessary to comply with the reimbursable provisions but not the prior permit, the claimants point out that these are 'capital outlays' addressed in the Mandated Cost Manual. The claimants incorporated the Manual's requirements for computer hardware and software purchases acquired through a vendor contract. If not acquired through a vendor contract, the claimants state that only the pro-rata portion of the purchase price to implement the reimbursable activities may be claimed.⁶⁴

The claimants respond to the Water Boards' specific comments as discussed in the analysis below.

⁶⁰ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 4.

⁶¹ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 4.

⁶² Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 3-5.

⁶³ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 6.

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B. Department of Finance

In comments filed on September 3, 2010, Finance commented that the Proposed Parameters and Guidelines lack adequate specificity related to the costs of the proposed activities. Finance first argues the Parameters and Guidelines should clearly indicate that the costs to implement the higher level of service or new program are specifically the costs imposed by the test claim permit and not the prior permit, such as, for example, for equipment.⁶⁵ Second, the Parameters and Guidelines should distinguish the cost of activities alleged to be reimbursable from the costs associated with programs not required by the test claim permit; and costs should be prorated if necessary.⁶⁶ Third, the Parameters and Guidelines, in “Section VII. Offsetting Savings and Reimbursement,” should identify the categories of fees that are identified as offsetting revenue in the test claim decision.⁶⁷

C. State Water Resources Control Board and Regional Water Quality Control Board

In comments filed September 16, 2010, the Water Boards express concern that the request for reimbursement in the Proposed Parameters and Guidelines is not clearly limited to only those costs that exceed the level of activities required under the prior (2001) permit, and they assert that the increased costs associated with the higher level of service should be compared to the costs under the 2001 permit.⁶⁸ Further, the Water Boards state that the claimants fail to adequately explain whether “loaded personnel costs” includes overhead and administrative costs or not, and whether they will pro rate their ‘loaded personnel costs’ to cover only the new activities.⁶⁹ The Water Boards also criticize the lack of specificity, i.e., identification of general activities qualified by phrases such as “including but not limited to” and “costs, including personnel costs” because they are vague as to whether the claimants are identifying the most reasonable method of complying with the reimbursable permit provisions.⁷⁰ According to the Water Boards,

⁶⁵ Exhibit C, Finance’s Comments on the Proposed Parameters and Guidelines, filed September 3, 2010, page 1.

⁶⁶ Exhibit C, Finance’s Comments on the Proposed Parameters and Guidelines, filed September 3, 2010, page 1.

⁶⁷ Exhibit C, Finance’s Comments on the Proposed Parameters and Guidelines, filed September 3, 2010, page 1.

⁶⁸ Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 4.

⁶⁹ Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 4.

⁷⁰ Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 5.

[N]ot only have the Claimants had over three and one-half years of experience implementing the activities they believe are necessary to comply with the reimbursable provisions, they should by now be in a position to adequately describe anticipated changes to those activities over the remainder of the five year term.⁷¹

The Water Boards also disagree that training for vendors should be reimbursable because vendors that bid and carry out contracted activities should be well-versed or expert in the services they provide.⁷² And to the extent that vendors charge for other costs, those costs should be prorated to only the reimbursable activities in the permit.⁷³ The Water Boards point to the claimants' identification of costs to purchase upgrades to equipment, hardware and software to support data analysis, tracking and reporting, saying such costs should be limited to those incurred after January 24, 2007 and that claimants should be required to demonstrate that the purchases are necessary to comply with the test claim permit and are only for the pro-rata costs attributable to the test claim permit.⁷⁴ According to the Water Boards, the claimants should be required to "demonstrate how they intend to exclude, in a transparent manner, the percentage of costs of equipment and upgrades used for unreimbursable purposes . . . in a verifiable manner."⁷⁵

The Water Boards further assert that the claimants should identify offsetting revenues that were anticipated when the Commission adopted its Statement of Decision, as well as revenues from conveyance system cleaning, parking sign enforcement, and any general fund revenues available for reimbursable provisions to offset reimbursement.⁷⁶ And the Water Boards reserve the right to comment on any reasonable reimbursement methodology if one is proposed.⁷⁷

⁷¹ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 5.

⁷² Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 6.

⁷³ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 6.

⁷⁴ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 6.

⁷⁵ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 6.

⁷⁶ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 16.

⁷⁷ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 16.

The Water Boards also specifically comment on each of the proposed activities as discussed in the analysis below.

IV. Discussion

A. Eligible Claimants (Section II. of the Parameters and Guidelines)

The following copermittees are eligible to claim reimbursement, provided they are subject to the taxing restrictions of articles XIII A and XIII C of the California Constitution, and the spending limits of article XIII B of the California Constitution, and incur increased costs as a result of this mandate that are paid from their local proceeds of taxes:

The County of San Diego and the Cities of 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.⁷⁸

The San Diego County Regional Airport Authority and the San Diego Unified Port District are also copermittees,⁷⁹ and both were on the claimants' proposed list of eligible claimants.⁸⁰ However, based on the following, neither are eligible to claim reimbursement under article XIII B, section 6.

Adopted by the voters in 1979, article XIII B, section 6 of the California Constitution was specifically designed to protect the tax revenues of local governments from state mandates that would require spending those revenues. The purpose is to prevent "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."⁸¹

⁷⁸ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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*, 07-TC-09-R, adopted May 26, 2023, page 4, footnote 6.

⁷⁹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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*, 07-TC-09-R, adopted May 26, 2023, page 4, footnote 6.

⁸⁰ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010, page 14.

⁸¹ *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763, quoting *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Sonoma v.*

Article XIII B does not reach beyond taxation and does not restrict the growth in appropriations financed from nontax sources, such as bond funds, user fees based on reasonable costs, or revenues from local assessments, fees, and charges.⁸² Local agencies funded by revenues other than “proceeds of taxes” cannot accept the benefits of an exemption from article XIII B’s spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.⁸³

Article XIII B and the statutes that implement it also expressly state that special districts that are funded entirely by “other than proceeds of taxes” (such as from bond funds, fees or assessments) are not subject to the appropriations limit. Article XIII B, section 9(c) provides, “appropriations subject to limitation” do *not* include those appropriations of any special district that existed on January 1, 1978, and did not levy ad valorem property taxes as of the 1977-1978 fiscal year:

Appropriations subject to limitation” for each entity of government do not include: [¶] . . . [¶]

(c) Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977–78 fiscal year levy an ad valorem tax on property in excess of 12½ cents per \$100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes.

Government Code section 7901(e) implements section 9(c) of article XIII B,⁸⁴ and clarifies that special districts that existed on January 1, 1978, and did not levy a property tax in excess of 12 ½ cents per \$100 of assessed value in 1977-1978, are not “local agencies” for purposes of article XIII B:

The term “special district” [as part of the definition of “local agency”] shall not include any district which (1) existed on January 1, 1978, and did not

Commission on State Mandates (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185, holding that reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local government to incur “increased actual expenditures of limited tax proceeds that are counted against the local government’s spending limit.”

⁸² *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

⁸³ *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986.

⁸⁴ Government Code section 7900(a) states: “The Legislature finds and declares that the purpose of this division is to provide for the effective and efficient implementation of Article XIII B of the California Constitution.”

possess the power to levy a property tax at that time or did not levy or have levied on its behalf, an ad valorem property tax rate on all taxable property in the district on the secured roll in excess of 12 ½ cents per one hundred dollars (\$100) of assessed value for the 1977-78 fiscal year, or (2) existed on January 1, 1978, or was thereafter created by a vote of the people, and is totally funded by revenues other than the proceeds of taxes as defined in subdivision (c) of Section 8 of Article XIII B of the California Constitution.⁸⁵

Therefore, a special district is not a “local agency” eligible for reimbursement for purposes of article XIII(B), section 6 if it: (1) existed on January 1, 1978, and did not possess the power to levy a property tax at that time or did not levy or have levied on its behalf, an ad valorem property tax rate on all taxable property in the district on the secured roll in excess of 12 ½ cents per one hundred dollars (\$100) of assessed value for the 1977-78 fiscal year, or (2) existed on January 1, 1978, or was thereafter created by a vote of the people, and is totally funded by revenues other than the proceeds of taxes as defined in subdivision (c) of Section 8 of Article XIII B of the California Constitution, because it is not subject to the taxing and spending limitations of article XIII A and B of the California Constitution.⁸⁶

The San Diego County Regional Airport Authority was formed in 2001 pursuant to the Public Utilities Code, Division 17, commencing with section 170000, which does not permit the Authority to levy taxes.⁸⁷ Rather, its sources of revenue include those “attributable to airport operations,” and “imposing fees, rents, or other charges for facilities, services, the repayment of bonded indebtedness,” as well as “revenues generated from enterprises” on the Authority’s property.⁸⁸ Therefore pursuant to Government Code section 7901(e), the Authority is not a “local agency” for purposes of article XIII, section B. This comports with the Authority’s financial report for fiscal years

⁸⁵ Article XIII B, section 8(c) states: “proceeds of taxes shall include, but not be restricted to, all tax revenues and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues. With respect to any local government, “proceeds of taxes” shall include subventions received from the State, other than pursuant to Section 6, and, with respect to the State, proceeds of taxes shall exclude such subventions.”

⁸⁶ Government Code section 7901(e), California Code of Regulations, title 2, sections 1183.1(g) and 1187.14.

⁸⁷ California Public Utilities Code, section 17000, et seq.. Statutes 2001, chapter 946.

⁸⁸ California Public Utilities Code, section 170064 (a) – (c).

2021 and 2022 that states it is not funded by tax revenues.⁸⁹ Therefore, the Airport Authority's revenues are not subject to the taxing and spending limitations of article XIII A and B, so it is not an eligible claimant.

The San Diego Unified Port District was formed in 1962 pursuant to Appendix 1 of the Harbors and Navigation Code, which *does* authorize the District to impose taxes.⁹⁰ However, its most recent financial report indicates the District has not levied taxes since 1970:

The District's maritime, real estate, and parking operations generate billions of dollars for the region's economy and allow the District to operate without the benefit of tax dollars. The District has the authority to levy a tax but has not done so since 1970.⁹¹

As a special district that has not levied taxes since 1970, the District is not subject to an appropriations limit because it existed on January 1, 1978 and did not levy a property tax in excess of 12½ cents per \$100 of assessed value in fiscal year 1977-1978. Additionally, it is totally funded by revenues other than the proceeds of taxes.⁹² Therefore, the San Diego Unified Port District is not subject to the appropriations limit of article XIII B and is not an eligible claimant.

B. Period of Reimbursement (Section III. of the Parameters and Guidelines)

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim on June 20, 2008,⁹³ establishing eligibility for fiscal year 2006-2007. However, since the permit has a later effective date, the period of reimbursement begins on the permit's effective date of January 24, 2007.⁹⁴

⁸⁹ Exhibit X, San Diego County Regional Airport Authority, Annual Comprehensive Financial Report, Fiscal Years Ended June 30, 2022 and 2021, page 14.
https://www.san.org/DesktopModules/Bring2mind/DMX/API/Entries/Download?EntryId=16004&Command=Core_Download&language=en-US&PortalId=0&TabId=197
(accessed on June 15, 2023), page 14.

⁹⁰ California Harbors and Navigation Code, Appendix 1, sections 43-45.

⁹¹ Exhibit X, Port of San Diego, California, Annual Comprehensive Financial Report, Fiscal Years Ended June 30, 2022 and 2021, page 8.
<https://pantheonstorage.blob.core.windows.net/administration/2022-ACFR-final.pdf>
(accessed on June 15, 2023), page 8.

⁹² California Constitution, article XIII B, section 9(c). Government Code section 7901(e).

⁹³ Exhibit X, Test Claim, filed June 20, 2008, page 3.

⁹⁴ Exhibit X, Test Claim, filed June 20, 2008, page 331 (Order No. R9-2007-0001).

In their Proposed Parameters and Guidelines, the claimants state that the permit term is January 24, 2007 to January 23, 2012.⁹⁵ Under the Clean Water Act, the term of an NPDES permit is five years.⁹⁶ However, states authorized to administer the NPDES program may continue the state-issued permit until the effective date of a new permit, if state law allows.⁹⁷ California's regulations provide that the terms and conditions of an expired permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on continuation of expired permits have been complied with.⁹⁸ This comports with Attachment B of the test claim permit that states the permit expires five years after adoption, but is automatically continued pending issuance of a new permit.⁹⁹

Reimbursement under article XIII B, section 6, however, continues to be required for each fiscal year that local agencies incur actual increased costs to comply with the reimbursable state-mandated program.¹⁰⁰ On May 8, 2013, the San Diego Regional Water Quality Control Board adopted a new permit, which, by its terms, became effective on June 27, 2013 (Order No. R9-2013-0001). The state-mandated requirements imposed by the test claim permit may continue uninterrupted under the 2013 permit.¹⁰¹ However, any *new* activities required by R9-2013-0001 are not reimbursable under this mandate, and will not become reimbursable unless they are the subject of a later-approved test claim decision on that permit.

Beginning January 1, 2018, based on Government Code sections 57350 and 57351 as amended by Statutes 2017, chapter 536 (SB 231, which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state because the claimants' fee authority is subject only to a voter protest provisions of article XIII D and Government Code section 17556(d) applies.¹⁰² Pursuant to Government Code section 17556(d) and the court's decision in

⁹⁵ Exhibit B, Claimants' Proposed Parameters and Guidelines, filed June 28, 2010, page 14. Exhibit X, Test Claim, filed June 20, 2008, page 174 (Order No. R9-2007-0001).

⁹⁶ 33 United States Code section 1342(b).

⁹⁷ Code of Federal Regulations, title 40, section 122.6(d).

⁹⁸ California Code of Regulations, title 23, section 2235.4.

⁹⁹ Exhibit X, Test Claim, filed June 20, 2008, page 185 (Order No. R9-2007-0001).

¹⁰⁰ California Constitution, article XIII B, section 6; Government Code sections 17514, 17560, 17561.

¹⁰¹ The 2013 permit is at issue in a pending Test Claim, *California Regional Water Quality Control Board, San Diego Region*, Order No. R9-2013-0001, 14-TC-03.

¹⁰² *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195. See also *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 577, holding that SB 231 does not apply retroactively.

Paradise Irrigation Dist., there are no costs mandated by the state when a local government has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service and that are subject only to a voter protest.¹⁰³ Statutes of 2017, chapter 536 amended the Government Code's definition of "sewer" to include stormwater sewers within the meaning of article XIII D, thereby allowing local governments to use their constitutional police powers to impose stormwater fees on property owners subject only to the voter protest provisions of article XIII D.¹⁰⁴ Therefore, reimbursement for this state-mandated program ends on December 31, 2017.

Accordingly, the Parameters and Guidelines identify the period of reimbursement from January 24, 2007 through December 31, 2017.

C. Reimbursable Activities (Section IV. of the Parameters and Guidelines)

According to Government Code section 17557(a) and section 1183.7 of the Commission's regulations, the Parameters and Guidelines must identify the activities mandated by the state and "may include proposed reimbursable activities that are reasonably necessary for the performance of the state-mandated program." As the Commission's regulation states:

(d) Reimbursable Activities. A description of the specific costs and types of costs that are reimbursable, including one-time costs and on-going costs, and reasonably necessary activities required to comply with the mandate. "Reasonably necessary activities" are those activities necessary to comply with the statutes, regulations and other executive orders found to impose a state-mandated program. Activities required by statutes, regulations and other executive orders that were not pled in the test claim may only be used to define reasonably necessary activities to the extent that compliance with the approved state-mandated activities would not otherwise be possible. Whether an activity is reasonably necessary is a mixed question of law and fact. All representations of fact to support any proposed reasonably necessary activities shall be supported by documentary evidence in accordance with section 1187.5 of these regulations.¹⁰⁵

In accordance with the Government Code and the Commission's regulations, any proposed reasonably necessary activity must be supported by substantial evidence in

¹⁰³ *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

¹⁰⁴ Government Code sections 53750; 53751 (Stats. 2017, ch. 536); see also *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408, holding that water pollution prevention is a valid exercise of government police power.

¹⁰⁵ California Code of Regulations, title 2, section 1183.7(d).

the record explaining why the activity is necessary to perform the state-mandate.¹⁰⁶ In addition, section 1187.5 of the Commission's regulations requires that oral or written representations of fact shall be under oath or affirmation, and all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so.

1. All Copermittee Collaboration (Section IV.A and B. of the Parameters and Guidelines)

The Commission found that Part L.1.a.3.-6. of the test claim permit, addressing copermittee collaboration, mandated new requirements that are reimbursable. These activities are analyzed out of the order listed in the permit and Test Claim Decision to help explain the Commission-approved activities, as well as the reasonably necessary activities the claimants propose. The Commission approved the following two activities:

- 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, as required by the first sentence in Part L.1.
- 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, as required by Part L.1.a.3.-6.¹⁰⁷

Reimbursement to “collaborate with the other copermittees to address common issues” and to “plan and coordinate activities required under the permit” is limited to what the Commission approved in its Decision. Reimbursement is not required for activities or requirements not pled in the Test Claim, imposed by the prior (2001) permit, or expressly denied by the Commission (e.g., collaboration with the other copermittees to develop and implement a Hydromodification Management Plan or developing urban runoff activities related to municipal activities, like low impact development (LID) BMPs

¹⁰⁶ Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d), 1187.5.

¹⁰⁷ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 109-112, 150.

(Best Management Practices) and plans).¹⁰⁸ The Commission found that the prior permit also required the parties to enter into a Memorandum of Understanding (MOU) and expressly limited reimbursement for collaboration to the new activities found to mandate a new program or higher level of service.¹⁰⁹ Thus, collaboration required by the first sentence in Part L.1. is an ongoing reimbursable activity and is identified in the Parameters and Guidelines for other approved sections of the test claim permit where collaboration is expressly required (i.e., the Educational Component of the Jurisdictional Urban Runoff Management Program, the requirement to update the Watershed Urban Runoff Management Program, the Regional Urban Runoff Management Program, and the Long Term Effectiveness Assessment).

By contrast, the requirement to execute and submit an MOU or formal agreement to the Regional Board no later than 180 days after adopting the permit, as required by Part L.1.a.3.-6., is a one-time activity and is limited to the four items specifically listed above. The Commission found that under the MOU required by the prior permit, identifying and defining the responsibilities of the principal permittee, copermittees, and lead watershed copermittees, and including in the MOU any other collaborative arrangement to which the parties agreed to comply with the prior permit were not reimbursable because they were not new.¹¹⁰

¹⁰⁸ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 111-112, 118-126.

¹⁰⁹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 111-112. The Decision states: “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.”).

¹¹⁰ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, page 111.

In compliance with Part L.1.a.3.-6. of the permit, the copermitees entered into a new MOU dated November 16, 2007.¹¹¹ The MOU establishes a regional management committee, a regional planning subcommittee and nine regional workgroups or sub-workgroups to support the regional coordination of programs.¹¹² The MOU also includes the copermitees' fiscal and cost sharing responsibilities¹¹³ a management structure for regional activities;¹¹⁴ and a dispute resolution process for non-compliance.¹¹⁵

Thus, Section IV.A.1. of the Parameters and Guidelines identifies the following one-time activity eligible for reimbursement:

1. 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 (Part L.1.a.3.-6) that:
 - Establishes a management structure to promote consistency and develop and implement regional activities;
 - Establishes standards for conducting meetings, decisions-making, and cost-sharing.
 - Provides guidelines for committee and workgroup structure and responsibilities;
 - Lays out a process for addressing Copermitee non-compliance with the formal agreement.

*Reimbursement is limited to the pro rata costs to execute and submit an MOU or formal agreement on only the four topics identified above. Executing and submitting a full MOU, JPA, or other formal agreement is not reimbursable.*¹¹⁶

¹¹¹ Exhibit X, Test Claim, filed June 20, 2008, pages 495 -579 (MOU).

¹¹² Exhibit X, Test Claim, filed June 20, 2008, pages 517-525, 535. The MOU's nine regional workgroups or sub-workgroups include: fiscal, reporting, and assessment workgroup; education and residential sources workgroup; regional monitoring workgroup and two sub-workgroups for dry weather and coastal monitoring; regional watershed URMP workgroup; land development workgroup; municipal activities workgroup; and industrial and commercial sources workgroup.

¹¹³ Exhibit X, Test Claim, filed June 20, 2008, pages 501-507 (MOU).

¹¹⁴ Exhibit X, Test Claim, filed June 20, 2008, pages 507-521 (MOU).

¹¹⁵ Exhibit X, Test Claim, filed June 20, 2008, pages 529-531 (MOU).

¹¹⁶ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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,*

2. Jurisdictional Urban Runoff Management Program and Reporting

a. JURMP Reporting on Street Sweeping and Conveyance System Cleaning (Section IV.B.1.a. of the Parameters and Guidelines)

The Commission found that reporting on street sweeping (Part J.3.a.(3)(c)(x.-xv.) and on conveyance system cleaning (Part J.3.a.(3)(c)(iv.-viii.)) are reimbursable. Specifically, the Commission approved reimbursement to include the following street-sweeping information in the Jurisdictional Urban Runoff Management Program (JURMP) annual report:

- 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.
- 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.
- 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.
- Identification of the total distance of curb-miles swept.
- Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
- Amount of material (tons) collected from street and parking lot sweeping.¹¹⁷

The Commission also approved reimbursement to include in the JURMP annual report the following conveyance system cleaning information:

- Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and

F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L, 07-TC-09-R, adopted May 26, 2023, page 111.

¹¹⁷ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R, adopted May 26, 2023, pages 62-66.*

inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

- Identification of the total distance (miles) of the MS4 [Municipal Separate Storm Sewer System], 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.
- 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.
- Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
- Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.¹¹⁸

These activities are identified in Section IV.B.1.a. of the Parameters and Guidelines.

The claimants also request reimbursement for the following costs and additional activities, alleging they are reasonably necessary to comply with the mandate to report on street sweeping and conveyance system cleaning:

Reporting and Tracking Policies and Procedures: Claimants' personnel costs to develop, update and implement street sweeping reporting and tracking policies and procedures;

Data Tracking and Analysis: Claimant's costs, to develop, update, and implement data tracking and analysis methods and procedures and personnel costs to develop and maintain data tracking methods or systems, and performing data tracking and analysis for reports to the Regional Water Quality Control Board. Also included are the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.

Report Writing: Claimant's personnel costs, to develop and write reports to the Regional Water Quality Control Board.

¹¹⁸ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023 pages 66-73.

Employee Supervision and Management: Time spent by supervisory and management personnel supervising personnel directly responsible for performing the mandated-activities. (Hereinafter referred to as "Employee Supervision and Management".)

Contracted Services: Any of the costs described above may be incurred through the use of vendors, contractors, consultants, or other service providers. In such case, only actual costs to the claimant will be claimed, and will only include that portion of the cost that is related to the reimbursable mandate. Claimants may also include the costs of preparing requests for proposals or requests for bids, negotiating and drafting third party contracts, and subsequently administering service contracts for the time they are performing these tasks using the claimant's Personnel rates. (Hereinafter referred to as "Contracted Services".)¹¹⁹

The Water Boards comment that there is insufficient detail for the first two activities: report tracking policies and procedures and data tracking and analysis.¹²⁰ As to data tracking and analysis, the Water Boards object to purchasing computer equipment and upgrades unless they are limited to what is necessary to comply with the test claim permit and used only for the reimbursable activities.¹²¹ Regarding report writing, the Water Boards repeat their objection to computer equipment and upgrade purchases, and repeat their objection to unspecified personnel costs.¹²² As to employee supervision and management and contracted services, the Water Boards assert that the claimants should demonstrate how their supervisors' and managers' time is spent supervising work only on mandated provisions.¹²³ Further, the Water Boards argue that claimants should only be allowed to claim 'contracted services' costs to prepare requests for bids, negotiate and draft third party contracts, and administer service contracts if the claimants can demonstrate that these costs, together with the costs of

¹¹⁹ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 36, 37, 40-41.

¹²⁰ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 9.

¹²¹ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 9.

¹²² Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 9.

¹²³ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 9.

the contracted service, is the most cost effective and reasonable manner, through a cost-benefit analysis, of complying with the street sweeping reporting mandate.¹²⁴

The claimants respond to the Water Boards' concern regarding the lack of detail by stating that they removed from their original proposal phrases such as "costs other than personnel costs" and they now identify specific reimbursable activities that are reasonably necessary for reporting.¹²⁵ Regarding computer systems and upgrades, the claimants state that they incorporated references to sections of the Mandated Cost Manual relating to 'capital outlays.'¹²⁶ Regarding report writing, the claimants respond that they removed the term 'loaded hourly rate' and simply use the term 'personnel costs' and they incorporated reference to sections of the Mandated Cost Manual relating to 'capital outlays.'¹²⁷ As to employee supervision and contracted services, the claimants say they will follow the Mandated Cost Manual in identifying supervisory costs and will not claim those costs as both direct and indirect. The claimants disagree with the Water Boards regarding performing a cost benefit analysis to determine whether contracting out is the most cost effective method to comply with the mandate. Rather, the claimants rely on the Mandated Cost Manual, which they quote as saying that contracted services are allowable if "the local agency lacks the staff resources or necessary expertise, or it is economically feasible to hire a contractor to perform the mandated activity."¹²⁸

The Commission finds that the proposed reasonably necessary activities and costs are either already eligible for reimbursement pursuant to the boilerplate language in Section V. of the Parameters and Guidelines and do not need to be re-stated in Section IV. of the Parameters and Guidelines, or are not supported by evidence in the record.

First, the claimants' request for "personnel," "contracted services" and "computer hardware and software" are direct costs addressed in Section V.A. of the Parameters and Guidelines, governing salaries and benefits, contracted services, and fixed assets (expressly including "computer equipment"). The pro rata share of these costs attributable to the mandated activities are eligible for reimbursement, and are subject to

¹²⁴ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 8-9, 12, 21-22.

¹²⁵ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 13.

¹²⁶ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 14.

¹²⁷ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 14.

¹²⁸ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 13.

the Controller's review and audit.¹²⁹ Section V.A. of the Parameters and Guidelines states in pertinent part the following:

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

[¶] . . . [¶]

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

However, there is no evidence in the record supporting the claimants' alleged reasonably necessary activities to develop policies and procedures, or develop, update and implement data tracking and analysis methods and procedures for reports to the Regional Board. The mandate is limited to identifying the required information, including the amount of waste and material collected, for the annual report. Any proposed reasonably necessary activity must be supported by substantial evidence in

¹²⁹ Government Code section 17561(d)(1) authorizes the State Controller's Office to audit the records of any local agency to verify the actual amount of the mandated costs, and to reduce any claim the Controller determines is excessive or unreasonable.

the record explaining why the activity is necessary to perform the state mandate.¹³⁰ In addition, section 1187.5 of the Commission's regulations requires that oral or written representations of fact shall be under oath or affirmation, and that all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so. The record lacks any evidence that the activities the claimants propose are reasonably necessary to comply with the state-mandated reporting.

Therefore, Section IV.B.1.a. of the Parameters and Guidelines authorizes reimbursement for the claimants to:

- a. Include in the JURMP Annual Report the following information:
 - i. Street Sweeping Information (Part J.3.a.(3)(c)(x.-xv))
 - 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.
 - 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.
 - 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.
 - Identification of the total distance of curb-miles swept.
 - Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
 - Amount of material (tons) collected from street and parking lot sweeping.
 - ii. Conveyance System Cleaning Information (Part J.3.a.(3)(c)(iv.-viii.))
 - Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of

¹³⁰ Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

- 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.
- 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.
- Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
- Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

b. JURMP Conveyance System Cleaning (Section IV.B.1.b. of the Parameters and Guidelines)

The Commission approved reimbursement for the following activity in Part D.3.a.(3)(b)(iii) of the test claim permit:

Conveyance system cleaning

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:

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.¹³¹

¹³¹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 70-71. The conclusion in the Decision (p. 140) incorrectly states that the following in Part D.3.a.(3)(a) of the test claim permit is reimbursable: “Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant

Section IV.B.1.b. of the Parameters and Guidelines tracks the plain language of the test claim permit and identifies these state-mandated activities as:

b. Conveyance System Cleaning

- 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 any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, which 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.

The claimants also propose the following costs and “reasonably necessary” activities, and propose clarifying some non-reimbursable activities:

- Conveyance System Inspection. Claimant’s personnel costs to inspect the conveyance system for the purpose of assessing the accumulation of trash, debris, or litter, or for verifying the proper operation of structural treatment controls.
- Conveyance System Cleaning Operations. Claimant’s personnel costs to clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, to clean accumulated trash and debris from any MS4 facility that is designed to be self cleaning, or to clean open channels of observed anthropogenic litter.
- Vehicles and Equipment. Claimant’s costs to purchase, rent, lease, or contract for vehicles and equipment to perform conveyance system inspection or cleaning (including vector [sic] trucks or other cleaning equipment), and to transport and dispose of collected material. This includes one-time costs for equipment purchases and corresponding equipment depreciation costs.
- Vehicles and Equipment Maintenance. Annual maintenance costs, including parts, supplies (e.g. water), and personnel costs. This also includes the costs for operating, renting, leasing, or contracting for facilities to store and maintain vehicles, equipment and supplies.

discharges to or from its MS4s and related drainage structures.” This activity was expressly denied by the Commission on page 72: “[P]art 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).” Thus, the Parameters and Guidelines identify the Commission’s findings to authorize reimbursement only for Part D.3.a.3.b.iii.

- Fuel. The actual costs of the fuel necessary to run the vehicles and equipment, to inspect and clean the MS4 facilities, and to transport and dispose of collected materials.
- Program Development. Claimant's costs, to develop and update the claimant's conveyance system cleaning program including specific criteria, policies, procedures, manuals and forms. This includes the development and utilization of inspection and maintenance schedules. Program development tasks are generally one-time costs with annual reviews and periodic updates.
- Employee and Vendor Training. Claimant's costs, to develop, update, and conduct training on conveyance system inspection, cleaning, and disposal policies and practices. The costs include training of all claimant and vendor employees who perform tasks necessary to implement conveyance system cleaning and related functions during the life of the Permit.
- Parking Signage and Enforcement. Claimant's costs to purchase and install signage and to enforce parking prohibitions in areas where conveyance system cleaning is scheduled and costs to purchase, installation, or replacement of signage to inform the public of applicable parking restrictions, as well as their surveillance and enforcement.
- Employee Supervision and Management. (See Section IV.A.)
- Contracted Services. (See Section IV.A.)

Non-reimbursable Activities

Conveyance System Cleaning (part D.3.a.(3)): reimbursable activities and costs do not include:

1. Part D.3.a.(3)(a) of the 2007 permit;
2. Part D.3.a.(3)(b)(i), (iv) – (vi) of the 2007 permit;
3. Annual inspection of MS4 facilities (D.3.a.(3)(b)(i));
4. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a.(3)(b)(iv));
5. Proper disposal of waste removed pursuant to applicable laws (D.3.a.(3)(b)(v));

6. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a.(3)(b)(vi)). Part D.3.a.(3)(b)(ii) of the 2007 Permit.¹³²

The Water Boards comment that the Commission found that many conveyance system cleaning activities are not reimbursable because they were in the prior permit, so only the costs incurred beyond those to comply with the prior permit should be reimbursable.¹³³ The Water Boards also state that inspections were required under the 2001 permit, so they should not be reimbursable.¹³⁴ As to cleaning system operations, the Water Boards argue that phrases such as “including Personnel Costs” are not specific enough.¹³⁵ Regarding vehicles and equipment and maintenance, the Water Boards assert that if they are acquired for materials disposal they should not be reimbursable because disposal was required under the prior permit. Further, costs must be incurred during the permit term, and for contracts, not already included in contract costs. According to the Water Boards, it is unclear what equipment the claimants would need to clean conveyance systems they did not already own prior to the permit. If the vehicles and equipment are solely dedicated to conveyance system cleaning, the Water Boards question whether the single-purpose use is the most reasonable method to comply with the mandate.¹³⁶

The Water Boards further argue to the extent that conveyance system cleaning is contracted, fuel should be included in the contract cost.¹³⁷ Regarding program development, the Water Boards state that it is unclear what “internal conveyance system cleaning program” means, and request specificity to allow meaningful evaluation.¹³⁸

¹³² Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 38-39.

¹³³ Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 9-10.

¹³⁴ Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 10.

¹³⁵ Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 10.

¹³⁶ Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 10.

¹³⁷ Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 11.

¹³⁸ Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 11.

As to vendor costs, the Water Boards refer to their general comments, i.e., disagreeing that vendor training is necessary because vendors should be well versed in the services they provide. And vendors' costs should be prorated if necessary to only the reimbursable activities in the permit.¹³⁹ The Water Boards also question whether parking enforcement signs would be the same as for street sweeping. To the extent the signage overlaps with other types of parking enforcement unrelated to the permit, costs should be segregated. And the claimants should be required to offset any reimbursement for signage enforcement with enforcement revenue.¹⁴⁰

Regarding the last two activities, employee supervision and management and contracted services, the Water Boards assert that the claimants should demonstrate how their supervising work is prorated to only mandated provisions. Further, the claimants should only be allowed to claim costs to negotiate and prepare contract-related documents if they can demonstrate, through a cost-benefit analysis, that these costs, together with the cost of the service, is the most cost-effective and reasonable way to comply with the conveyance system cleaning mandate.¹⁴¹

The claimants acknowledge that they may not claim activities that were required under the prior permit, and propose listing non-reimbursable activities in the Parameters and Guidelines to ensure that erroneous claims are not filed.¹⁴² The claimants also acknowledge that MS4 inspections are not reimbursable because they were required under the prior permit.¹⁴³ The claimants removed "including Personnel Costs" from its Revised Proposed Parameters and Guidelines.¹⁴⁴ The claimants disagree with the Water Boards regarding the most reasonable method to comply with the mandate, stating that their revised Parameters and Guidelines closely follow the Commission's regulations and the 'most reasonable methods' to comply are necessary to carry out the mandated program. The claimants acknowledge the need to prorate the cost of vehicles, equipment, maintenance, storage of vehicles and equipment used for multiple purposes in accordance with the SCO Manual. Claims for equipment is limited to the

¹³⁹ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 6, 11.

¹⁴⁰ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 11.

¹⁴¹ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 8-9.

¹⁴² Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 15-16.

¹⁴³ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 16.

¹⁴⁴ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 5, 16, 38-39.

permit term “with the proviso that . . . depreciation and use allowance costs are also allowable even if the initial purchase was made in a prior period and accounting requirements found in SCO’s Manual are met.”¹⁴⁵ The claimants concur that disposal of materials is not reimbursable.¹⁴⁶ In response to the assertion that fuel should be included in any contracted costs for conveyance system cleaning, the claimants acknowledge that vendors must accurately account for their reimbursement requests as limited by the claiming requirements in the Mandated Cost Manual.¹⁴⁷ In response to the Water Boards’ comments on program development, the claimants state that they removed “internal” from the term “conveyance system cleaning program.”¹⁴⁸ The claimants disagree with the Water Boards regarding vendor training, stating that they may recover training costs “as may be necessary in utilizing new types of equipment and/or protocols”.¹⁴⁹ The claimants acknowledge that signage should only be reimbursed once, and that unrelated parking enforcement costs should not be claimed. The claimants argue that they cannot use enforcement revenue to offset the cost of signage because of Proposition 26, which exempts fines and penalties from the definition of taxes, and requires that the amount charged bear a fair or reasonable relationship to the payor’s burden on, or benefit received from the government activity. The claimants argue that the cost of signage does not bear a fair or reasonable relationship to the payor’s burden or benefit received from the conveyance system cleaning.¹⁵⁰ In response to the comments on employee supervision and contract services, the claimants state that they will follow the Mandated Cost Manual on supervisory costs and will not claim them as both direct and indirect. The claimants disagree with the Water Boards regarding a cost benefit analysis to determine whether contracting out is the most cost effective method to comply with the mandate. Rather,

¹⁴⁵ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 17-18.

¹⁴⁶ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 18.

¹⁴⁷ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 6, 18-19.

¹⁴⁸ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 19, 39.

¹⁴⁹ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 6.

¹⁵⁰ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 11-12, 20.

the claimants rely on the Mandated Cost Manual, which authorizes contracting without a cost-benefit analysis.¹⁵¹

The Commission finds that the proposed activities and costs are either eligible for reimbursement under the boilerplate language of the Parameters and Guidelines, or are overbroad and not supported by evidence in the record.

First, direct costs like employee supervision and management, materials and supplies, fixed assets, and contracted services that directly relate the state-mandated activities may be claimed under Section V.A. of the Parameters and Guidelines, and are subject to the review and audit by the Controller.¹⁵²

However, the Commission found that the inspection requirements in Part D.3.a.(3).a. and b. are not a new program or higher level of service because inspections were required under the prior permit.¹⁵³ The claimants' Proposed Parameters and Guidelines request reimbursement for personnel costs to *inspect* the conveyance system, but in rebuttal comments, acknowledge that inspections in Part D.3.a.3.a. of the test claim permit are not reimbursable.¹⁵⁴ Thus, the Parameters and Guidelines clarify the activities that not eligible for reimbursement as follows:

The following conveyance system cleaning activities are *not* reimbursable:

1. Implementing a schedule of inspection activities under Part D.3.a.3.a. of the 2007 permit;
2. Annual inspection of MS4 facilities (D.3.a.3.b.i.);
3. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a.3.b.iv.);
4. Proper disposal of waste removed pursuant to applicable laws (D.3.a.(3)(b)(v));

¹⁵¹ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 13.

¹⁵² Government Code section 17561.

¹⁵³ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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*, 07-TC-09-R, adopted May 26, 2023, page 79.

¹⁵⁴ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 15.

5. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a.3.b.vi.).
6. Authorization to inspect some MS4 facilities every other year following two years of inspection under Part D.3.a.3.b.ii. of the 2007 Permit.¹⁵⁵

Moreover, there is no evidence in the record that the claimants' proposed activities are reasonably necessary to implement the mandate. These include developing programs and policies and procedures, employee and vendor training, and installing signs and enforcing parking prohibitions in areas where conveyance system cleaning is scheduled. Proposed reasonably necessary activities must be supported by substantial evidence in the record explaining why they are necessary to perform the state mandate.¹⁵⁶ In addition, section 1187.5 of the Commission's regulations requires that oral or written representations of fact shall be under oath or affirmation, and that all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so. Therefore, the claimants' proposed reasonably necessary activities are denied.

c. JURMP Educational Component (Section IV.B.1.c. of the Parameters and Guidelines)

The Commission partially approved the requirements imposed by Part D.5. addressing the test claim permit's educational component, recognizing that the prior permit also required education and training on many of the listed topics in the permit, including those for "municipal departments and personnel."¹⁵⁷ Thus, the Commission found that the following new education-related activities are eligible for reimbursement:

- D.5.a.(1): Each copermittee shall educate each target community (municipal departments, construction site owners and developers, industrial owners and operators, commercial owners and operators, the residential community, the general public, and school children) on the following topics: erosion prevention,

¹⁵⁵ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 57-62.

¹⁵⁶ Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

¹⁵⁷ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, page 79.

non-stormwater discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control.

- D.5.a.(2): The 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;¹⁵⁸ and (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.”¹⁵⁹
- 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:

¹⁵⁸ Development Projects are defined in Attachment C of the test claim permit as: “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.” Exhibit X, Test Claim, filed June 20, 2008, page 345 (Order No. R9-2007-0001, Attachment C).

¹⁵⁹ The conclusion in the Amended Decision states that these educational topics in i. – iv.. are reimbursable for “Planning Boards and Elected Officials.” (Exhibit A, pp. 141-142). The Commission found, however, that all the topics in (a) i. – iv. are new for planning boards and elected officials, and the topics in (a) iii.-iv. are also new for planning and development review staffs. Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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*, 07-TC-09-R, adopted May 26, 2023, page 80.

- 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 [Standard Urban Storm Water Mitigation Plan]¹⁶⁰ requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.
- D.5.(b)(1)(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.
 - D.5.(b)(1)(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.
 - D.5.(b)(2): As early in the planning and development process as possible and all through the permitting and construction process, implement a program to educate project applicants, contractors, property owners, and community planning groups *who are not developers or construction site owners*. 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 these groups 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.¹⁶¹

¹⁶⁰ SUSMP is defined in Attachment C of the test claim permit as: "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects." Exhibit X, Test Claim, filed June 20, 2008, page 351 (Order No. 2007-0001, Attachment C).

¹⁶¹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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,*

These new state-mandated activities are identified in Section IV.B.1.c. of the Parameters and Guidelines.

In addition, the collaboration required in Part D.5.b.3 (educating residential, the general public, and school children) is required by the first sentence in Part L.1. The Commission approved the requirements in Part L.1. for the copermittees to collaborate with all other copermittees to address *new* common issues, and to plan and coordinate the *newly* mandated activities.¹⁶² Part D.5.b.3. also requires the copermittees to “collaboratively conduct or participate in development and implementation of a plan to educate residential, general public and school children target communities.”¹⁶³ Thus, this portion of the Parameters and Guidelines references both Part D.5.b.3. and the first sentence in Part L.1..

The claimants also request reimbursement for the following costs and activities they allege are reasonably necessary to comply with the mandate:

- Program Development. Claimant’s costs, to develop an educational program for the target communities and the costs of preparation, collaboration, and development of the educational program, training, policy development, establishment of procedures, and updates to the same. While program development tasks are generally one-time costs, the permit requires measureable increases in knowledge and measurable changes in behavior, which necessitate annual reviews and periodic updates to the program; therefore these costs are also included.
- Reporting and Tracking Policies and Procedures: Claimant’s personnel costs to develop, update and implement reporting and tracking policies and procedures.
- Data Tracking and Analysis: Claimant’s costs to implement and update data tracking and analysis methods and procedures and personnel costs to

F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L, 07-TC-09-R, adopted May 26, 2023, pages 74, 78-84, 141-143.

¹⁶² Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R, adopted May 26, 2023, pages 112, 150.*

¹⁶³ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R, adopted May 26, 2023, pages 82-83.*

develop and maintain data tracking methods or systems and performing data tracking and analysis for reports to the Regional Water Quality Control Board, as well as the costs of purchases of and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in of the reimbursable mandate in compliance with the Permit.

- Educational Materials. Claimant's personnel and printing costs to develop, produce, and distribute educational materials and related reporting to document the efforts.
- Employee and Vendor Annual Training. Claimant's costs to develop, update, and conduct training of staff responsible for providing education to target communities and the costs of training of all claimant and vendor employees who perform tasks necessary to implement educational functions during the life of the Permit.
- Education of Target Audiences. Claimant's personnel and printing costs to implement and conduct educational programs for the target communities.
- Report Writing. Claimant's personnel costs to develop and write reports to the Regional Water Quality Control Board.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).¹⁶⁴

The Water Boards comment that there is insufficient detail for the first two activities: report tracking policies and procedures and data tracking and analysis.¹⁶⁵ They also recommend that the claimants prorate personnel and other costs to ensure only the approved activities are reimbursed. And to the extent that Program Development incorporates a hydromodification management plan or low impact development, the copermittees must segregate those costs to avoid seeking improper reimbursement.¹⁶⁶ As to data tracking and analysis, the Water Boards state that claimants have not identified the computer upgrades or why they are necessary to perform the reimbursable activities. The Water Boards also object to purchasing computer equipment and upgrades unless they are limited to what is necessary to comply with the permit and segregated for reimbursable activities. According to the Water Boards, the

¹⁶⁴ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 44-45.

¹⁶⁵ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 12.

¹⁶⁶ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 12-13.

claimants should be required to transparently demonstrate what percentage of computer equipment is reimbursable beyond the prior permit.¹⁶⁷

Regarding educational materials, the Water Boards again request specificity and proration of costs. And to the extent that the educational materials incorporate a hydromodification management plan or low impact development, the copermittees must segregate those costs to avoid seeking improper reimbursement.¹⁶⁸ The Water Boards also disagree that vendor training should be reimbursable, and say that vendor costs should be prorated to only the reimbursable activities in the permit.¹⁶⁹ Regarding educating target audiences and report writing, the Water Boards again criticize a lack of specificity, and recommend that report writing be prorated to exclude activities that are not reimbursable.¹⁷⁰

As to employee supervision and management and contracted services, the Water Boards again assert that the claimants should demonstrate how their supervising work is limited to the mandated provisions. And the Water Boards repeat their argument that service contract costs should only be allowed if the claimants can demonstrate, through a cost-benefit analysis, that they are the most cost effective and reasonable way to comply with the mandate.¹⁷¹

In response to the Water Boards, the claimants revised their proposed reimbursable activities to specify only the reimbursable activities that are reasonably necessary, and agree that only prorated costs are appropriate. The claimants also explain that Educational Program Development activities that incorporate hydromodification management plan activities or low impact development activities are now explicitly prohibited in the claimant's revised proposed Parameters and Guidelines.¹⁷² In response to the Water Boards' comments on data tracking and analysis, the claimants state that computer and software upgrades are necessary to comply with the updated data tracking and analysis requirements in the test claim permit. Because computer systems vary among the claimants, the claimants propose that each jurisdiction claim

¹⁶⁷ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 12, 13.

¹⁶⁸ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 13.

¹⁶⁹ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 6, 13.

¹⁷⁰ Exhibit D, Water Boards' Combined Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 6, 13.

¹⁷¹ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 8-9, 12.

¹⁷² Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 13

upgrades that fit their system, which would be “disclosed and justified on reimbursement claim forms submitted to SCO in accordance with their Mandated Cost Manual. . . .”¹⁷³ In response to the Water Boards’ comments on educational materials, the claimants revised their proposed reimbursable activities to specify only the reimbursable activities that are reasonably necessary, and agree that only prorated costs are appropriate, and have inserted activities that are not reimbursable.¹⁷⁴ The claimants disagree with the Water Boards regarding vendor training, stating “[w]hile vendors’ employees do not generally require additional training to meet the Claimants’ needs, if this is not the case, Claimants may recover such additional training costs as may be necessary in utilizing new types of equipment and/or protocols.”¹⁷⁵ The claimants revised their proposed activities for education of target audiences and report writing to increase specificity and agree that proration is appropriate.¹⁷⁶ As to employee supervision and management and contracted services, the claimants state that they will follow the Mandated Cost Manual in identifying supervisory costs and will not claim those costs as both direct and indirect. The claimants disagree with the Water Boards regarding performing a cost benefit analysis to determine whether contracting out is the most cost effective method to comply with the mandate. Rather, the claimants rely on the Mandated Cost Manual, which they quote as saying that contracted services are allowable if “the local agency lacks the staff resources or necessary expertise, or it is economically feasible to hire a contractor to perform the mandated activity.”¹⁷⁷

First, the Commission agrees with the claimants that *developing* and *implementing* the educational program for residential communities, the general public, and school children is expressly required by the plain language of Part D.5.b.3., which states: “Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities.”¹⁷⁸

¹⁷³ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 12, 13, 22-23.

¹⁷⁴ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 3-5, 23.

¹⁷⁵ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 24.

¹⁷⁶ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 4-5, 24.

¹⁷⁷ Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 13, 22.

¹⁷⁸ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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,*

However, the introductory paragraph in Part D.5. and language in Part D.5.b.1.-2. mandate that each copermitttee only *implement* an education program for the other target communities (municipal departments and personnel, new development and construction) and does not expressly require that the claimants develop those programs.¹⁷⁹ In construing regulations and statutes, it is a well-established rule that the use of different words indicates that different meanings are intended.¹⁸⁰ So the requirement in D.5.b.3., for “development and implementation” of the residential, general public and school district programs indicates a different meaning than the requirement in Parts D.5., D.5.b.1., and D.5.b.2., for only implementation of the education programs for municipal staffs, elected officials, planning boards, project applicants, and community planning groups. Education programs for municipal departments and personnel, as well as for developers and construction site owners were also required under the prior permit.¹⁸¹ Moreover, there is no evidence in the record that *developing* a program for these other target communities is reasonably necessary to comply with the mandate. Thus, only *implementing* the educational programs for these target communities is eligible for reimbursement and the parameters and guidelines make it clear that reimbursement is *not* required to develop these programs.

In addition, the educational program required by Part D.5. is ongoing. The program is part of the Jurisdictional Urban Runoff Management Program (JURMP) and is, therefore, subject to the Program Effectiveness Assessment requirements of Part I.1. of the test claim permit, which requires that the program be annually assessed to identify modifications and improvements needed to maximize effectiveness.¹⁸²

F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L, 07-TC-09-R, adopted May 26, 2023, pages 82-83., see also Exhibit X, Test Claim, filed June 20, 2008, page 300 (Order No. R9-2007-0001).

¹⁷⁹ Exhibit X, Test Claim, filed June 20, 2008, pages 297-300 (Order No. R9-2007-0001).

¹⁸⁰ *Trancas Property Owners Assoc. v. City of Malibu* (1998) 61 Cal.App.4th 1058, 1061. The California Supreme Court said that using different words “is significant” to show a different intention existed. *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507.

¹⁸¹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R, adopted May 26, 2023, pages 79-83.*

¹⁸² Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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,*

As to the claimants' proposed activities and costs, the pro rata direct costs of employee supervision and management, materials and supplies, fixed assets (including computer equipment), training, and contracted services that relate directly to the state-mandated activities may be claimed under Section V.A. of the Parameters and Guidelines, and are subject to the Controller's audit.¹⁸³

However, the Commission finds that the claimants' remaining proposed reasonably necessary activities are either overbroad or not supported by evidence in the record.

The claimants requested activities of "reporting" and "report writing," are required by Part J.a.3.i. of the test claim permit, but neither they nor Part J.a.3.i. were pled in this Test Claim. The Commission's regulations are clear that "[a]ctivities required by statutes, regulations and other executive orders that were not pled in the test claim may only be used to define reasonably necessary activities to the extent that compliance with the approved state-mandated activities would not otherwise be possible."¹⁸⁴

Moreover, there is no evidence in the record that the claimants' remaining proposed activities (tracking policies and procedures, data tracking and analysis, and annual training for vendors) are reasonably necessary to perform the state-mandated education and training, so they are denied. Proposed reasonably necessary activities must be supported by substantial evidence in the record explaining why they are necessary to perform the state-mandate in accordance with the Government Code and Commission's regulations.¹⁸⁵ In addition, section 1187.5 of the Commission's regulations requires that oral or written representations of fact shall be under oath or affirmation, and all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so.

Thus, Section IV.B.1.c. of the Parameters and Guidelines identify the reimbursable activities as follows:

F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L, 07-TC-09-R, adopted May 26, 2023, page 100. According to declarations in the Test Claim record, including this by Jon Van Rhyn of the County of San Diego: "Compliance with these mandated activities [in Section D.5.] requires the routine incorporation of testing and surveying methods into the program elements to ensure that implementation is resulting in the targeted outcomes. To comply with this mandate, the County expects to expend 288 hours of staff time in FY 2008-09, and each year thereafter, to develop, administer and analyze surveys and tests." Exhibit X, Test Claim, filed June 20, 2008, page 589. (Declaration of Jon Van Rhyn, Water Quality Manager, County of San Diego.)

¹⁸³ Government Code section 17561.

¹⁸⁴ California Code of Regulations, title 2, section 1183.7(d).

¹⁸⁵ Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

- c. Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), and the first sentence in Part L.1.)
 - i. Each copermitttee shall educate each target community (municipal departments, construction site owners and developers, industrial owners and operators, commercial owners and operators, the residential community, the general public, and school children) on the following topics: erosion prevention, non-stormwater discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control. (D.5.a.(1).)

The 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).)

- ii. 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; and (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).)
- iii. 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)(a).)
- iv. 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:
 - Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.

- The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
 - Current advancements in BMP technologies.
 - SUSMP [Standard Urban Storm Water Mitigation Plan] requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms. (D.5.b.(1)(b)(iii) - (vi).)
- v. 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.5.b.(1)(c).)
- vi. 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.(1)(d).)
- vii. As early in the planning and development process as possible and all through the permitting and construction process, implement a program to educate project applicants, contractors, property owners, and community planning groups *who are not developers or construction site owners*. 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 these groups on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training. (D.5.b.(2).)

*Reimbursement is **not** required to develop any of the educational programs described above in D.5.a., D.5.b.(1), or D.5.b.(2) of the permit.*

*Reimbursement is also **not** required to educate developers and construction site owners on the topics listed in D.5.b.(2).¹⁸⁶*

¹⁸⁶ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, page 82.

- viii. 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. (D.5.b.(3).)

3. Watershed Urban Runoff Management Program (Section IV.B.2. of the Parameters and Guidelines)

The Commission partially approved reimbursement for the new mandated activities required by Parts E.2.f. and E.2.g. of the test claim permit, addressing the Watershed Urban Runoff Management Program (WURMP), as follows:¹⁸⁷

Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] identified 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 [maximum extent practicable], 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 Activities

¹⁸⁷ Watershed is defined in Attachment C of the test claim 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 drainage area, catchment, or river basin)." Exhibit X, Test Claim, filed June 20, 2008, page 352 (Order No. R9-2007-0001, Attachment C).

Watershed Urban Runoff Management Plan is defined in Attachment C of the test claim permit as: "A written description of the specific watershed urban runoff management measures and programs that each watershed group of Copermittees will implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards." Exhibit X, Test Claim, filed June 20, 2008, page 352 (Order No. R9-2007-0001, Attachment C).

The Watershed Management Areas (WMAs) identified in the test claim permit are: Santa Margarita River, San Luis Rey River, Carlsbad, San Dieguito River, Peñasquitos, Mission Bay, San Diego River, San Diego Bay, and Tijuana River. (Exhibit X, Test Claim, filed June 20, 2008, pages 303-304 (Order No. R9-2007-0001, Table 4).)

(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.¹⁸⁸

These activities are identified in Section IV.B.2. of the Parameters and Guidelines.

In addition, the first sentence in Part L.1. of the test claim permit approved by the Commission requires copermittee collaboration “to address common issues, [and] promote consistency among Watershed Urban Runoff Management Programs” and, therefore, this section of the Parameters and Guidelines also references the first sentence in Part L.1..¹⁸⁹ As indicated above, reimbursement for collaboration is limited to activities approved by the Commission in the Test Claim Decision (to collaborate on an *updated* WURMP for each listed watershed). The prior permit also required a WURMP and required the copermittees to collaborate to address common issues to promote consistency among WURMPs, so collaboration is required only on the *updated* WURMP as described in the activities listed in the Parameters and Guidelines.¹⁹⁰

¹⁸⁸ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 72-77 (Emphasis added.)

¹⁸⁹ Exhibit X, Test Claim, filed June 20, 2008, page 329 (Order No. R9-2007-0001).

¹⁹⁰ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 90, 111. According to the Decision: “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

The claimants also request reimbursement for the following costs and activities they allege are reasonably necessary:

- Working Body Support and Representation: Claimant's costs to organize and administer the Watershed Urban Runoff Management Program ("WURMP") Working Bodies.¹⁹¹ And the costs incurred 1) to perform the responsibilities of chairs,¹⁹² co-chairs, and secretaries,¹⁹³ 2) attend and participate at meetings (including preparation and travel time), 3) other activities required for planning, discussion, and coordination such as telephone calls, emails, and video conferencing. Required tasks include 1) developing and distributing meeting agendas and notes, and 2) distributing, presenting, reviewing, and approving any of the Watershed Work Products described below.
- Collaborative Watershed Work Product Development. Claimant's Personnel costs to develop and update WURMP Work Products and the costs of such activities, including:
 - Watershed Urban Runoff Management Programs ("WURMPs"). A WURMP that includes all the elements described in Permit Part E.2.;

or higher level of service in the analysis above (i.e., not in the 2001 permit) including the Regional Urban Runoff Management Program."

¹⁹¹ Permit Part E.2.g. requires the collaborative development and implementation of a WURMP for each of the following Watershed Management Areas ("WMAs"): 1) Santa Margarita River; 2) San Luis Rey River; 3) San Dieguito River; 4) Peñasquitos; 5) Mission Bay; 6) San Diego River; 7) San Diego Bay; 8) Tijuana River. Exhibit X, Test Claim, filed June 20, 2008, pages 302-304 (Order No. R9-2007-0001, Table 4).

¹⁹² MOU Section I defines a Chair as follows: "Chair means presiding over and providing leadership and direction to a Working Body. This includes serving as a point of contact to external entities such as the Regional Board staff, stakeholders, and industry groups, soliciting group input on and developing meeting content, facilitating meetings, and coordinating with the Secretary or Working Body Support staff to finalize work products for distribution to the Working Body. Chair responsibilities may also be divided between Co-Chairs."

¹⁹³ MOU Section I defines a Secretary as follows: "Secretary means a person who takes responsibility for the records, correspondence, minutes, or notes of meetings, and related affairs of a working body. This includes: maintaining group contact lists; preparing and sending out meeting notifications and agendas; arranging for meeting rooms and equipment; taking, preparing, and finalizing meeting minutes or notes; and, coordinating with the Chair or Working Body Support staff to organize and distribute work products to the Working Body."

- Watershed Activities Lists. Any Watershed Quality Activity¹⁹⁴ or Watershed Education Activity¹⁹⁵ necessary to meet the requirements of Permit Part E.2.f.(2), to include any or all of the minimum information identified in Permit Part E.2.f.(3);
- Annual WURMP Work Plans and Budgets. Any Work Plan or Budget developed to support the implementation of a WURMP;
- WURMP Annual Reports. Both the annual report content provided by individual Watershed Copermittees and the completion of the consolidated WURMP Annual Report;
- Watershed Specific Standards: 1) Watershed reporting, assessment, and program data and information management standards; and 2) standards and approaches for watershed-level management of specific source categories or types. It applies to work products developed by individual Copermittees, their consolidation into comprehensive, watersheds standards documents, and periodic updates as necessary for each;
- Working Body Status Reports: Watershed Working Body status reports developed for dissemination to Copermittees and interested parties. Status reports typically describe Watershed Working Body activities and accomplishments, success in completing scheduled tasks, and key issues, activities, and tasks to be addressed; and
- Other Watershed Work Products. Any Watershed Working Body Work Product not specifically identified above, but required to achieve or maintain compliance with Permit Part E.2.
- Watershed Implementation of Programs and Activities. Claimant's costs for the ongoing implementation of programs and activities funded and/or conducted at the watershed level and Watershed programs and activities costs including:
 - Watershed Water Quality Activities
 - Watershed Education Activities
 - Other programs and activities required to implement the WURMP

Implementation costs associated with these programs and activities including:

¹⁹⁴ Watershed quality activities are “activities other than education that address high priority water quality problems in the WMA.”

¹⁹⁵ Watershed education activities are “Outreach and training activities that address high priority water quality problems in the WMA.”

- Materials production and distribution, equipment, supplies, fees, media purchases, and other costs associated with program implementation.
- Equipment. The actual cost of purchasing, renting, leasing, or contracting for vehicles and equipment to perform watershed activities mandated by the Permit. This includes one-time costs for vehicle and equipment purchases and corresponding equipment depreciation costs.
- Vehicle and Equipment Maintenance. Annual vehicle and equipment maintenance costs, including parts, supplies (e.g., water), and Personnel Costs. This also includes the costs of operating, renting, leasing, or contracting for facilities to store and maintain the vehicles and/or equipment and supplies.
- Fuel. The actual cost of the fuel for the vehicles and equipment performing watershed activities mandated by the Permit.
- Reporting and Tracking Policies and Procedures. Claimant's personnel costs to develop, update, and implement each WMA activity and tracking policies and procedures.
- Data Tracking and Analysis. Claimant's costs to develop, update, and implement data tracking and analysis methods and procedures for reports to the Regional Water Quality Control Board and costs of purchases and upgrades to equipment, hardware, software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.
- Report Writing. Claimant's personnel costs to develop and write reports to the Regional Water Quality Control Board.
- Employee and Vendor Annual Training. Claimant's costs to develop, update, and conduct training of staff responsible for developing or conducting WMA activities and costs of training of all claimant and vendor employees who perform tasks necessary to implement these functions during the life of the Permit.
- Cost Accounting and Documentation. Claimant's personnel costs to monitor and conduct cost accounting for all expenditures incurred in accordance with WURMP development and implementation and costs of documenting and monitoring expenditures incurred in developing and distributing budget balance and expenditure reports, and claim submittal forms and costs of individual Copermittee activities in developing and maintaining data tracking methods or systems, and of performing data tracking and analysis (including staff training), as well as the costs of purchases and upgrades to equipment, hardware, and software necessary to support expenditure tracking, analysis and reporting.

- Coordination. Claimant's personnel costs, to coordinate WURMP Working Body content, issues, programs, and activities with organizations and parties outside the claimant's jurisdiction and the costs of coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).¹⁹⁶

The Water Boards comment that the claimants use too many vague, non-specific phrases regarding the WURMP. They say that after nearly four years of implementation, the claimants should be able to specifically describe the necessary tasks to perform the WURMP, as well as anticipated changes over the remainder of the permit term. The Water Boards also repeat their comments about vendor training and computer upgrades, and they question specific costs proposed for equipment and vehicle and equipment maintenance, as well as facilities to store and maintain vehicles and equipment. The Water Boards state that WURMP may require vehicles only to attend meetings, and it is unlikely that cars would be purchased exclusively for WURMP activities, so the claimants should be required to specify and prorate costs for only WURMP activities.¹⁹⁷

The claimants respond that they have increased specificity and deleted catch-all phrases and categories in their proposed activities. The claimants disagree that vendor training is not recoverable, and agree that computer equipment must be prorated to apply only to the reimbursable activities. As to vehicles, the claimants agree that the WURMP activities do not generally require vehicles and equipment to implement, but because the claimants attend meetings, mileage for required travel should be reimbursable.¹⁹⁸

First, as stated earlier, pro rata direct costs for employee supervision and management, materials and supplies, fixed assets, travel (including mileage), and contracted services that relate directly to the state-mandated activities may be claimed under Section V.A.

However, the proposed reporting and report writing activities are required by Parts J.1.b. and J.3.b. of the test claim permit, which were not pled in the Test Claim. The Commission's regulations are clear that "[a]ctivities required by statutes, regulations and

¹⁹⁶ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 49-52.

¹⁹⁷ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 13-14.

¹⁹⁸ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 24-26.

other executive orders that were not pled in the test claim may only be used to define reasonably necessary activities to the extent that compliance with the approved state-mandated activities would not otherwise be possible.”¹⁹⁹ Reporting and report writing do not define the state-mandated activities the Commission approved, so they are not eligible for reimbursement.²⁰⁰

Moreover, there is no evidence in the record that any of the activities proposed by the claimants are reasonably necessary to comply with the mandate to update the WURMP as specified. Proposed reasonably necessary activities must be supported by substantial evidence in the record explaining why they are necessary to perform the state-mandated activity in accordance with the Government Code and Commission’s regulations.²⁰¹ Section 1187.5 of the Commission’s regulations also requires that oral or written representations of fact shall be under oath or affirmation, and all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so.

In addition, the claimants’ proposed reasonably necessary activities are overbroad. Reimbursement for the costs to “organize and administer the Watershed Urban Runoff Management Program (“WURMP”) Working Bodies” is consistent with the copermittees’ MOU, which establishes several working bodies the MOU defines as: “Committees, Subcommittees, Workgroups, Sub-workgroups, or any other group of Copermittees assembled to conduct work required by, for, or in furtherance of, compliance with the Permit ...”²⁰² The MOU established a WURMP sub-workgroup to meet four times per year, unless otherwise approved by all the copermittees, to develop and implement the WURMP and the watershed activities required by the test claim permit.²⁰³ However, the prior permit also required a WURMP and required the copermittees to collaborate to address common issues and to promote consistency among the WURMPs, and required the MOU to provide a management structure that identified joint responsibilities and collaborative arrangements, so the working bodies were likely organized under the prior permit’s MOU.²⁰⁴ The Test Claim Decision limited reimbursement for collaboration

¹⁹⁹ California Code of Regulations, title 23, section 1183.7(d).

²⁰⁰ California Code of Regulations, title 2, section 1183.7(d).

²⁰¹ Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

²⁰² Exhibit X, Test Claim, filed June 20, 2008, page 499 (MOU).

²⁰³ Exhibit X, Test Claim, filed June 20, 2008, page 527 (MOU).

²⁰⁴ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted

to the new activities in Part E.2.f., which the Commission found mandated a new program or higher level of service.²⁰⁵ Thus, substantial evidence in the record is required to show that the costs incurred to “organize and administer the WURMP Working Bodies” is reasonably necessary to comply with the mandate to “develop and implement an **updated** Watershed Urban Runoff Management Program.” In addition, the claimant’s reimbursement request for developing and updating WURMP work products “that includes all the elements described in Permit Part E.2.” is overly broad, as the Commission only approved Parts E.2.f. (watershed activities, including watershed education activities) and E.2.g. (copermittee collaboration) for reimbursement.

Accordingly, the Parameters and Guidelines identify the following reimbursable activities:

1. Watershed Urban Runoff Management Program (WURMP) (Parts E.2.f, E.2.g, and the first sentence in Part L.1..)
 - a. Each Copermittee shall collaborate with other Copermittees within its Watershed Management Area identified in Table 4 of the test claim permit, with frequent regularly scheduled meetings, to develop and implement an **updated** WURMP for each watershed to reduce the discharge of pollutants from the MS4 to the MEP (maximum extent practicable) and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, as specified below.
 - b. Update the WURMP to include and implement *only* the following elements:
 - i. 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

May 26, 2023, page 90. See also pages 111-112 for a discussion of the MOU under the prior permit.

²⁰⁵ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, page 90. The Decision states: “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..”

Activities. 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.

Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.²⁰⁶ These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

- ii. Submit a Watershed Activities List with each updated 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.
- iii. Each activity on the Watershed Activities List shall include the following information:
 - A description of the activity;
 - A time schedule for implementation of the activity, including key milestones;
 - An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
 - A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
 - A description of how the activity is consistent with the collective watershed strategy;
 - A description of the expected benefits of implementing the activity; and
 - A description of how implementation effectiveness will be measured.
- c. 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

²⁰⁶ Exhibit X, Test Claim, filed June 20, 2008, page 143 (Order No. R9-2007-0001, Part E.2.f.1.a. & b.).

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.

4. Regional Urban Runoff Management Program (Part IV.B.3. of the Parameters and Guidelines)

The Commission approved the following new state-mandated activities based on Parts F.1.– F.3. of the test claim permit relating to the Regional Urban Runoff Management Program (RURMP).²⁰⁷

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a RURMP 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 RURMP 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.

²⁰⁷ RURMP is defined in Attachment C of the test claim permit as: "A written description of the specific regional urban runoff management measures and programs that the Copermittees will collectively implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards." Exhibit X, Test Claim, filed June 20, 2008, page 350 (Order No. R9-2007-0001, Attachment C).

2. Develop the standardized fiscal analysis method required in section G of the permit,²⁰⁸ and,
3. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.²⁰⁹

These activities are identified in the Parameters and Guidelines, with clarifying modifications as discussed below.

There is some overlap between Parts F.1-F.3. and other parts of the permit approved by the Commission. For example, collaboration is also required in Part L.1., and the Commission approved the requirement in Part L.1.. for the copermittees to collaborate with each other to address common issues, and to plan and coordinate activities found to mandate a new program or higher level of service.²¹⁰ Thus, the Parameters and Guidelines identify Part L.1. together with Parts F.1-F.3.

²⁰⁸ Section G.2. of the Test Claim Permit describes the standardized fiscal analysis method as follows: “As part of the Regional Urban Runoff Management Program, the Copermittees shall 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). This standardized method shall:

- a. Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.
- b. Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program.
- c. Identify a metric or metrics to be used to report program component and total program expenditures.”

Exhibit X, Test Claim, filed June 20, 2008, page 305 (Order No. R9-2007-0001, Part G.2.)

²⁰⁹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 91-92, 96, 144-145.

²¹⁰ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 109-112, 150.

However, the requirement in Part F.3., that the RURMP be developed and implemented to “facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs,” needs further interpretation. Part I also requires program effectiveness assessment. As described in the next section below, the Commission approved reimbursement to annually assess the jurisdictional and watershed programs, as required by Parts I.1. and I.2., and to conduct a long term effectiveness assessment (a one-time activity) that addresses the jurisdictional, watershed, and regional programs “no later than 210 days in advance of the expiration of this [test claim permit],” as required by Part I.5. Conducting the assessments is provided for in Part I, so “*facilitate* the assessment . . . of the jurisdictional, watershed, and regional programs” does not mean to actually assess these programs. The general rule is that materially different language in a statute or regulation on the same or related subjects means that the Legislature or state agency intended a different meaning.²¹¹ In addition, it is noteworthy that the claimants did not plead Part I.3. of the test claim permit, which addresses annually assessing the effectiveness of the regional program, so this activity is not eligible for reimbursement.²¹² Neither the test claim permit, nor the Fact Sheet, explain what “facilitate” the assessment of the effectiveness of the jurisdictional, watershed, and regional programs means.

The best description of facilitating assessments is in the MOU, which lists the general responsibilities of regional workgroups and sub-workgroups (or working bodies), including their roles in facilitating consistency in the program and developing, annually reviewing, and updating as necessary subject-specific standards for assessments. It states in pertinent part:

The purpose of Regional Workgroups and Sub-workgroups is to provide regional coordination of urban runoff management activities within assigned subject areas, to develop and implement recommended Regional General Programs, and to provide coordination of activities with stakeholders and interested parties. Regional Workgroups are advisory to the Management Committee through the Planning Subcommittee. Regional Sub-workgroups are advisory to the Regional Workgroups to which they are subordinate.

[¶] . . . [¶]

²¹¹ *Trancas Property Owners Assoc. v. City of Malibu* (1998) 61 Cal.App.4th 1058, 1061. The California Supreme Court said that using different words “is significant” to show a different intention existed. *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507.

²¹² Exhibit X, Test Claim, filed June 20, 2008, pages 201, 209-212 (Order No. R9-2007-0001).

At a minimum, each Regional Workgroup and Sub-workgroup shall have the following responsibilities within its assigned subject area:

[¶] . . . [¶]

Facilitate consistency in the development, implementation, review, and revision of General Programs, and the development of associated reports and work products;

Develop, annually review, and update as necessary subject-specific standards for reporting, *assessment*, and data and information management;²¹³

As the claimants stated in their proposed Parameters and Guidelines:

With limited exception, all Copermittee collaboration and coordination is carried out through these Working Bodies [pursuant to the MOU].²¹⁴ Working Body meetings typically address regional, jurisdictional, and watershed issues or functions concurrently because a clear separation between them does not exist. The types of costs presented below [proposed reasonably necessary activities] therefore apply to parts L, F, and I.5.²¹⁵

The MOU and the claimants' comment comport with the plain meaning of 'facilitate.' The courts look to dictionary definitions to determine the usual and ordinary meaning of a term in a statute or regulation.²¹⁶ The dictionary defines "facilitate" as "to make easier" or to "help bring out."²¹⁷ The MOU's description of developing, annually reviewing, and updating as necessary subject-specific standards for assessments fall within that definition. Thus, the Parameters and Guidelines clarify that reimbursement for this activity includes "facilitating consistency in the assessment programs and

²¹³ Exhibit X, Test Claim, filed June 20, 2008, pages 513-514 (MOU). Emphasis added.

²¹⁴ According to the MOU: "Working Body means Committees, Subcommittees, Workgroups, Sub-workgroups, or any other group of Copermittees assembled to conduct work required by, for, or in furtherance of, compliance with the Permit (Figure A identifies the Working Bodies established in this MOU)." Exhibit X, Test Claim, filed June 20, 2008, page 499 (MOU).

²¹⁵ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 53.

²¹⁶ *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 567.

²¹⁷ Merriam-Webster Dictionary, facilitate, <https://www.merriam-webster.com/dictionary/facilitate#:~:text=transitive%20verb,make%20easier%20%3A%20help%20bring%20about> (accessed on June 9, 2023).

developing, annually reviewing, and updating as necessary subject-specific standards for the assessments.”

The claimants also request reimbursement for the following costs and alleged “reasonably necessary” activities:

- Regional Coordination of Copermittees and Regional Working Bodies. Claimant’s costs to develop, distribute, review, and present work products necessary for regional planning, coordination, and collaboration amongst Copermittees and Regional Working Bodies and the costs of written work products, presentations at meetings, and other means of coordination and review such as email.
- Working Body Support and Representation. [Fn. omitted.] Claimant’s costs to organize and administer the Regional Working Bodies and the costs of activities: 1) to perform the responsibilities of chairs co-chairs, and secretaries, 2) attend and participate in meetings (including preparation and travel time), and 3) planning, discussion, and coordination telephone calls, emails, and video conferencing. Required tasks include: 1) developing and distributing meeting agendas and notes, and 2) distributing, presenting, reviewing, and approving any of the Regional Work Products described below.
- Regional Work Product Development. Claimant’s personnel costs to develop and update any regional work product identified in an approved Regional Working Body Work Plan and Budget and the costs of such activities including:
 - Working Body Status Reports. Regional Working Body status reports developed for dissemination to Copermittees and interested parties. Status reports typically describe Regional Working Body activities and accomplishments, success in completing scheduled tasks, and key issues, activities, and tasks to be addressed;
 - Annual Work Plans and Budgets. Both individual Regional Working Body Work Plans and Budgets and the Copermittees’ Annual Regional Work Plan and Regional Shared Costs Budget;
 - Regional URMP Annual Reports. Both the annual report content provided by individual Regional Working Bodies and the completion of the consolidated Regional URMP Annual Report;
 - Regional Standards. 1) Regional reporting, assessment, and program data and information management standards; and 2) regional standards and approaches for the management of specific source categories or types. It applies to work products developed by individual Regional Working Bodies, their consolidation into comprehensive, regional standards documents, and periodic updates as necessary for each; and

- Other Regional Work Products. Any Regional Working Body Work Product not specifically identified above, but required by the Permit or necessary to achieve or maintain Permit compliance. This includes, but is not limited to:
 - A formal agreement between the Copermittees that provides a management structure for meeting the requirements of the Permit. [Fn. omitted.]
 - By-laws for the conduct of Copermittee Working Bodies.
 - A standardized method and format for annually conducting and reporting fiscal analyses of urban runoff management programs.²¹⁸
 - A Long Term Effectiveness Assessment ("LTEA") that addresses at least the following: review and assessment of jurisdictional, watershed, and regional program effectiveness (including analysis of outcome levels 1-6); assessment of the effectiveness of the Receiving Waters Monitoring Program in meeting its ability to answer the five core management questions, and; evaluation of the relationship of program implementation to changes in water quality. This may also include shared or individual Copermittee costs of collaboratively developing assessment methods and approaches, developing or maintaining data tracking methods or systems, and of performing data collection, tracking, management, analysis, and reporting (including staff training), as well as purchases and upgrades to equipment, hardware, and software necessary to support these data management functions.
 - Regional Implementation of Programs and Activities. Claimant's personnel costs for the ongoing implementation of regionally-funded and/or conducted programs and costs of materials production and distribution, equipment, supplies, fees, and media. Regional programs and activities include:
 - Education of Residential Target Audiences
 - Annual Regional Effectiveness Assessments
 - Programs and Activities Included as Part of the Regional URMP
 - Cost Accounting and Documentation. Claimant's personnel costs to monitor and conduct cost accounting for all expenditures incurred in accordance with Regional Working Body Work Plans and Budgets and the Copermittees' Annual Regional Work Plan and Regional Shared Costs Budget and costs

²¹⁸ The standardized fiscal method must be submitted to the Regional Board by January 31, 2009. It is a one-time requirement.

- associated with documenting and monitoring expenditures (e.g., developing and distributing budget balance and expenditure reports, claim submittal forms) incurred pursuant to approved Regional Working Body Work Plans and Budgets. It also includes the individual Copermittee costs of developing or maintaining data tracking methods or systems, and of performing data tracking and analysis (including staff training), as well as the costs of purchases and upgrades to equipment, hardware, and software necessary to support expenditure tracking, analysis, and reporting.
- External Coordination. Claimant's personnel costs to coordinate Regional Working Body content, issues, programs, and activities with external organizations and parties and coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies.
 - Employee Supervision-and Management. (See Section IV.A).
 - Contracted Services. (See Section IV.A).²¹⁹

The Water Boards object to the proposed qualifying language such as "costs, including personnel costs" and "costs including, but not limited to" The Water Boards are also concerned about the lack of specificity in the claimant's proposed language. Further, the Water Boards disagree that training vendors is reimbursable because vendors that bid on and carry out contracted activities should be well-versed or expert in the services they provide.²²⁰ The Water Boards also point to the claimants' identification of costs to purchase upgrades to equipment, hardware and software to support data analysis, tracking and reporting, saying such costs should be limited to those incurred after January 24, 2007 and that claimants should be required to demonstrate that the purchases are necessary to comply with the test clam permit but not necessary to comply with the prior permit. According to the Water Boards, the claimants should be required to "demonstrate how they intend to exclude, in a transparent manner, the percentage of costs of equipment and upgrades used for unreimbursable purposes . . . in a verifiable manner."²²¹ Additionally, the Water Boards specifically object to the claimant's proposed Report of Waste Discharge (ROWD) as a

²¹⁹ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 53-56.

²²⁰ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 6, 15.

²²¹ Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, pages 6, 14-15.

regional work product because a ROWD was not approved by the Commission and is required by federal law.²²²

In rebuttal comments, the claimants revised their proposed activities to reduce open ended and vague activities.²²³ The claimants disagree that they have not adequately described the tasks necessary to perform the Regional Collaboration requirements, as the tasks are described in the proposed activities listed above.²²⁴ The claimants also disagree that vendor training should not be recoverable.²²⁵ The claimants acknowledge that costs for computer equipment should be prorated to cover only the reimbursable activities.²²⁶ The claimants also agree that the costs of preparing and submitting a ROWD should not be reimbursable, and deleted it from their proposed activities.²²⁷

First, the direct costs for personnel, materials and supplies, fixed assets, travel, and contracted services that relate directly to the state-mandated activities may be claimed under Section V.A.

Second, the claimants' reimbursement request to organize and administer the Regional Working Bodies and to adopt a formal agreement between the copermittees that provides a management structure for meeting the requirements of the test claim permit are required by Part L.1.a.3.-6. of the test claim permit that governs all copermittee collaboration, and is accounted for as a one-time activity in Section IV.A.1. of the Parameters and Guidelines. Similarly, conducting the Long Term Effectiveness Assessment ("LTEA") is required by Part I.5. of the Test Claim permit, and as described below, is identified as a one-time reimbursable activity in Section IV.A.2. of the Parameters and Guidelines.

In addition, the reimbursement request for regional implementation of programs and activities, including the "annual regional effectiveness assessments" is denied. As indicated above, the claimants did not plead Part I.3. of the test claim permit, which addresses the regional annual effectiveness assessment.

²²² Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, filed September 16, 2010, page 15.

²²³ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 5.

²²⁴ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 27.

²²⁵ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, pages 5-6, 27.

²²⁶ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 27.

²²⁷ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 28.

Moreover, much of the claimants' proposed language is overbroad and not narrowly tailored to the state-mandated activities approved by the Commission. These include, for example, "Claimant's personnel costs to develop and update *any regional work product* identified in an approved Regional Working Body Work Plan and Budget;" "Any Regional Working Body Work Product not specifically identified above, but required by the Permit or necessary to achieve or maintain Permit compliance;" "Claimant's personnel costs to monitor and conduct cost accounting for all expenditures incurred in accordance with Regional Working Body Work Plans and Budgets;" and "Claimant's personnel costs to coordinate Regional Working Body content, issues, programs, and activities with external organizations and parties and coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies." Reasonably necessary activities are limited to those activities necessary to comply with the statutes, regulations and other executive orders that the Commission found impose a state-mandated program.²²⁸

In addition, there is no evidence in the record that the activities identified by the claimants are reasonably necessary to comply with the mandated activities.

Thus, Section IV.B.3. of the Parameters and Guidelines states:

3. Regional Urban Runoff Management Program (Parts F.1.-F.3., and the first sentence of Part L.1.)

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that 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 include the following:

- a. Develop and implement a Regional Residential Education Program which shall include the following:
 - 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.
 - Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a. (bacteria, nutrients, sediment, pesticides, and trash).
- b. Develop the standardized fiscal analysis method required in section G of the permit. The standardized fiscal analysis method shall:

²²⁸ California Code of Regulations, title 2, section 1183.7(d).

- Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.
 - Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program.
- c. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs. This includes facilitating consistency in the assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments.

5. Program Effectiveness Assessments (Sections IV.A.2., IV.B.4. of the Parameters and Guidelines)

The Commission approved the following state-mandated activities from Parts I.1. (annual assessment of the JURMP), and I.2. (annual assessment of the WURMP) of the test claim permit:

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 Discharge 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 1-6²²⁹ 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 of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

²²⁹ 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.” Exhibit X, Test Claim, filed June 20, 2008, pages 345-346 (Order No. R9-2007-0001, Attachment C).

- (5) Utilize Implementation Assessment,²³⁰ Water Quality Assessment,²³¹ and Integrated Assessment,²³² 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.²³³ 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

²³⁰ Implementation Assessment is defined in Attachment C of the test claim 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.” Exhibit X, Test Claim, filed June 20, 2008, page 347 (Order No. R9-2007-0001, Attachment C).

²³¹ Water Quality Assessment is defined in Attachment C of the test claim permit as an “Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges.” Exhibit X, Test Claim, filed June 20, 2008, page 352 (Order No. R9-2007-0001, Attachment C).

²³² Integrated Assessment is defined in Attachment C of the test claim 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.” Exhibit X, Test Claim, filed June 20, 2008, page 347 (Order No. R9-2007-0001, Attachment C).

²³³ Section A of the permit governs prohibitions and receiving water limitations. Exhibit X, Test Claim, filed June 20, 2008, pages 265-267 (Order R9-2007-0001.).

- a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4) 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 [sic] 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.²³⁴ 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.²³⁵

The Commission also approved reimbursement to conduct a one-time, long term effectiveness assessment.

Long Term Effectiveness Assessment (Part I.5.):

- a. Collaborate with the other Copermittees to develop a Long Term 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)²³⁶ of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

²³⁴ Section A of the permit governs prohibitions and receiving water limitations. Exhibit X, Test Claim, filed June 20, 2008, pages 265-267 (Order R9-2007-0001.)

²³⁵ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 145-149.

²³⁶ 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

- 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 Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.²³⁷

The Parameters and Guidelines identify these activities in sections IV.A.2. (LTEA) and IV.B.4. (annual program effectiveness assessments of the JURMP and WURMP).

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.” Exhibit X, Test Claim, filed June 20, 2008, page 309 (Order No. R9-2007-0001).

²³⁷ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 149-150.

There is some overlap between Part I.5. (LTEA) and the first sentence of Part L.1. The Commission approved the requirement in Part L.1. for collaboration among all copermittees to address common issues, and to plan and coordinate the required new mandated activities.²³⁸ Thus, the Parameters and Guidelines combine Part L.1. with the requirement in Part I.5. to collaborate.

In addition, collaborating on and submitting the long term effectiveness assessment to the Regional Board is not an annual requirement. Rather, it is submitted once, “no later than 210 days in advance of the expiration of the [test claim permit].”²³⁹ Therefore, this is listed as a one-time activity in the Parameters and Guidelines.

The claimants also request reimbursement for the following alleged reasonably necessary activities:

- Program Development. Claimant’s costs to develop and annually update JURMP and WURMP effectiveness assessment methods, approaches, and documentation (e.g., policies, procedures, manuals and forms), as well as data management systems and tools necessary to support the implementation of effectiveness assessments.
- Program Implementation. Claimant’s personnel costs to conduct the annual JURMP and WURMP effectiveness assessments in accordance with the Copermittee’s effectiveness assessment program and the requirements of Parts I.1 and I.2 of the Permit and the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting.
- Employee and Vendor Annual Training. Claimant’s costs to develop, update, and conduct training of staff responsible for developing or conducting effectiveness assessments and the costs of training claimant and vendor employees who perform tasks necessary to implement assessment functions during the life of the Permit.
- JURMP and WURMP Modifications. Claimant’s personnel costs to modify the JURMP and WURMP based upon the results of

²³⁸ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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.(3), 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, 07-TC-09-R*, adopted May 26, 2023, pages 112, 150.

²³⁹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 105, 107, 149.

effectiveness assessments in accordance with the requirements of Parts I.1.b and I.2.b of the Permit and the costs of the development and implementation of plans and schedules to address the identified modifications and improvements.

- Report Writing. Claimant's personnel costs to develop and write reports required by Parts I.1.c and I.2.c of the Permit.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).²⁴⁰

First, the direct costs for personnel, materials and supplies, fixed assets, and contracted services that relate directly to the state-mandated activities may be claimed under Section V.A.

In addition, the claimants' request for reimbursement "to develop and write reports" required as part of the annual assessments of the JURMP and WURMP is already identified in the mandated activities. As indicated above, the Commission approved the following activities required by Part I.1.c. and I.2.c. as reimbursable state-mandated activities:

- 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.²⁴¹
- 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.²⁴²

²⁴⁰ Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, filed November 16, 2010, page 61.

²⁴¹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 101, 147.

²⁴² Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 103, 149.

The annual reports for the JURMP and WURMP are governed by Part J.3. of the test claim permit, which generally requires the copermittees to submit detailed reports containing a comprehensive description of all their activities to meet the JURMP and WURMP requirements, including a reporting of the assessment of the effectiveness of these programs.²⁴³ The claimants only claimed Part J. of the test claim permit for street sweeping (J.3.a.(3)(c)(x.-xv.) and conveyance system cleaning (J.3.a.(3)(c)(.iv.-viii.), which are discussed above. However, based on the Commission's approval of Parts I.1.c. and I.2.c. of the test claim permit, it is reimbursable to *include* in the annual reports the program effectiveness assessments for the JURMP and the WURMP.

Moreover, there is no evidence in the record supporting any of the claimants' proposed reasonably necessary activities to comply with the mandate in Part I, so these requested activities and costs are denied. Proposed reasonably necessary activities must be supported by substantial evidence in the record explaining why they are necessary to perform the state-mandated activity in accordance with the Government Code and Commission's regulations.²⁴⁴ In addition, section 1187.5 of the Commission's regulations requires that oral or written representations of fact shall be under oath or affirmation, and all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so.

Accordingly, Section IV.A.2. of the Parameters and Guidelines authorizes one-time reimbursement to develop the Long Term Effectiveness Assessment as follows:

2. Long Term Effectiveness Assessment (Parts I.5 and the first sentence in Part L.1.):
 - a. Collaborate with the other Copermittees to develop a Long Term 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 the test claim permit.
 - b. The LTEA shall be designed to address each of the objectives listed below, and to serve as a basis for the Copermittees' Report of Waste Discharge (ROWD) for the next permit cycle:
 - Assessment of watershed health and identification of water quality issues and concerns.

²⁴³ Exhibit X, Test Claim, filed June 20, 2008, pages 324, 327 (Order No. R9-2007-0001, Part J.3.a.3.i., JURMP and J.3.b.2.m., WURMP).

²⁴⁴ Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

- Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns.
 - Evaluation of the need to address additional pollutant sources not already included in Copermittee programs.
 - Assessment of progress in implementing Copermittee programs and activities.
 - Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources.
 - Assessment of changes in discharge and receiving water quality.
 - Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality.
 - Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.
- 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 percent reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80 percent confidence.
- e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

Section IV.B.4. of the Parameters and Guidelines identifies the annual program effectiveness assessments of the JURMP and WURMP as follows:

4. Program Effectiveness Assessments (Parts I.1., I.2.)
 - a. Annual Effectiveness Assessment of Jurisdictional Urban Runoff Management Program (Part I.1.)

1. Each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
 - (i) Specifically assess the effectiveness of each of the following:
 - Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
 - Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge Detection and Elimination, and Education); and
 - Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
 - (ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items listed above.
 - (iii) Utilize outcome levels 1-6, as defined in Attachment C to Order No. R9-2007-0001, to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.
 - (iv) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.
 - (v) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, as defined in Attachment C of Order No. R9-2007-0001, where applicable and feasible.
2. 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 (Prohibitions and Receiving Water Limitations).

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.

3. Each Copermittee shall *include* in the Jurisdictional Urban Runoff Management Program Annual Report, a report on the effectiveness assessment as implemented under each of the requirements listed above.
- b. Annual Effectiveness Assessment of the Watershed Urban Runoff Management Program Watershed (Part I.2.)
 1. Each watershed group of Copermittees identified in Table 4 of the test claim permit shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
 - (i) Specifically assess the effectiveness of each of the following:
 - Each Watershed Water Quality Activity implemented;
 - Each Watershed Education Activity implemented; and
 - Implementation of the Watershed Urban Runoff Management Program as a whole.
 - (ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items that are part of the WURMP listed above.
 - (iii) Utilize outcome levels 1-6 to assess the effectiveness of each Watershed Water Quality Activity implemented and each Watershed Education Activity implemented, where applicable and feasible.
 - (iv) 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.
 - (v) 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.
 - (vi) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the bulleted items that are part of the WURMP listed above, where applicable and feasible.

- (vii) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.
2. 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 (Prohibitions and Receiving Water Limitations).

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.

3. Each watershed group of Copermittees shall *include* in the Watershed Urban Runoff Management Program Annual Report, a report on the effectiveness assessment as implemented under each of the requirements listed above.

Reimbursement is not required to conduct the annual effectiveness assessment of the Regional Urban Runoff Management Program.

D. Claim Preparation and Submission (Section V. of the Parameters and Guidelines)

1. Training

Section V. of the Parameters and Guidelines (Claim Preparation and Submission) identifies the direct costs that are eligible for reimbursement. Training costs are included in Section V.6. because, as indicated above, the state-mandated activities include training. Accordingly, Section V.6. on Training provides:

Report the cost of training an employee as specified in Section IV of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and

purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1., Salaries and Benefits, and A.2., Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3., Contracted Services.

2. Travel

In addition, Part E.2 (Watershed Urban Runoff Management Program) also mandates that the collaboration with other Copermittees within its Watershed Management Area, “with frequent regularly scheduled meetings.”²⁴⁵ And other parts require copermittee collaboration. Thus, Section V.4. identifies the direct costs for travel as follows:

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

All other direct costs identified in the boilerplate language of Section V. of the Parameters and Guidelines are reimbursable as specified.

E. Offsetting Revenues and Reimbursements (Section VII. of the Parameters and Guidelines)

In the Test Claim Decision, the Commission identified the following potential offsetting revenues:

- 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- 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

²⁴⁵ Exhibit X, Test Claim, filed June 20, 2008, page 146. (Order No. R9-2007-0001, Part E.2.g..)

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.²⁴⁶

Accordingly, Section VII. of the Parameters and Guidelines states:

Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, state and federal funds, any service charge, fee, or assessment authority to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes, shall be identified and deducted from any claim submitted for reimbursement. Such offsetting revenues include the following:

- 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning.
- 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.

V. Staff Recommendation

Based on the foregoing analysis, the Commission hereby adopts the Proposed Decision and Parameters and Guidelines.

²⁴⁶ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 139, 151.

PARAMETERS AND GUIDELINES²⁴⁷

San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), L.1.a.(3)-(6)

07-TC-09-R

Period of reimbursement is January 24, 2007 through December 31, 2017.

I. SUMMARY OF THE MANDATE

These Parameters and Guidelines address activities related to reducing stormwater pollution in compliance with NPDES Permit (CAS0108758, Order No. R9-2007-0001) issued by the San Diego Regional Water Quality Control Board (Regional Board), a state agency.

On May 26, 2023, the Commission adopted the Amended Test Claim Decision on Remand.²⁴⁸ The Commission partially approved the Test Claim, finding that the test claim permit imposes a reimbursable state-mandated program upon local agency copermittees within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission approved this test claim for the following reimbursable activities only:

- Reporting on street sweeping and conveyance system cleaning (Part J.3.a.(3)(c)(iv)-(viii), (x)-(xv));
- Conveyance system cleaning (Part D.3.a.(3)(b)(iii));
- Educational component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), 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);

²⁴⁷ Please note that the Decision and Parameters and Guidelines is a single document and must be read as a whole. It is not intended to be separated and should be posted in its entirety.

²⁴⁸ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R, adopted May 26, 2023.*

- 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)).²⁴⁹

Further, the Commission found that 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- 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.

II. ELIGIBLE CLAIMANTS

The following city and county copermittees are eligible to claim reimbursement, provided they are subject to the taxing restrictions of articles XIII A and XIII C of the California Constitution, and the spending limits of article XIII B of the California Constitution, and incur increased costs as a result of this mandate that are paid from their local proceeds of taxes:

The County of San Diego and the Cities of 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.

The San Diego Unified Port District and San Diego County Regional Airport Authority are copermittees, but are *not* eligible to claim reimbursement under article XIII B, section 6 of the California Constitution.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimant filed the test claim on June 20, 2008, establishing eligibility for reimbursement

²⁴⁹ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 5-6.

for the 2006-2007 fiscal year. Therefore, costs incurred would be reimbursable on or after July 1, 2006; but because the permit did not become effective until January 24, 2007, costs are reimbursable beginning January 24, 2007. Beginning January 1, 2018, there are no costs mandated by the state because the claimants have fee authority sufficient as a matter of law to cover the costs of these activities pursuant to Government Code section 17556(d). Therefore, costs incurred are reimbursable from January 24, 2007, through December 31, 2017.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller (Controller) within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a local agency may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a local agency filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Gov. Code §17560(b).)
5. If the total costs for a given fiscal year do not exceed \$1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event, or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the

State of California that the foregoing is true and correct,” and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant that incurs increased costs, the following activities are reimbursable:

A. One-Time Activities

1. 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 (Part L.1.a.(3)-(6)):
 - a. Establishes a management structure to promote consistency and develop and implement regional activities;
 - b. Establishes standards for conducting meetings, decisions-making, and cost-sharing.
 - c. Provides guidelines for committee and workgroup structure and responsibilities;
 - d. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

*Reimbursement is limited to the pro rata costs to execute and submit an MOU or formal agreement on only the four topics identified above. Executing and submitting a full MOU, JPA, or other formal agreement is **not** reimbursable.*²⁵⁰

2. Long Term Effectiveness Assessment (Part I.5 and the first sentence in Part L.1.):
 - a. Collaborate with the other Copermittees to develop a Long Term 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

²⁵⁰ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, page 111.

later than 210 days in advance of the expiration of the test claim permit.

- b. The LTEA shall be designed to address each of the objectives listed below, and to serve as a basis for the Copermittees' Report of Waste Discharge (ROWD) for the next permit cycle:
- Assessment of watershed health and identification of water quality issues and concerns.
 - Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns.
 - Evaluation of the need to address additional pollutant sources not already included in Copermittee programs.
 - Assessment of progress in implementing Copermittee programs and activities.
 - Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources.
 - Assessment of changes in discharge and receiving water quality.
 - Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality.
 - Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.
- c. The LTEA shall address outcome levels 1-6,²⁵¹ and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

²⁵¹ 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

- 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 percent reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80 percent confidence.
- e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

B. Ongoing Activities

1. Jurisdictional Urban Runoff Management Program

- a. Include in the JURMP Annual Report the following information:
 - i. Street Sweeping Information (Part J.3.a.(3)(c)(x-xv))
 - 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.
 - 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.

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.” (Exhibit X, Test Claim, filed June 20, 2008, pages 188-189 (Order No. R9-2007-0001, Attachment C).)

- 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.
 - Identification of the total distance of curb-miles swept.
 - Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
 - Amount of material (tons) collected from street and parking lot sweeping.
- ii. Conveyance System Cleaning Information (Part J.3.a.(3)(c)(iv)-(viii))
- 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.
 - 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.
 - 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.
 - Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
 - Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.
- b. Conveyance System Cleaning (Part D.3.a.(3)(b)(iii))
- i. Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc).
- ii. The maintenance activities shall, at a minimum, include any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, which 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.

The following conveyance system cleaning activities are not reimbursable:

- Implementing a schedule of inspection activities (Part D.3.a.(3)(a));
 - Annual inspection of MS4 facilities (Part D.3.a.(3)(b)(i));
 - Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (Part D.3.a.(3)(b)(iv));
 - Proper disposal of waste removed pursuant to applicable laws (Part D.3.a.(3)(b)(v));
 - Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (Part D.3.a.(3)(b)(vi)).
 - Authorization to inspect some MS4 facilities every other year following two years of inspection under Part D.3.a.(3)(b)(ii) of the test claim permit.²⁵²
- c. Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), and the first sentence in Part L.1.)
- i. Each copermittee shall educate each target community (municipal departments, construction site owners and developers, industrial owners and operators, commercial owners and operators, the residential community, the general public, and school children) on the following topics: erosion prevention, non-stormwater discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control. (Part D.5.a.(1).)

The educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources. (Part D.5.a.(2).)

²⁵² Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, pages 57-62.

- ii. 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; and (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization). (Part D.5.b.(1)(a).)
- iii. 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.” (Part D.5.b.(1)(a).)
- iv. 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:
 - Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
 - The Copermittee’s inspection, plan review, and enforcement policies and procedures to verify consistent application.
 - Current advancements in BMP technologies.
 - SUSMP [Standard Urban Storm Water Mitigation Plan] requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms. (Part D.5.b.(1)(b)(iii) - (vi).)
- v. 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. (Part D.5.b.(1)(c).)
- vi. 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. (Part D.5.b.(1)(d).)

- vii. As early in the planning and development process as possible and all through the permitting and construction process, implement a program to educate project applicants, contractors, property owners, and community planning groups who are not developers or construction site owners. 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 these groups on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training. (Part D.5.b.(2).)

*Reimbursement is **not** required to develop any of the educational programs described above in Parts D.5.a., D.5.b.(1), or D.5.b.(2).*

*Reimbursement is also **not** required to educate developers and construction site owners on the topics listed in Part D.5.b.(2).²⁵³*

- viii. 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. (Part D.5.b.(3) and the first sentence in Part L.1.)

- 2. Watershed Urban Runoff Management Program (WURMP, Parts E.2.f, E.2.g, and the first sentence in Part L.1.)
 - a. Each Copermittee identified in Table 4 of the test claim permit shall collaborate with other Copermittees within its Watershed Management Area, with frequent regularly scheduled meetings, to develop and implement an **updated** WURMP for each watershed to reduce the discharge of pollutants from the MS4 to the MEP (maximum extent practicable) and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, as specified below. (Part E.2.g. and the first sentence in Part L.1.)

²⁵³ Exhibit A, Commission on State Mandates, Amended Test Claim Decision on Remand 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, 07-TC-09-R*, adopted May 26, 2023, page 82.

- b. Update the WURMP to include and implement *only* the following elements:
 - i. 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. 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. Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.
 - ii. Submit a Watershed Activities List with each updated 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.
 - iii. Each activity on the Watershed Activities List shall include the following information:
 - A description of the activity;
 - A time schedule for implementation of the activity, including key milestones;
 - An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
 - A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
 - A description of how the activity is consistent with the collective watershed strategy;
 - A description of the expected benefits of implementing the activity; and
 - A description of how implementation effectiveness will be measured.

- c. 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. (Part E.2.f.)
2. Regional Urban Runoff Management Program (Parts F.1-F.3, and the first sentence in Part L.1.)

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that 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 include the following:

- a. Develop and implement a Regional Residential Education Program which shall include the following:
 - 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.
 - Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a. (bacteria, nutrients, sediment, pesticides, and trash). (Part F.1.)
- b. Develop the standardized fiscal analysis method required in section G of the permit. The standardized fiscal analysis method shall:
 - Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.
 - Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program. (Part F.2.)

- c. *Facilitate* the assessment of the effectiveness of jurisdictional, watershed, and regional programs. Reimbursement for this activity includes facilitating consistency in the assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments. (Part F.3.)
4. Program Effectiveness Assessments (Parts I.1, I.2., I.5.)
 - a. Annual Effectiveness Assessment of Jurisdictional Urban Runoff Management Program (Part I.1.)
 1. Each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
 - (i) Specifically assess the effectiveness of each of the following:
 - Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
 - Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge Detection and Elimination, and Education); and
 - Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
 - (ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items listed above.
 - (iii) Utilize outcome levels 1-6, as defined in Attachment C to Order No. R9-2007-0001, to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.²⁵⁴

²⁵⁴ 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

- (iv) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.
 - (v) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, as defined in Attachment C of Order No. R9-2007-0001, where applicable and feasible.²⁵⁵
2. 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

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.” (Exhibit X, Test Claim, filed June 20, 2008, pages 188-189 (Order No. R9-2007-0001, Attachment C).)

²⁵⁵ Implementation Assessment is defined in Attachment C of the test claim 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.” (Exhibit X, Test Claim, filed June 20, 2008, page 190 (Order No. R9-2007-0001, Attachment C).)

Water Quality Assessment is defined in Attachment C of the test claim permit as an “Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges.” (Exhibit X, Test Claim, filed June 20, 2008, page 195 (Order No. R9-2007-0001, Attachment C).)

Integrated Assessment is defined in Attachment C of the test claim 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.” (Exhibit X, Test Claim, filed June 20, 2008, page 190 (Order No. R9-2007-0001, Attachment C).)

effectiveness, as necessary to achieve compliance with section A of this Order (Prohibitions and Receiving Water Limitations).

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.

3. Each Copermittee shall *include* in the Jurisdictional Urban Runoff Management Program Annual Report, a report on the effectiveness assessment as implemented under each of the requirements listed above.
- b. Annual Effectiveness Assessment of the Watershed Urban Runoff Management Program Watershed (Part I.2.)
1. Each watershed group of Copermittees identified in Table 4 of the test claim permit shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
 - (i) Specifically assess the effectiveness of each of the following:
 - Each Watershed Water Quality Activity implemented;
 - Each Watershed Education Activity implemented; and
 - Implementation of the Watershed Urban Runoff Management Program as a whole.
 - (ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items that are part of the WURMP listed above.
 - (iii) Utilize outcome levels 1-6 to assess the effectiveness of each Watershed Water Quality Activity implemented and each Watershed Education Activity implemented, where applicable and feasible.
 - (iv) 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.

- (v) 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.
 - (vi) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the bulleted items that are part of the WURMP listed above, where applicable and feasible.
 - (vii) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.
2. 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 (Prohibitions and Receiving Water Limitations).

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.

3. Each watershed group of Copermittees shall *include* in the WURMP Annual Report, a report on the effectiveness assessment as implemented under each of the requirements listed above.

*Reimbursement is **not** required to conduct the annual effectiveness assessment of the Regional Urban Runoff Management Program.*

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV., Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable

activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee as specified in Section IV of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1., Salaries and Benefits, and A.2., Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3., Contracted Services.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both: (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement in accordance with the Office of Management and Budget Circular 2 CFR, Chapter I and Chapter II, Part 200 et al. Claimants have the option of using 10 percent of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10 percent.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR, Chapter I and Chapter II, Part 200 et al.) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR, Chapter I and Chapter II, Part 200 et al.). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be: (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.); (2) direct salaries and wages; or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in 2 CFR, Chapter I and Chapter II, Part 200 et al.) shall be accomplished by: (1) classifying a department's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage that the total amount of allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in 2 CFR, Chapter I and Chapter II, Part 200 et al.) shall be accomplished by: (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed pursuant to this chapter²⁵⁶ is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV., must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, state and federal funds, any service charge, fee, or assessment authority to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes shall be identified and deducted from any claim submitted for reimbursement. Such offsetting revenue includes the following:

²⁵⁶ This refers to title 2, division 4, part 7, chapter 4 of the Government Code.

- 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning.
- 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.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local governments in claiming costs to be reimbursed. The claiming instructions shall be derived from these parameters and guidelines and the decisions on the test claim and parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the eligible claimants to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of an eligible claimant, the Commission shall review the claiming instructions issued by the Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.17.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The decisions adopted for the test claim and parameters and guidelines are legally binding on all parties and interested parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

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 July 27, 2023, I served the:

- **Current Mailing List dated July 24, 2023**
- **Draft Proposed Decision and Parameters and Guidelines, Schedule for Comments, and Notice of Hearing issued July 27, 2023**

San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6), 07-TC-09-R 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

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 July 27, 2023 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 7/24/23

Claim Number: 07-TC-09-R

Matter: 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.

Claimants: City of Carlsbad
City of Chula Vista
City of Del Mar
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

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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Exhibit G

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February 16, 2024

RECEIVED
February 16, 2024
*Commission on
State Mandates*

VIA CSM DROPBOX

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Re: SAN DIEGO UNIFIED PORT DISTRICT AND SAN DIEGO COUNTY
REGIONAL AIRPORT AUTHORITY COMMENTS ON DRAFT
PROPOSED DECISION AND PARAMETERS AND GUIDELINES,
TEST CLAIM 07-TC-09-R

Dear Ms. Halsey:

The San Diego County Regional Airport Authority (“Airport Authority”) and the San Diego Unified Port District (“Port District”) (collectively, “Special Districts”) submit these comments in response to the Draft Proposed Decision and Parameters and Guidelines for Test Claim 07-TC-09-R (“Proposed Decision”). We appreciate the work that the Commission on State Mandates (“Commission”) has invested in the Proposed Decision, and submit these comments to urge a revision to the Proposed Decision that recognizes the Special Districts as eligible claimants under Test Claim 07-TC-09 (“Test Claim”).

BACKGROUND

The Port District was created by the State of California and approved by voters in Chula Vista, Coronado, Imperial Beach, National City and San Diego in 1962 to manage the tidelands and submerged lands of San Diego Bay.¹ The Port District is governed by the applicable Harbors & Navigation Codes Sections and Appendixes. The Airport Authority was created on January 1, 2003, as an independent agency to manage the day-to-day operations of San Diego International Airport (“SAN”) and address the region’s long-term air transportation needs.² The Airport Authority is governed by the applicable Public Utilities Code Sections.

Both Special Districts have and maintain stormwater systems. The Special Districts’ storm drain systems collect surface and storm waters on their own properties and discharge that water offsite. Parts of the stormwater systems of the Special Districts’ interconnect with other public stormwater systems.

¹ Harbors and Nv. Code, appx. I.

² Pub. Util. Code, div. 17.

The Special Districts were both subject to R9-2007-001, National Pollutant Discharge Elimination System (“NPDES”) No. CAS0108758 (“Permit”) along with the County of San Diego and the Incorporated Cities of San Diego (“Municipal Claimants”). This Permit required both the Municipal Claimants and the Special Districts to perform certain activities which were completed by both the Municipal Claimants and the Special Districts. Since both the Municipal Claimants and the Special District had to perform these mandated activities, both groups are eligible claimants.

DISCUSSION

The Special Districts respectfully requests reconsideration of the Proposed Decision with respect to the decision to not include the Special Districts as eligible claimants under the Test Claim. The Special Districts believe that they should be entitled to reimbursement under Section 6 of Article XIII B of the California Constitution (“Section 6”) because the plain language of Section 8 of Article XIII B of the California Constitution (“Section 8”) demonstrates that the Special Districts are eligible claimants. Additionally, the Proposed Decision should be revised because it improperly disqualifies the Special Districts by relying on a defined term that is not used in Section 6 and misstates the taxing authority of the Airport Authority. Lastly, equity requires that the Special Districts be treated the same as the Municipal Claimants.

I. Reimbursement Under Section 6 is Proper Because the Special Districts Are Local Governments Under Section 8

The Special Districts are eligible claimants under the Test Claim because Section 8 applies to local governments and the Special Districts are “local governments” as defined by Article XIII B of the California Constitution.³ Section 6 mandates reimbursement “whenever the Legislature or any state agency mandates a new program or higher level of service on any local government.” Section 8(d) defines “local government” as “any city, county, city and county, school district, *special district*, *authority*, or other political subdivision of or within the State.” (Emphasis added.) The plain language of this definition thus expressly includes “special districts” and “authorities” such as the Special Districts. Since the Special Districts are included in Section 6 through Section 8(d), they are eligible claimants as a matter of law.

Including the Special Districts as eligible claimants makes sense because the purpose of Section 6 is to protect local revenues after Proposition 13 “severely restricted the taxing powers of local governments.”⁴ These severe restrictions include both expenditure limits **and** voter approval of taxes.⁵ As such, recovery under Section 6 is proper where the costs can only be recovered through tax revenue.⁶

³ Cal. Const. art. XIII B, § 8.

⁴ *County of Fresno v. State* (1991) 53 Cal.3d 482, 487; *see also County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 210.

⁵ *County of Fresno*, *supra*, 53 Cal.3d at p. 487.

⁶ *City of El Monte v. Comm'n on State Mandates*, 83 Cal. App. 4th 266, 280, (2000), holding modified by *Dep't of Fin. v. Comm'n on State Mandates*, 122 Cal. Rptr. 2d 447 (Ct. App. 2002).

Here, recovery under Section 6 should be granted because the Special Districts are subject to severe voter approval restrictions on taxing just like the municipal claimants.⁷ Before the Port District can collect a special tax to pay for stormwater drainage services, it must obtain voter approval.⁸ Similarly, the Airport Authority must obtain voter approval before levying a charge for stormwater services.⁹ As such, the Special Districts should be able to recover under Section 6 because they can only recover for the stormwater mandates from taxation.

II. The Proposed Decision Improperly Disqualifies the Special Districts

The Proposed Decision relies on two arguments to disqualify the Special Districts. The first is that there is a taxation requirement necessary to count as a local government under Section 6. The second is that the Airport is unable to tax and therefore cannot be a local government under Section 6.¹⁰ Both are incorrect.

A. The Taxation Requirements in the Section 7901 Definition of “Local Agency” Do Not Apply to Section 6

The Proposed Decision relies on the definition of “local agency” in Government Code section 7901 (“Section 7901”) to determine that the Special Districts are not eligible claimants for reimbursement under Section 6 of Article XIII B of the California Constitution (“Section 6”). Section 7901 defines “local agency” as a special district, except, in part, special districts that are totally funded by revenues other than the proceeds of taxes as defined in [Section 8(c)].”

As stated above, Section 6 applies to local governments. Section 8, which defines “local government”, does not include any limitations relating to taxing authority or require that taxes

⁷ See Cal. Const. art. XIII C, subd. (e). Such revenues must:

- Be imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged and not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege;
- Be imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and not exceed the reasonable costs to the local government of providing the service or product;
- Be imposed for the reasonable regulatory costs for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof;
- Be imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property;
- Be 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;
- Be an assessment or property-related fee regulated by Proposition 218.
- Be a charge imposed as a condition of property development.

⁸ See, e.g., Harb. & Nav. App. 1, § 61, subd. (a) (authorizing special taxes).

⁹ Pub. Util. Code, § 170072 (authorizing “special benefit assessments consistent with the requirements of Article XIII B of the California Constitution”).

¹⁰ Cf Proposed Decision, § IV.A “The San Diego County Regional Airport Authority was formed in 2001 pursuant to the Public Utilities Code, Division 17, commencing with section 170000, which does not permit the Authority to levy taxes.”

actually be imposed in order to qualify as a “local government.” The more specific definition of “local government” contained in Section 8 must govern the interpretation of eligibility under Section 6. For this reason, it is improper to disqualify the Special Districts as “local governments” under Section 6 on the basis that they do not levy taxes under Section 7901.

Additionally, the term defined in Section 7901, “local agency” is not used in Section 6. The definition of “local agency” in Section 7901 is inapplicable to Section 6. For this reason, it is improper to disqualify the Special Districts as “local governments” under Section 6 on the basis that they do not levy taxes.

Even if the term “local agency” was included in Section 6, the definition in Section 7901 would not apply. Because specific provisions of a law govern over general provisions,¹¹ the definitions in Section 7901, which were enacted for the general “effective and efficient implementation of Article XIII B”, cannot prevail over the definitions in Government Code section 17518 (“Section 17518”), which was enacted specifically “to provide for the implementation of Section 6[.]”¹² Section 17518 defines “local agency” as “any city, county, special district, authority, or other political subdivision of the state.” This definition is consistent with the definition in Section 8. For the specific purpose of interpreting Section 6, a local government or local agency includes any special district or authority, without any qualification regarding the collection of tax revenues. For this additional reason, it is improper to disqualify the Special Districts as “local governments” under Section 6 on the basis that they do not levy taxes.

The purpose of Article XIII B to protect local voters from tax increases made necessary by unfunded state mandates will be undermined if local agencies which have been able to fund their services without taxes lose that ability due to unfunded mandates.

B. The Airport Authority has the Power to Levy Taxes

Even if there was some taxing authority required to qualify under Section 6, the Airport would satisfy this requirement. Public Utilities Code section § 17000.72 explicitly authorizes the Airport Authority to levy special benefit assessments as long as they are consistent with the requirements of Article XIII D of the California Constitution and, although assessments are distinct from taxes, both are relevant to the purpose of Article XIII B to protect local property owners from funding unfunded state mandates. Article XIII D requires voter approval for stormwater system fees. Therefore, the Airport Authority should receive reimbursement under Section 6.¹³

¹¹ *Rose v. State* (1942) 19 Cal.2d 713, 724 (“A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.”)

¹² Gov. Code, § 17500.

¹³ *Compare* Public Utilities Code §17002 to *City of El Monte v. Comm'n on State Mandates*, 83 Cal. App. 4th 266, 280, (2000), holding modified by *Dep't of Fin. v. Comm'n on State Mandates*, 122 Cal. Rptr. 2d 447 (Ct. App. 2002)

III. Equity Requires the Special Districts to Receive the Same Reimbursement as the Municipal Claimants Under Section 6

Equity doctrines are generally intended to uphold “some minimum standard of decency, honor, and reliability in their dealings with their Government.”¹⁴ As such, fairness requires that the Special Districts be eligible to receive reimbursements for the stormwater mandates.

First, Special Districts, like the Municipal Claimants, are obligated to take actions on and off their own properties to fulfill the mandated activities in the Permit. Since the Special Districts must perform the same mandated activities as eligible claimants, they should in fairness be eligible claimants.

Second, the Special Districts had no means, without voter approval, to charge a tax or fee to recoup these costs. Equity requires the Special Districts to be treated in the same manner as the Municipal Claimants.

CONCLUSION

For the foregoing reasons, the Special Districts respectfully request to be considered as eligible claimants as the Special Districts are subject to the same mandates as the Municipal Claimants. The Special Districts are eligible claimants because they are “local governments” and the applicable definition of local government includes no requirement that the entity actually impose a tax. Additionally, the Special Districts are subject to severe taxing limits just like the Municipal Claimants. Further, the Proposed Decision misstates the Airport Authority’s ability to generate revenues without voter approval.

As a result, the Special Districts are eligible claimants and should be authorized to submit reimbursement claims.

Pursuant to Title 2, Section 1183.8 and Section 1183.3 of the California Code of Regulations, I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my personal knowledge, information, or belief, and that this declaration is executed on this 16th day of February, 2024, in San Diego, California.

Sincerely,



Shawn D. Hagerty
of BEST BEST & KRIEGER LLP

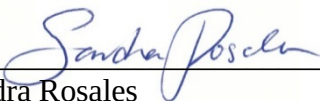
SDH:sr

¹⁴ *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60-61 (1984).

CERTIFICATE OF SERVICE

Pursuant to section 1181.3(a)(1)(D), the Commission will serve all e-filed documents, including SAN DIEGO UNIFIED PORT DISTRICT AND SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY COMMENTS ON DRAFT PROPOSED DECISION AND PARAMETERS AND GUIDELINES, TEST CLAIM 07-TC-09-R on those persons on the following mailing list for Test Claim 07-TC-09-R who have provided an email address

Executed on February 16, 2024, at Downey, California.



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Matter: 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.

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City of Del Mar
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

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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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 February 16, 2024, I served the:

- **Current Mailing List dated January 19, 2024**
- **Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines filed February 16, 2024**

San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6), 07-TC-09-R 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

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 February 16, 2024 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/19/24

**Claim
Number:** 07-TC-09-R

Matter: 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.

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City of Del Mar
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

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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Exhibit H

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February 16, 2024

RECEIVED
February 20, 2024
*Commission on
State Mandates*

VIA CSM DROPBOX

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

Re: COUNTY OF SAN DIEGO, CITIES OF CARLSBAD, DEL MAR,
IMPERIAL BEACH, LEMON GROVE, POWAY, SAN MARCOS,
SANTEE, SOLANA BEACH, CHULA VISTA, CORONADO, EL
CAJON, ENCINITAS, ESCONDIDO, LA MESA, NATIONAL CITY,
OCEANSIDE, SAN DIEGO, AND VISTA COMMENTS ON DRAFT
PROPOSED DECISION AND PARAMETERS AND GUIDELINES,
TEST CLAIM 07-TC-09-R

Dear Ms. Hasley:

The County of San Diego and the Cities of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, El Cajon, Encinitas, Escondido, La Mesa, National City, Oceanside, San Diego, and Vista (collectively, “Municipal Claimants”) submit these comments in response to the Draft Proposed Decision and Parameters and Guidelines for Test Claim 07-TC-09-R (“Proposed Decision”). The Municipal Claimants appreciate the time and significant work that the Commission on State Mandates (“Commission”) has invested in the Proposed Decision and over the past many years on Test Claim 07-TC-09-R (“Test Claim”).

The Municipal Claimants submit these comments in order to address two major issues. First, and most importantly, through these comments and the supporting documents, the Municipal Claimants request that the Commission adopt reasonable reimbursement methodologies (“RRMs”) to allow for the timely and efficient reimbursement of the mandated activities previously approved by the Commission and confirmed in two Courts of Appeal decisions.¹ Timely and efficient reimbursement to the Municipal Claimants is long overdue. The RRM process would be the most efficient way to allow the Municipal Claimants to finally receive the reimbursement for these state mandated activities that the California Constitution requires.

¹ The Commission originally adopted the Test Claim Decision in March of 26, 2010 and issued an Amended Test Claim Decision on Remand on May 26, 2023. The Court of Appeal has substantially confirmed the Commission’s decision in *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661 and in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535.

Second, these comments respond to certain technical issues in the Proposed Decision related to both the timing of the mandates and two specific activities that are reasonably necessary to perform the required activities.

I. BACKGROUND

The Municipal Claimants, County Regional Airport Authority, and the San Diego Unified Port District (“Co-Permittees”) were subject to Order R9-2007-001, National Pollutant Discharge Elimination System (“NPDES”) No. CAS0108758 (“2007 Permit”) issued by the California Regional Water Quality Control Board, San Diego Region. The 2007 Permit required a number of actions that this Commission and two Court of Appeal decision have determined are state mandates subject to subvention in accordance with the California Constitution. These mandated actions are:

- Reporting on street sweeping and conveyance system cleaning (Part J.3.a.(3)(c)(iv)-(viii), (x)-(xv));
- Conveyance system cleaning (Part D.3.a.(3)(b)(iii));
- Educational component (D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), 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)).²

The 2007 Permit was revised by Order No. R9-2013-0001, as amended (“2013 Permit”). The County has filed a separate test claim with respect to the 2013 Permit that is pending before the Commission.³ The County’s test claim includes a request for reimbursement of mandated activities from the 2007 Permit that are continued in the 2013 Permit. As discussed more fully below, the Municipal Claimants contend that the mandated activities from the 2007 Permit that are continued in the 2013 Permit are subject to subvention, but that reimbursement for those activities should occur through the claims process for the test claim on the 2013 Permit. The Municipal Claimants are not seeking reimbursement in this process for requirements of the 2013 Permit.

² Proposed Decision, 2.

³ *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001, 14-TC-03.*

II. SCOPE OF THE REIMBURSEMENT REQUEST AND RESERVATION OF RIGHTS

As the Commission and two Courts of Appeal have determined, the Municipal Claimants are entitled to subvention for the unfunded mandates required by the 2007 Permit. The Municipal Claimants performed the mandates contained in the 2007 Permit from 2007 until the end of fiscal year (“FY”) 2014/2015, by which time the mandates of the 2013 Permit were in full force. In this reimbursement process, the Municipal Claimants are entitled to and seek reimbursement only for the state mandates during this period from 2007 until the end of FY 2014/2015 when they were required by the 2007 Permit. The Municipal Claimants will seek reimbursement for the mandates performed under the 2013 Permit, including, but not limited to, mandates that were in the 2007 Permit but were continued in the 2013 Permit, in that separate action. The Municipal Claimants therefore reserve all rights regarding mandates in the 2013 Permit.

For this reason, the Municipal Claimants object to and disagree with the portions of the Proposed Decision that improperly seek to address an issue that is not currently before the Commission—the possible impact of Senate Bill 231 (“SB 231”).⁴ The Municipal Claimants contend that the Commission must delete these portions of the Proposed Decision for multiple reasons. First, SB 231 is not at issue in this Test Claim because the mandated activities under the 2007 Permit were all completed prior to the time SB 231 was enacted in 2017 and before it became effective in 2018. SB 231 is therefore not relevant to this Test Claim, as the most recent Court of Appeal opinion in this matter concluded.⁵ Since SB 231 has no application to this Test Claim, the Proposed Decision should not address it. Whatever its relevance to future matters, it has no place in this proceeding.

Second, the Municipal Claimants contend that the Commission’s analysis regarding SB 231 is inconsistent with *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535 and *City of Salinas* (2002) 98 Cal.App.4th 1351. Although it is irrelevant to this proceeding and should not be addressed at all by the Commission here, the Municipal Claimants reserve all rights regarding the applicability of SB 231 and its constitutionality. The Municipal Claimants believe that even if SB 231 were applicable, which it is not, the appropriate approach for the Commission to take regarding SB 231 would be to wait until a court of competent jurisdiction resolves the constitutionality of SB 231 in the context of an actual fee enacted under its provisions. Since SB 231 is irrelevant here, the Commission should just delete all references to it in the Proposed Decision.

III. THE COMMISSION SHOULD ADOPTED THE RRMS PROPOSED BELOW BY THE MUNICIPAL CLAIMANTS

An RRM is “a formula for reimbursing local agencies . . . for costs mandated by the state, as defined in Section 17514.”⁶ The RRM “shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed

⁴ See Proposed Decision, pp. 7-8 and 22-24.

⁵ *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 577.

⁶ Gov. Code 17518.5(a)

documentation of actual local costs.”⁷ To create the RRM, one should use “cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs.”⁸ An RRM may be developed and proposed by the claimant.⁹

Consistent with the Government Code and the Commission’s Regulations, the Municipal Claimants have developed and request that the Commission adopt the RRMs below for the mandated activities. Some of the RRMs are based on “approximations of local costs” from which generalized formulas to support timely and cost-effective reimbursement have been developed. Some of the RRMs are based on both “approximations of local costs” and specific actual costs to perform the mandated activities. Finally, some of the RRMs derive solely from fixed, actual costs that were then allocated to each individual Municipal Claimant using a cost formula used by the Municipal Claimants and documented in various Cost-Sharing Memorandums of Understanding (“MOUs”) used by the Municipal Claimants to divided costs for certain mandated activities.¹⁰ How these RRMs may be used for purposes of timely and cost-effective reimbursement is set forth in the discussion of each RRM.

These RRMs are based on detailed information from the Municipal Claimants relating to the costs they incurred to perform the state mandated activities. To help prepare these RRMs, the Municipal Claimants hired D-Max Engineering, Inc. to evaluate all available documentation relating to the 2007 Permit including the County 2011 Co-Permittee Surveys, Co-Permittee Declarations, Jurisdictional Urban Runoff Management Program (“JURMP”) Annual Reports, Water Quality Improvement Project (“WQIP”) Annual Reports, Watershed Urban Runoff Management Program (“WURMP”) Annual Reports, County Fiscal Analysis Documents, MOUs, County Watershed Workgroup Expenditure Records, Regional Cost Sharing Documentation, and D-Max proposal records relating to JRMP annual reporting services (“D-Max Files”).¹¹ Using this information, D-Max helped create the below RRMs. The details of how these RRMs were developed, and the documents relied on by D-Max, are set forth in the Declaration of John Quenzer in Support of Reasonable Reimbursement Mythology 07-TC-09-R (“Quenzer Declaration”) and Declaration of Lara Barrett in Support of Reasonable Reimbursement Mythology 07-TC-09-R (“Barrett Declaration”) filed herewith and incorporated herein.

Adopting these RRMs is consistent with the purpose of the RRM approach and is particularly appropriate in the context of this Test Claim. RRMs streamline a process that can at times be overly cumbersome and result in unfair reimbursement decisions that are inconsistent with the California Constitution. The proposed RRMs would be a very efficient and fair way to permit the Municipal Claimants to finally receive the money that the California Constitution, this Commission and two Courts of Appeal have found they are entitled to receive. Due to the State’s decision to contest all

⁷ Gov. Code 17518.5(d)

⁸ Gov. Code 17518.5(b)

⁹ Gov. Code 17518.5(e)(4).

¹⁰ Declaration of Lara Barrett in Support of Reasonable Reimbursement Mythology 07-TC-09-R (“Barrett Declaration”), ¶9.g., Municipal Claimants Supporting Documents Volume13, pages 10,785-10,907.

¹¹ Barrett Declaration, ¶9, Declaration of John Quenzer in Support of Reasonable Reimbursement Mythology 07-TC-09-R (“Quenzer Declaration”), ¶7, Municipal Claimants Supporting Documents Volumes 1-14.

possible legal issues through years of unnecessary litigation, fourteen years have passed since the 2007 Permit and its unfunded mandates were adopted. Using the RRM process would be a fair way, consistent with the requirements of state law and the California Constitution, to finally provide the Municipal Claimants with reimbursement for funds that the State required them to expend years ago.

**A. RRM for Reporting on Street Sweeping and Conveyance System Cleaning
(Part J.3.a.(3)(c) (iv)-(viii), (x)-(xv))**

The Municipal Claimants propose the following RRM for reporting on street sweeping and conveyance system cleaning. This RRM is in a reasonable approximation of the local costs mandated by the state as suggested by Government Code 17518.5.¹²

$$\begin{aligned} & \text{Reimbursement} \\ &= \sum_{t=2007}^{2013} [\text{Conveyance Reporting Cost}]_t \\ &+ \sum_{t=2007}^{2013} [\text{Sweeping Reporting Cost}]_t \end{aligned}$$

The term “*Conveyance Reporting Cost*” refers to the annual reporting cost per Co-Permittee to cover the conveyance system cleaning adjusted annually by the San Diego-Carlsbad Consumer Price Index for all urban consumers, not seasonally adjusted (“CPI”) and the term “*Sweeping Reporting Cost*” refers to the annual cost per Co-Permittee to cover street sweeping reporting adjusted annually by the CPI.¹³ A reasonable value in 2007 for the *Conveyance Reporting Cost* is five thousand seven hundred and eighty-four dollars and eighty-five cents (\$5,784.85), while a reasonable value in 2007 for the *Sweeping Reporting Cost* is six thousand one hundred and forty-three dollars and sixty-seven cents (\$6,143.67).¹⁴

Using this formula, each Municipal Claimant would receive eighty-seven thousand, two-hundred and forty-seven dollars and fifty-nine cents (\$87,247.59) which is the sum of each Municipal Claimant’s *Conveyance Reporting Cost* and *Sweeping Reporting Cost* across the applicable time period. That is, each Municipal Claimant would be entitled to claim five thousand seven hundred and eighty-four dollars and eighty-five cents (\$5,784.85) adjusted annually for CPI for each of the six-and-a-half-years *Conveyance Reporting Cost* was required and six thousand one hundred and forty-three dollars and sixty-seven cents (\$6,143.67) adjusted annually for CPI for each of the six-and-a-half-years for *Sweeping Reporting Cost* was required.

¹² Quenzer Declaration ¶12.

¹³ *Id.*

¹⁴ *Id.*

B. RRM for Conveyance System Cleaning (Part D.3.a.(3)(b)(iii))

The Municipal Claimants propose the following RRM for conveyance system cleaning. The conveyance system includes the inlet or storm basins, pipes, and channels. This RRM is a reasonable approximation of the local costs mandated by the state as suggested by Government Code 17518.5.¹⁵

$$\begin{aligned} & \text{Reimbursement} \\ &= \sum_{t=2007}^{2015} [(Unit\ Cost)_S(\#S)]_t + \sum_{t=2007}^{2015} [(Unit\ Cost)_P(P)]_t \\ &+ \sum_{t=2007}^{2015} [(Unit\ Cost)_C(C)]_t \end{aligned}$$

The term “ $(Unit\ Cost)_S$ ” refers to the cost to clean one inlet or storm basin adjusted annually by the CPI; the term “ $(Unit\ Cost)_P$ ” refers to the cost to clean one linear foot of the pipe adjusted annually by the CPI; “ $(Unit\ Cost)_C$ ” refers to the cost to clean one linear foot of the channel adjusted annually by the CPI; the term “ $\#S$ ” refers to the number of inlets or storm basins cleaned in a year by a Co-Permittee; the term “ P ” refers to the distance of the pipe cleaned in linear feet by a Co-Permittee; and the term “ C ” refers to the distance of the channel cleaned in linear feet by a Co-Permittee.¹⁶ A reasonable value in 2007 for the $(Unit\ Cost)_S$ is one hundred and fifty dollars and sixty-six cents (\$150.66).¹⁷ A reasonable value in 2007 for the $(Unit\ Cost)_P$ is six dollars and seventy-seven cents (\$6.77/ft).¹⁸ A reasonable value in 2007 for the $(Unit\ Cost)_C$ is eight dollars and fifty-two cents (\$8.52/ft).¹⁹

The $(Unit\ Cost)_S$, $(Unit\ Cost)_P$, and $(Unit\ Cost)_C$ align with those found in the NPDES Stormwater Cost Survey Final Report from January 2005²⁰ (“2005 State Survey”). The 2005 State Survey determined that the average cost of basin cleaning in Santa Clarita was one hundred and seventy dollars (\$170) per basin which is more than the 2007 $(Unit\ Cost)_S$.²¹ Additionally, the State Survey found that the average cost of drain line and channel cleaning in the City of Corona was eight dollars per linear foot (\$8/ft), which is more than the weighted average of the 2007 $(Unit\ Cost)_P$ and 2007 $(Unit\ Cost)_C$.²² Given that all of the proposed unit costs are lower than those from the 2005 Survey despite being two years later, the proposed unit costs are reasonable to apply to all Co-Permittees.²³

¹⁵ *Id.*, at ¶13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ https://www.owp.csus.edu/research/papers/papers/NPDES_Stormwater_costsurvey.pdf

²¹ *Id.*; 2005 State Survey, p. 46.

²² Quenzer Declaration ¶13; 2005 State Survey, p. 16.

²³ Quenzer Declaration ¶13

Under this RRM, an individual claimant would calculate its reimbursement using the total number of inlets and storm basins, feet of channel cleaned, feet of pipe cleaned, and the unit costs described above.²⁴ Each Municipal Claimant would submit evidence of the number of inlets and storm basins cleaned, feet of channel cleaned, and feet of pipe cleaned to get reimbursed based on the unit costs in the RRM.

C. RRM for the Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3))

The Municipal Claimants propose the following RRM for the education component. The education component includes regional outreach shared costs for the residential education program development and implementation and jurisdictional educational programs.²⁵ This RRM is a combination of a reasonable approximation of the local costs mandated by the state as suggested by Government Code 17518.5 and the actual shared costs where no reasonable approximation was applicable.²⁶

$$\begin{aligned} \text{Reimbursement} &= \sum_{t=2007}^{2015} [(County\ Education\ Costs)(MOU)]_t \\ &+ \sum_{t=2007}^{2015} [(Education\ Costs)(Total)]_t \end{aligned}$$

The term “*County Education Costs*” refers to the actual annual shared costs for developing and implementing the Residential Education Program, the term “*MOU*” refers to the Municipal Claimant’s proportional share of the cost based on the applicable MOUs, the term “*Education Costs*” refers to the percentage of the total stormwater budget reported as jurisdictional education costs; and the term “*Total*” refers to the Co-Permittee’s total stormwater budget in a particular year.²⁷ A reasonable value for the *Education Costs* is two and sixteen hundredths percent (2.16%).²⁸

Under this RRM, each entity would receive their proportional share of the *County Education Costs* based on the applicable MOUs and two and sixteen hundredths percent (2.16%) of the Municipal Claimant’s total stormwater budget.²⁹

²⁴ *Id.*

²⁵ *Id.*, at ¶14.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*, at ¶14.b.

²⁹ *Id.*, at ¶14.

D. RRM for the Watershed Activities and Collaboration in the Watershed Urban Runoff Management Program (Part E.2.f & E.2.g)

The Municipal Claimants propose the following RRM for the watershed activities and collaboration in the Watershed Urban Runoff Management Program. This includes the watershed workgroup cost share contributions, the jurisdictional watershed activities, the regional watershed activities such as the WURMP, and watershed workgroup activities.³⁰ This RRM is a combination of a reasonable approximation of the local costs mandated by the state as suggested by Government Code 17518.5 and the actual costs where no reasonable approximation was applicable.³¹

Reimbursement

$$\begin{aligned}
 &= \sum_{t=2007}^{2013} [(Watershed Lead Costs)(MOUs)]_t \\
 &+ \sum_{t=2007}^{2013} [4 * Jurisdictional Activities]_t + \sum_{t=2007}^{2013} [(WURMP Costs)(MOU)]_t \\
 &+ \sum_{t=2007}^{2013} [(Rate)(\# Attendees)(\# Meetings)]_t
 \end{aligned}$$

The term “*Watershed Lead Costs*” refers to the actual annual shared costs for the Residential Education Program; the term “*MOU*” refers to the Municipal Claimant’s proportional share of the cost based on the applicable MOUs, the term “*Jurisdictional Activities*” refers to the costs to perform one jurisdictional activity per Co-Permittee adjusted annually for the CPI; the term “*WURMP Costs*” refers to the actual annual costs for the Regional WURMP Working Group costs; the term “*Rate*” refers to the cost of the Municipal Claimant employee time per regional workgroup meeting; the term “*# Attendees*” refers to the number of attendees each Co-Permittee had attend the meeting; and “*# Meetings*” refers to the number of meetings per year.³² A reasonable value for the *Jurisdictional Activities* is eight thousand one hundred and twenty-five dollars (\$8,125).³³ A reasonable value for the *Rate* is two hundred and sixty-two dollars and eighty-eight cents (\$262.88).³⁴

Under this RRM, each entity would receive their proportional share of the *Watershed Lead Costs* and the *WURMP Costs* based on the applicable MOUs; two hundred and twenty-one thousand, four hundred and sixty-one dollars and fifty cents (\$221,461.50) for the jurisdictional watershed activities; and reimbursement for the Watershed Workgroup Meetings based on the number of employees that attended the meeting.³⁵

³⁰ *Id.*, at ¶15.

³¹ *Id.*

³² *Id.*

³³ *Id.*, at ¶15.b.

³⁴ *Id.*, at ¶15.d.

³⁵ *Id.*, at ¶15.

E. RRM for the Regional Urban Runoff Management Program (Parts F.1., F.2. & F.3).

The Municipal Claimants propose the following RRM for the Regional Urban Runoff Management Program (“RURMP”). This RRM is the actual costs of implementation as there was no reasonable applicable approximation.³⁶

$$Reimbursement = \sum_{t=2007}^{2013} [(Cost\ Share)(MOU)]_t$$

The term “*Cost Share*” refers to the actual annual cost share values for the RURMP as invoiced by County and the term “*MOU*” refers to the Municipal Claimant’s proportional share of the cost based on the applicable MOUs.³⁷

Under this formula, each entity would receive their proportional share of the *Cost Share* based on the applicable MOUs.³⁸

F. RRM for the Program Effectiveness Assessment (Parts I.1 & I.2).

The Municipal Claimants propose the following RRM for the program effectiveness assessment. Program effectiveness includes the jurisdictional program effectiveness assessments and the regional fiscal, reporting, and assessment workgroup activities.³⁹ This RRM is a combination of a reasonable approximation of the local costs mandated by the state as suggested by Government Code 17518.5 and the actual costs where no reasonable approximation was applicable.⁴⁰

$$\begin{aligned} Reimbursement &= \sum_{t=2007}^{2013} [(Effectiveness)(Total)]_t \\ &+ \sum_{t=2007}^{2015} [(FRA\ Workgroup\ Costs)(MOU)]_t \end{aligned}$$

The term “*Effectiveness*” refers to the percentage of the total stormwater budget for all Co-Permittees spent on assessing if the jurisdiction program was effective; the term “*Total*” refers to the total stormwater budget for each Co-Permittee; the term “*FRA Workgroup Costs*” are the shared costs for developing and implementing the Regional Fiscal, Reporting, Assessment Workgroup Expenditures, and the term “*MOU*” refers to the Municipal Claimant’s proportional

³⁶ *Id.*, at ¶16.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*, at ¶17.

⁴⁰ *Id.*

share of the cost based on the applicable MOUs.⁴¹ A reasonable value for the *Effectiveness* is three and seventy-two hundredths percent (3.72%).⁴²

Under this formula, each entity would receive their proportional share of the *FRA Workgroup Costs* based on the applicable MOU; and three and seventy-two hundredths percent (3.72%) of the Municipal Claimant's total stormwater budget.⁴³

G. RRM for the Long-term Effectiveness Assessment (Part I.5).

The Municipal Claimants propose the following RRM for the long term effectiveness assessment. This RRM is the actual costs of implementation as there was no reasonable applicable approximation.⁴⁴

$$Reimbursement = \sum_{t=2007}^{2013} [(Contractor Costs)(MOU)]_t$$

The term “*Contractor Costs*” are the actual annual costs of the contractors needed to assess the long term effectiveness of the projects as reported by County and the term “*MOU*” refers to the Municipal Claimant's proportional share of the cost based on the applicable MOUs.⁴⁵

Under this formula, each entity would receive their proportional share of the *Contractor Costs* based on the applicable MOUs.⁴⁶

H. RRM for the All Permittee Collaboration (Part L.1.a.(3)-(6)).

The Municipal Claimants propose the following RRM for the all permittee collaboration. All Co-Permittee collaboration includes support for regional workgroup meetings, regional workgroup meetings, and workgroup expenditures. This RRM is the actual costs of implementation as there was no reasonable applicable approximation.⁴⁷

$$\begin{aligned} Reimbursement &= \sum_{t=2007}^{2013} [(County Cost)(MOU)]_t + \sum_{t=2007}^{2017} [(Workgroup Cost)(MOU)]_t \\ &+ \sum_{t=2007}^{2013} [(Rate)(\# Meeting Attendances)]_t \end{aligned}$$

⁴¹ *Id.*

⁴² *Id.*, at ¶17.a.

⁴³ *Id.*

⁴⁴ *Id.*, at ¶18.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*, at ¶19.

The term “*County Cost*” refers to the actual costs spent to support the various all Co-Permittee meetings; the term “*MOU*” refers to the Municipal Claimant’s proportional share of the cost based on the applicable MOUs; the term “*Rate*” refers to the cost of the Municipal Claimant employee time per regional workgroup meeting; the term “*# Attendees*” refers to the number of attendees each Co-Permittee had attend the regional workgroup meeting; the term “*# Meetings*” refers to the number of meetings per year the term “*Workgroup Cost*” refers to the actual costs of activities performed by the workgroup.⁴⁸ A reasonable value for the *Rate* is two hundred and sixty-two dollars and eighty-eight cents (\$262.88).⁴⁹

Under this formula, each entity would receive their proportional share of the *County Cost* and the *Workgroup Cost* based on the applicable MOUs; and reimbursement for the Regional Workgroup Meetings based on the number of employees that attended the meetings.⁵⁰

I. The Municipal Claimants Request the Commission to Adopt the RRM

The Municipal Claimants respectfully request that the Commission adopt the RRM described above and in the D-Max Declaration. For convenience, all formulas have been gathered and listed in the below table for adoption.

The Municipal Claimants also respectfully request the Commission to allow the Municipal Claimants to recover any owed interest from the reimbursements, as well as recoverable legal and expert costs to process the Test Claim.

⁴⁸ *Id.*

⁴⁹ *Id.*, at ¶19.b.

⁵⁰ *Id.*, at ¶19.

Item to be Reimbursed	Proposed Reasonable Reimbursement Method
Reporting on Street Sweeping and Conveyance System Cleaning (Part J.3.a.(3)(c) (iv)-(viii), (x)-(xv))	$Reimbursement = \sum_{t=2007}^{2013} [Conveyance\ Reporting\ Cost]_t + \sum_{t=2007}^{2013} [Sweeping\ Reporting\ Cost]_t$
Conveyance System Cleaning (Part D.3.a.(3)(b)(iii))	$Reimbursement = \sum_{t=2007}^{2015} [(Unit\ Cost)_S(\#S)]_t + \sum_{t=2007}^{2015} [(Unit\ Cost)_P(P)]_t + \sum_{t=2007}^{2015} [(Unit\ Cost)_C(C)]_t$
Educational Component (Parts D.5.a.(1)-(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3))	$Reimbursement = \sum_{t=2007}^{2015} [(County\ Education\ Costs)(MOU)]_t + \sum_{t=2007}^{2015} [(Education\ Costs)(Total)]_t$
Watershed activities and collaboration in the Watershed Urban Runoff Management Program (Part E.2.f & E.2.g)	$Reimbursement = \sum_{t=2007}^{2013} [(Watershed\ Lead\ Costs)(MOUs)]_t + \sum_{t=2007}^{2013} [4 * Jurisdictional\ Activities]_t + \sum_{t=2007}^{2013} [(WURMP\ Costs)(MOU)]_t + \sum_{t=2007}^{2013} [(Rate)(\#Attendees)(\#Meetings)]_t$
Regional Urban Runoff Management Program (Parts F.1., F.2. & F.3)	$Reimbursement = \sum_{t=2007}^{2013} [(Cost\ Share)(MOU)]_t$
Program Effectiveness Assessment (Parts I.1 & I.2)	$Reimbursement = \sum_{t=2007}^{2013} [(Effectiveness)(Total)]_t + \sum_{t=2007}^{2015} [(FRA\ Workgroup\ Costs)(MOU)]_t$
Long-term Effectiveness Assessment (Part I.5)	$Reimbursement = \sum_{t=2007}^{2013} [(Contractor\ Costs)(MOU)]_t$
All Permittee Collaboration (Part L.1.a.(3)-(6))	$Reimbursement = \sum_{t=2007}^{2013} [(County\ Cost)(MOU)]_t + \sum_{t=2007}^{2013} [(Rate)(\#Meeting\ Attendances)]_t + \sum_{t=2007}^{2017} [(Workgroup\ Cost)(MOU)]_t$

V. IF THE RRMS ARE NOT ACCEPTED, THE MUNICIPAL CLAIMANTS BELIEVE THERE ARE ADDITIONAL REIMBURSABLE ACTIVITIES

The Proposed Decision seeks to exclude certain reasonable and necessary activities associated with the approved mandates that the Municipal Claimants original included their 2010 submittals. The Municipal Claimants believe that the Proposed Decision improperly excludes at least two of these activities—those related to the development of policies and procedures for reporting of certain activities and the development of educational programs. Reimbursement is proper for reasonably necessary activities associated with the mandate.⁵¹ Reasonably necessary activities are “those activities necessary to comply with the statutes, regulations and other executive orders found to impose a state mandated program. . . . All representations of fact to support any proposed reasonably necessary activities shall be supported by documentary evidence in accordance with section 1187.5 of these regulations.” As explained below, at least two activities should be included under these definitions.

A. Policies and Procedures on Tracking and Reporting Street Sweeping and Conveyance System Cleaning should be Reimbursed Where Reporting is Required and Reimbursable

The Commission and two Court of Appeal decisions confirm that reporting on street sweeping and conveyance system cleaning are reimbursable.⁵² Despite this, the Proposed Decision seeks to exclude “personnel costs to develop, update and implement street sweeping reporting and tracking policies and procedures.”⁵³

In order for the Municipal Claimants to report on street sweeping and conveyance system cleaning, they had to have policies and procedures as to how the reporting should be done. Without policies and procedures, it would not be clear to the reporting staff what needed to be reported. As such, the costs to update and implement street sweeping reporting and tracking policies and procedures is necessary to accurately report on the street sweeping and conveyance system cleaning and should be subject to reimbursement. As part of the claims process, the Municipal Claimants should be permitted to submit evidence of these reasonable and necessary costs.

B. Developing Educational Programs should be Reimbursed Where Implementation is Required and Reimbursable

The Commission and two Court of Appeal decisions confirm that implementing educational programs are reimbursable.⁵⁴ Despite this, the Proposed Decision seeks to exclude costs relating.⁵⁵ However, in order to implement a program it must be developed; one cannot simply implement a new program without developing it. As such, development of these education programs is a cost that is reasonably necessary to support required implementation.

⁵¹ Cal. Code Regs. tit. 2, § 1183.7

⁵² Proposed Decision, p. 28.

⁵³ Proposed Decision, p. 29.

⁵⁴ Proposed Decision, p. 48.

⁵⁵ Proposed Decision, p. 48.

Additionally, the Commission's reliance on rules relating to legislative interpretation is misplaced. The general rules of statutory construction and interpretation requires laws and rules to be read in a manner that is harmonious with *all* laws.⁵⁶ Here, interpreting the mandate as only including the implementation of the education system is improper because it explicitly conflicts with both Government Code section 17557 and California Code of Regulations, title 2, section 1183.7.

Reimbursement is proper for "activities that are reasonably necessary for the performance of the state mandated program."⁵⁷ As stated above, it is unreasonable to expect implementation of a program that is new or different without some type of development of this program. Interpreting the mandate as only including implementation improperly ignores Government Code section 17557 and California Code of Regulations, title 2, section 1183.7. Therefore, development costs should be reimbursed along with the implementation. As part of the claims process, the Municipal Claimants should be permitted to submit evidence of these reasonable and necessary costs.

VI. CONCLUSION

For the foregoing reasons, the Municipal Claimants respectfully request removal of the references to SB 231 and adoption of the RRM's proposed for all reimbursable state mandated activities. If the Commission does not adopt the suggested RRM's, the Municipal Claimants respectfully request that the Commission revise the Proposed Decision to include all activities that are reasonably necessary to implement the state mandated activities.

Pursuant to Title 2, Section 1183.8 and Section 1183.3 of the California Code of Regulations, I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my personal knowledge, information, or belief, and that this declaration is executed on this 16th day of February, 2024, at San Diego, California.

Sincerely,



Shawn D. Hagerty
of BEST BEST & KRIEGER LLP

SDH:ak

⁵⁶ Supreme Court of the United States, Rules of Statutory Construction and Interpretation, App. A1 (https://www.supremecourt.gov/DocketPDF/18/18-9575/102239/20190611092122150_00000055.pdf)

⁵⁷ Gov. Code § 17557(a); see also Cal. Code Regs. tit. 2, § 1183.7(d).

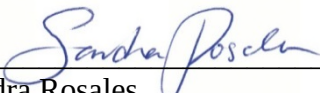
CERTIFICATE OF SERVICE

Pursuant to section 1181.3(a)(1)(D), the Commission will serve all e-filed documents, including the following documents:

1. COUNTY OF SAN DIEGO, CITIES OF CARLSBAD, DEL MAR, IMPERIAL BEACH, LEMON GROVE, POWAY, SAN MARCOS, SANTEE, SOLANA BEACH, CHULA VISTA, CORONADO, EL CAJON, ENCINITAS, ESCONDIDO, LA MESA, NATIONAL CITY, OCEANSIDE, SAN DIEGO, AND VISTA COMMENTS ON DRAFT PROPOSED DECISION AND PARAMETERS AND GUIDELINES, TEST CLAIM 07-TC-09-R
2. DECLARATION OF JOHN QUENZER IN SUPPORT OF REASONABLE REIMBURSEMENT METHODOLOGY, 07-TC-09-R
3. .DECLARATION OF LARA BARRETT IN SUPPORT OF REASONABLE REIMBURSEMENT METHODOLOGY, 07-TC-09-R
4. MUNICIPAL CLAIMANTS SUPPORTING DOCUMENTS VOLUMES 1-14

on those persons on the following mailing list for Test Claim 07-TC-09-R who have provided an email address

Executed on February 16, 2024, at Downey, California.


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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 10/3/23

Claim Number: 07-TC-09-R

Matter: 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.

Claimants: City of Carlsbad
City of Chula Vista
City of Del Mar
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

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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DECLARATION OF LARA BARRETT
IN SUPPORT OF REASONABLE REIMBURSEMENT METHODOLOGY
07-TC-09-R

I, Lara Barrett, declare as follows:

BACKGROUND

1. I am over the age of 18. I have personal knowledge of the facts set forth below and, if called as a witness, I could testify competently to all of the facts set forth herein.
2. Except as otherwise stated, the facts set forth herein are known to me personally or have been determined by my review of public records or official records maintained by the County of San Diego (“County”) in the ordinary course of business. All records reviewed were maintained by authorized personnel of the County, or persons acting under their control, in the ordinary course of business at or near the time of the act, condition, or event described therein. If called to testify as a witness, I could and would testify competently thereto.
3. I have worked for the County for five years. I currently work in the County’s Watershed Protection Program as a Land Use/Environmental Planner III.
4. I received education and training for my various positions with the County. Generally, all of my training taught me to perform my job consistent with applicable federal, state and local laws. I successfully completed all of my required education and training.
5. As a Land Use/Environmental Planner III, my responsibilities include: grant tracking and reporting, various compliance efforts, and support on legal cases. I have been in this role for approximately two years. Previously I worked in the Land Use and Environment Group Executive Office as a Chief Administrative Office Staff Officer for three years. My responsibilities in that role included preparation of documents and presentations for County Board of Supervisor (“Board”) meetings and assisting departments in implementing Board direction
6. In my role with the County, I have become familiar with Order No. R9-2007-0001, issued by the San Diego Regional Water Quality Control Board (“2007 Permit”) as well as Order No. R9-2013-0001, as amended (“2013 Permit”).
7. The County served as the “Principal Co-Permittee” under the 2007 Permit. In this role, the County was obligated to undertake a number of activities on behalf of or in coordination with the other entities subject to the 2007 Permit (“Co-Permittees”). As a result, the County has gathered, created, and maintained information and records documenting many of the activities undertaken and costs incurred by the County and other Co-Permittees to implement the Test Claim mandates. These include, but are not limited to the following:
 - a. The Regional Urban Runoff Management Program (“RURMP”) described in 2007 Permit Provision I.3; J.1.c(2) (“Copermittees shall annually assess the

effectiveness of [RURMP] implementation. . . . The Principal Permittee shall be responsible for creating and submitting the RURMP.”) and 2007 Permit Provision J.3.c (“The Principal Permittee shall generate the Regional Urban Runoff management Program Annual Reports. . . . Each [RURMP] Annual Report shall be a comprehensive documentation of all regional activities conducted by the Copermittees during the previous annual reporting period to meet all requirements of section F of Order No. R9-2007-0001.”);

- b. The Long-Term Effectiveness Assessment (“LETA”) described in 2007 Permit Provision I.5 (“The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 2.10 days in advance of the expiration of this Order.”);
 - c. The Jurisdictional Urban Runoff Management Program (“JURMP”) revisions described in the 2007 Permit Provisions J.1.a(1), (2) (“Each Copermittee shall submit its updated and revised JURMP to the Principal Permittee by the date specified by the Principal Permittee. . . . The Principal Permittee shall be responsible for collecting and assembling the individual JURMPs which cover the activities conducted by each individual Copermittee ”); and 2007 Permit Provision J.3.a(1), (2) (“Each Copermittee shall submit to the Principal Permittee its individual Jurisdictional Urban Runoff Management Program Annual Report by the date specified by the Principal Permittee. . . . The Principal Permittee shall submit Unified Jurisdictional Urban Runoff Management Program Annual Reports to the Regional Board. . . . The Principal Permit shall also be responsible for collecting and assembling each Copermittees’ individual Jurisdictional Urban Runoff Management Program Annual Report.”); and
 - d. The Watershed Urban Runoff Management Program (“WURMP”) described in 2007 Permit Provision J.1.b(2), (3) (“Each Lead Watershed Permittee is further responsible for the submittal of the WURMP to the Principal Permittee. . . . The Principal Permittee shall assemble and submit the WURMPs to the Regional Board[.]”).
8. In my role, I have become familiar with and know where County documents relating to the 2007 Permit are archived. I am also familiar with the work product and activities associated with both the 2007 and 2013 Permits including:
- a. The 2007 Permit’s JURMP, including the collaboration involved in developing and implementing the JURMPs; the requirement to include street sweeping and conveyance system cleanings in the annual reports; and the requirement to educate target community members on erosion prevention, non-stormwater discharge prohibitions, BMP types, high-risk behaviors;
 - b. The 2007 Permit’s WURMP, including the watershed activities included in the WURMPs and the collaboration involved in developing and implementing the WURMPs for each watershed;

- c. The RURMP, including the collaboration involved in developing and implementing the RURMP, the RURMP's education program, and the RURMP's fiscal analysis method;
 - d. Meetings held and attended by Co-Permittees to promote consistency among the 2007 Permit's JURMPs and WURMPs, and to plan and coordinate activities required under the 2007 Permit; and
 - e. The 2007 Permit's Program effectiveness assessment and long term effectiveness assessment requirements.
9. On December 11, 2023, I was asked to gather records to support the creation of a reasonable reimbursement methodologies to support reimbursement for the stormwater mandates from the 2007 Permit. The records I found, reviewed, and provided to D-Max Engineering included the following:
- a. County 2011 Co-Permittee Surveys. The County 2011 Co-Permittee Surveys includes three surveys created by County personal to memorialize the costs actually incurred at the time the costs were incurred. The first survey covers meeting attendance, time spent at meetings, and the costs relating to attendance including employee salaries. The second survey covers the actual and reporting costs of the structure cleaning. The third survey covers the actual and reporting costs of the street sweeping. The County 2011 Co-Permittee Surveys are included in the concurrently filed Municipal Claimants Supporting Documents Volume 1, pages 1-376.
 - b. Co-Permittee Declarations. The Co-Permittee Declarations are declarations from each of the Co-Permittees drafted in 2010 which includes information such as the costs of the watershed activities, the jurisdictional education costs, overall conveyance cleaning costs, Residential Education Program development and implementation, and meeting attendance and time. The Co-Permittee Declarations are included in the concurrently filed Municipal Claimants Supporting Documents Volume 1, pages 377-743.
 - c. JURMP Annual Reports. The County was principal permittee responsible for coordinating annual reports. Annual reports described activities occurring during the reporting year. Annual reports were created annually and submitted to the Regional Board in January the following fiscal year. These reports reflect contemporaneous information and are signed under penalty of perjury. The JURMP Annual Reports are included in the concurrently filed Municipal Claimants Supporting Documents Volumes 2- 11.
 - d. Water Quality Improvement Project ("WQIP") Annual Reports. The County was principal permittee responsible for coordinating annual reports. Annual reports described permittee activities, including monitoring data and compliance information, that occurred during the reporting year in each watershed. Annual reports were created annually and submitted to the Regional Board in January the

following fiscal year. These reports reflect contemporaneous information and are signed under penalty of perjury. The Water Quality Improvement Project Annual Reports are included in the concurrently filed Municipal Claimants Supporting Documents Volume 12.

- e. WURMP Annual Reports. The County was principal permittee responsible for coordinating annual reports. Annual reports described permittee activities, including regional watershed records of activities that each jurisdiction completed, that occurred during the reporting year in each watershed. Annual reports were created annually and submitted to the Regional Board in January the following fiscal year. These reports reflect contemporaneous information and are signed under penalty of perjury. The WURMP Annual Reports are included in the concurrently filed Municipal Claimants Supporting Documents Volume 13, pages 1-10,756.
- f. County Fiscal Analysis Documents. The County Fiscal Analysis Documents are documents that contain the jurisdiction's fiscal analysis when it was no longer included in the transitional JRMP/WQIP Annual Reports. The County Fiscal Analysis Documents are included in the concurrently filed Municipal Claimants Supporting Documents Volume 13, pages 10,757-10,784.
- g. Cost-Sharing Memorandums of Understanding. The Cost-Sharing Memorandums of Understanding are documents signed by all Co-Permittees explaining how costs for overall regional efforts or watershed specific costs are split between Co-Permittees. The memorandums are updated after every census as the cost split depends on population. The Cost-Sharing Memorandums of Understanding are included in the concurrently filed Municipal Claimants Supporting Documents Volume 13, pages 10,785-10,907.
- h. County Watershed Workgroup Expenditure Records. The County Watershed Workgroup Expenditure Records are spreadsheets with information relating to the cost share contributions the County made to the different watershed groups. The County Watershed Workgroup Expenditure Records are included in the concurrently filed Municipal Claimants Supporting Documents Volume 13, pages 10,908-10,916.
- i. Regional Cost Sharing Documentation. The Regional Cost Sharing Documentation is quarterly information packets explaining the quarterly expenditures by workgroup. The packet includes a variety of documents including tables of staff hours and rates, invoices for regional work groups and regional activities, and summaries of regional expenditures by workgroup. The Regional Cost Sharing Documentation are included in the concurrently filed Municipal Claimants Supporting Documents Volume 13, pages 10,917-13,074.

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

2/13/23 San Diego, CA
(Date and Place)

Lara Barrett
(Signature)

Lara Barrett
(Name)

DECLARATION OF JOHN QUENZER
IN SUPPORT OF REASONABLE REIMBURSEMENT METHODOLOGY
07-TC-09-R

I, John Quenzer, declare as follows:

BACKGROUND

1. I am over the age of 18. I have personal knowledge of the facts set forth below and, if called as a witness, I could testify competently to all of the facts set forth herein.
2. Except as otherwise stated, the facts set forth herein are known to me personally or have been determined by my review of public records or official records maintained by either D-Max Engineering, Inc. ("D-Max") or the County of San Diego ("County") in the ordinary course of business. All records reviewed were maintained by authorized personnel, or persons acting under their control, in the ordinary course of business at or near the time of the act, condition, or event described therein. If called to testify as a witness, I could and would testify competently thereto.
3. I am a Principal Scientist at D-Max. I have a Masters of Science in Environmental Engineering and Science from Johns Hopkins University and a Bachelor of Science in Environmental Chemistry from the University of California, San Diego. I am also a Certified Professional in Storm Water Quality ("CPSWQ") and a Qualified Stormwater Pollution Prevention Plan ("SWPPP") Developer ("QSD")/Qualified SWPPP Practitioner ("QSP"). A copy of my resume is included in the concurrently filed Municipal Claimant Supporting Documents Volume 14, pages 1-7.
4. I have worked at D-Max Engineering for nineteen (19) years. During this time, my work has focused on storm water management for municipal agencies in Southern California, mainly within San Diego County.
5. During my time at D-Max, I have worked on numerous projects for the County of San Diego, Cities of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, El Cajon, Encinitas, Escondido, La Mesa, National City, Oceanside, San Diego, Vista, San Diego County Regional Airport Authority, and the San Diego Unified Port District ("Co-Permittees") to implement the requirements of Order No. R9-2007-0001, issued by the San Diego Regional Water Quality Control Board ("2007 Permit") and Order No. R9-2013-0001, as amended ("2013 Permit"). I have served as an extension of staff managing storm water programs for the Cities of National City, Lemon Grove, and Santee. I have prepared and updated Jurisdictional Urban Runoff Management Program ("JURMP") and/or associated annual reports for more than half of the San Diego Co-Permittees. I regularly attended regional and watershed meetings for Co-Permittees collaboration, typically representing the City of National City. I have also worked with 16 of the 19 municipal Co-Permittees (those other than Airport Authority and Port District) on other various stormwater program needs during this time. My experience includes completing projects in each of the following areas:

- a. The 2007 Permit's JURMP, including the collaboration involved in developing and implementing the JURMPs; the requirement to include street sweeping and conveyance system cleanings in the annual reports; and the requirement to educate target community members on erosion prevention, non-stormwater discharge prohibitions, BMP types, high-risk behaviors;
 - b. The 2007 Permit's Watershed Urban Runoff Management Program ("WURMP"), including the watershed activities included in the WURMPs and the collaboration involved in developing and implementing the WURMPs for each watershed;
 - c. Regional Urban Runoff Management Program ("RURMP"), including the collaboration involved in developing and implementing the RURMP, the RURMP's education program, and the RURMP's fiscal analysis method;
 - d. Meetings held and attended by Co-Permittees to promote consistency among the 2007 Permit's JURMP and WURMP, and to plan and coordinate activities required under the permit; and
 - e. The 2007 Permit's Program effectiveness assessment and long term effectiveness assessment requirements.
6. In 2023, the County of San Diego, Cities of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, El Cajon, Encinitas, Escondido, La Mesa, National City, Oceanside, San Diego, and Vista (collectively, "Municipal Claimants") retained me and D-Max to assist in developing a reasonable reimbursement methodology.

DOCUMENTS OBTAINED AND REVIEWED

7. In my role as Principal Scientist at D-Max, I have access to all past records of contract proposals submitted by the company to Co-Permittees for stormwater services. I am familiar with these records and know how they are achieved. As such, I gathered the D-Max proposal records relating to JRMP annual reporting services ("D-Max Files"). A copy of these records is included in the concurrently filed Municipal Claimant Supporting Documents Volume 14, pages 8-129.
8. In my role as a consultant to all Municipal Claimants in connection with the development of a reasonable reimbursement methodology, I requested, received, and reviewed documents created and maintained by the County in the ordinary course of business which evidence their activities to implement each of the programs described above, and the costs associated with those activities, including but not limited to the following documents:
 - a. County 2011 Co-Permittee Surveys;
 - b. Co-Permittee Declarations;
 - c. JURMP Annual Reports;

- d. Water Quality Improvement Project (“WQIP”) Annual Reports;
- e. WURMP Annual Reports;
- f. County Fiscal Analysis Documents;
- g. Cost-Sharing Memorandums of Understanding (“MOUs”);
- h. County Watershed Workgroup Expenditure Records;
- i. Regional Cost Sharing Documentation; and

All of these documents are included in the Municipal Claimants Supporting Documents Volumes 1-13.

- 9. These documents included cost information from a representative sample of the Co-Permittees. I considered these documents and the variation in costs among Municipal Claimants to implement the state mandates to develop reasonable reimbursement methodologies for each reimbursable activity described in the Draft Proposed Decision and Parameters and Guidelines for Test Claim 07-TC-09-R (“Test Claim Mandate”) based on general allocation formulas, uniform cost allowances, and other approximations of Municipal Claimants costs to implement the Test Claim Mandates.
- 10. In the following sections, I describe how I developed the reasonable reimbursement methodology or formula for reimbursing Municipal Claimants for each Test Claim Mandate for the 2007 Permit.

REIMBURSEMENT FORMULAE

- 11. For the purpose of the below reimbursement formulas, the below general information should apply.
 - a. Reimbursements intended to cover the time in which the unfunded mandate was imposed shall be articulated as:

$$\sum_{t=2007}^{2015} [x]_t$$

In this formula, x shall refer to the line-item specific reimbursable and the year refers to the fiscal year where the mandate applied (i.e., 2007 shall refer to fiscal year (“FY”) 2006/2007). The purpose of this summation is to sum the specific reimbursable for each year that the state mandate was in place.

- b. All costs and monetary values are in United States dollars.

- c. Where the costs are increased annually by the San Diego-Carlsbad Consumer Price Index for all urban consumers, not seasonally adjusted (“CPI”), the annual increase shall follow the adjustment in the table below.

Fiscal Year	CPI Adjustment
FY 2006/2007	1.0000
FY 2007/2008	1.0000
FY 2008/2009	1.0385
FY 2009/2010	1.0384
FY 2010/2011	1.0520
FY 2011/2012	1.0840
FY 2012/2013	1.1013
FY 2013/2014	1.1157
FY 2014/2015	1.1364

12. Reporting on Street Sweeping and Conveyance System Cleaning (Part J.3.a.(3)(c) (iv)-(viii), (x)-(xv)).

The total reimbursable for reporting on street sweeping and conveyance system cleaning is:

$$\text{Reimbursement} = \$1,657,704.21$$

The total is determined by combining the cost to report on the conveyance system cleaning and street sweeping as described in detail below. Using this formula, each entity would receive eighty-seven thousand, two-hundred and forty-seven dollars and fifty-nine cents (\$87,247.59). The time period of the reimbursement for reporting is halfway through FY 2006/2007 through FY2012/2013 as this is when 2007 Permit required this activity.

In my opinion, the total cost spent on reporting for each Co-Permittee is comparable to the amounts reported in the NPDES Stormwater Cost Survey Final Report from January 2005 (“2005 State Survey”).

a. Reporting on Conveyance System Cleaning

The formula and components of the formula were determined by reviewing the County 2011 Co-Permittee Surveys. Using this information, I have determined that a reasonable reimbursement formula for the costs of reporting on conveyance system cleaning is:

$$\text{Reimbursement} = \sum_{t=2007}^{2013} [\text{Conveyance Reporting Cost}]_t$$

where the term “Conveyance Reporting Cost” refers to the annual reporting cost per Co-Permittee to cover the conveyance system cleaning adjusted annually by

the CPI. The value of the *Conveyance Reporting Cost* represents the median of the Co-Permittee's annual reporting costs to cover the conveyance system cleaning between FY 2007/2008 to FY 2009/2010. The median was selected because it results in a more conservative reporting cost than the mean. The cost to report on conveyance system cleaning includes the staff costs to report on conveyance system cleaning. The *Conveyance Reporting Cost* for FY 2006/2007 for each Co-Permittee was five thousand seven hundred and eighty-four dollars and eighty-five cents (\$5,784.85).

When this is applied to the time of the mandate for all Municipal Claimants, the total is:

$$Reimbursement = \$803,919.64$$

b. Reporting on Street Sweeping

The formula and components of the formula were determined by reviewing the County 2011 Co-Permittee Surveys. Using this information, I have determined that a reasonable reimbursement formula for the costs of reporting on street sweeping for each Co-Permittee is:

$$Reimbursement = \sum_{t=2007}^{2013} [Sweeping Reporting Cost]_t$$

where "*Sweeping Reporting Cost*" refers to the annual cost per Co-Permittee to cover street sweeping reporting adjusted annually by the CPI. The value of the *Conveyance Reporting Cost* represents the median of the Co-Permittee's annual reporting costs to cover street sweeping reporting between FY 2007/2008 to FY 2009/2010. The median cost was selected for the *Sweeping Reporting Cost* over the mean because the median was a more conservative estimate of the costs spent by each of the Co-Permittees. The *Sweeping Reporting Cost* for FY 2006/2007 for each Co-Permittee was six thousand one hundred and forty-three dollars and sixty-seven cents (\$6,143.67).

When this is applied to the time of the mandate for all Municipal Claimants, the total is:

$$Reimbursement = \$853,784.57$$

13. Conveyance System Cleaning (Part D.3.a.(3)(b)(iii)).

The formula and components of the formula were determined by reviewing the County 2011 Co-Permittee Surveys and JRMP Annual Reports. Using this information, I have determined that a reasonable reimbursement formula for the costs of conveyance system

cleaning is:

$$\begin{aligned}
 & \text{Reimbursement} \\
 &= \sum_{t=2007}^{2015} [(Unit\ Cost)_S(\#S)]_t + \sum_{t=2007}^{2015} [(Unit\ Cost)_P(P)]_t \\
 &+ \sum_{t=2007}^{2015} [(Unit\ Cost)_C(C)]_t
 \end{aligned}$$

where “ $(Unit\ Cost)_S$ ” is the cost to clean one sized inlet or storm basin adjusted annually by the CPI; “ $(Unit\ Cost)_P$ ” is the cost to clean one linear foot of the pipe adjusted annually by the CPI; “ $(Unit\ Cost)_C$ ” is the cost to clean one linear foot of the channel adjusted annually by the CPI ; “ $\#S$ ” is the number of inlets or storm basins cleaned in a year by a Co-Permittee; “ P ” is the distance of the pipe cleaned in linear feet by a Co-Permittee; and “ C ” is the distance of the channel cleaned in linear feet by a Co-Permittee. Pipes are underground, enclosed conveyance channels while channels are at ground level and open.

The $(Unit\ Cost)_S$, $(Unit\ Cost)_P$, and $(Unit\ Cost)_C$ are collectively referred to as the “*Unit Costs*”. The value of the $(Unit\ Cost)_S$ represents the median cost to clean one inlet or storm basin during FY 2007/2008. The value of the $(Unit\ Cost)_P$ represents the average cost to clean one linear foot of the pipe during FY 2007/2008. The value of the $(Unit\ Cost)_C$ represents the average cost to clean one linear foot of the channel during FY 2007/2008.

The $(Unit\ Cost)_S$ in FY 2006/2007 was one hundred and fifty dollars and sixty-six cents (\$150.66) (“2007 $(Unit\ Cost)_S$ ”); $(Unit\ Cost)_P$ in FY 2006/2007 was six dollars and seventy-seven cents (\$6.77/ft) (“2007 $(Unit\ Cost)_P$ ”); and $(Unit\ Cost)_C$ in FY 2006/2007 was eight dollars and fifty-two cents (\$8.52/ft) (“2007 $(Unit\ Cost)_C$ ”). In during FY 2007/2008, there were 46,397.80 linear feet of pipe cleaned and 38,568.52 linear feet of channel cleaned; the weighted average cost of the 2007 $(Unit\ Cost)_P$ and the 2007 $(Unit\ Cost)_C$ at seven dollars and sixty-five cents per linear foot (\$7.65/ft). All of the *Unit Costs* in the summation are adjusted annually for the CPI.

The *Unit Costs* align with those found in the 2005 State Survey. The 2005 State Survey determined that the average cost of basin cleaning in Santa Clarita was one hundred and seventy dollars (\$170) per basin which is more than the 2007 $(Unit\ Cost)_S$. Additionally, the State Survey found that the average cost of drain line and channel cleaning in the City of Corona was eight dollars per linear foot (\$8/ft), which is more than a weighted average of the 2007 $(Unit\ Cost)_P$ and 2007 $(Unit\ Cost)_C$. Therefore, the 2005 State Survey supports that the Unit Costs are reasonable to apply to all Co-Permittees.

The total number of #S, P, and C for all Municipal Claimants of each during each year are as follows:

Fiscal Year	# MS4 Structures Cleaned (#S)	Linear ft of MS4 Pipe Cleaned (P)	Linear ft of MS4 Open Channel Cleaned (C)
FY 2006/2007	12092	131439.75	1553201.076
FY 2007/2008	41847	140301.15	485964.3222
FY 2008/2009	37227	106249.1	2016202.269
FY 2009/2010	34392	182277.3	1981611.457
FY 2010/2011	35260	142610.9	1955701.586
FY 2011/2012	54261	128042.25	1609647.248
FY 2012/2013	29820	142091.1	1620035.61
FY 2013/2014	38952	142091.1	1620035.61
FY 2014/2015	38952	142091.1	1620035.61

The time period of the reimbursement for conveyance system cleaning is halfway through FY 2006/2007 through FY 2014/2015. This activity was required by the 2007 Permit and continued through FY 2014/2015 until the 2013 Permit requirements relating to the new JRMP were implemented.

When the cost of cleaning the inlets and storm basins, pipes, and channels is added across the time the mandate applied for all Municipal Claimants, the total is:

$$\text{Reimbursement} = \$192,429,725.49$$

14. Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3)).

The total reimbursable for education is:

$$\text{Reimbursement} = \$23,679,841.19$$

The total is determined by combining the regional outreach shared costs and jurisdictional educational programs as described in detail below. The time period of the reimbursement of the education components is halfway through FY 2006/2007 through FY 2014/2015. This activity was required by the 2007 Permit and continued through FY 2014/2015 which was when the 2013 Permit requirements relating to the new JRMP were implemented.

- a. Regional Outreach Shared Costs – Residential Education Program Development and Implementation

The formula and components of the formula were determined by reviewing the Co-Permittee Declarations and the Cost-Sharing MOU. Using this information, I have determined that a reasonable reimbursement formula for the costs of

Residential Education Program Development and Implementation is:

$$Reimbursement = \sum_{t=2007}^{2015} [(County\ Education\ Costs)(MOU)]_t$$

where “*County Education Costs*” are the actual annual shared costs for developing and implementing the Residential Education Program; and “*MOU*” is the Municipal Claimant’s proportional share of the cost based on the applicable MOUs. The yearly *County Education Costs* are:

Fiscal Year	County Costs for Regional Residential Education Program Development and Implementation
FY 2007/2008	\$219,226.90
FY 2008/2009	\$438,452.75
FY 2009/2010	\$876,907.50
FY 2010/2011	\$920,752.90
FY 2011/2012	\$966,791.36
FY 2012/2013	\$138,040.00
FY 2013/2014	\$8,880.99
FY 2014/2015	\$102,746.96

Although reimbursement would be proper from halfway through FY 2006/2007 through FY 2014/2015, there were only actual costs for a portion of this time.

When the costs for developing and implementing the Residential Education Program is added across the time the mandate applied for all Municipal Claimants, the total is:

$$Reimbursement = \$3,671,799.36$$

b. Jurisdictional Educational Programs

The formula and components of the formula were determined by reviewing the JRMP Annual Reports, WQIP Annual Reports, D-Max Files, and County Fiscal Analysis Documents. Using this information, I have determined that a reasonable reimbursement formula for the costs of the jurisdictional educational programs are as follows:

$$Reimbursement = \sum_{t=2007}^{2015} [(Education\ Costs)(Total)]_t$$

where “*Education Costs*” is the percentage of the total stormwater budget reported as education costs and “*Total*” is the Co-Permittee’s total stormwater budget in a particular year. The value of the *Education Costs* represents the average percentage of the total stormwater budget reported as education costs

between FY06-07 to FY14-15. The average yearly *Education Costs* are two and sixteen hundredths percent (2.16%) of the total annual stormwater budget. The yearly *Total* for all Municipal Claimants is:

Fiscal Year	Total Annual Stormwater Expenditures (19 Co-Permittees)
FY 2006/2007	\$99,849,122.32
FY 2007/2008	\$105,896,610.00
FY 2008/2009	\$105,788,161.00
FY 2009/2010	\$94,748,121.63
FY 2010/2011	\$106,901,926.27
FY 2011/2012	\$103,021,277.47
FY 2012/2013	\$104,352,557.25
FY 2013/2014	\$103,841,756.60
FY 2014/2015	\$101,898,700.47

The 2005 State Survey found that permittees spent between two and seven percent of the annual stormwater budget on education. The *Education Costs* are within the range found by the state supporting that this average percentage is reasonable to apply to the Co-Permittees.

When the costs for developing and implementing the Residential Education Program is added across the time the mandate applied for all Municipal Claimants, the total is:

$$\text{Reimbursement} = \$20,008,041.83$$

15. Watershed Activities and Collaboration in the WURMP (Part E.2.f & E.2.g).

The total reimbursable for watershed activities and collaboration in the WURMP is:

$$\text{Reimbursement} = \$5,390,740.78$$

The total is determined by combining the cost share contributions, jurisdictional watershed activities, regional WURMP costs and meeting costs as described in detail below. The time period of the reimbursement for watershed activities and collaboration in the WURMP is halfway through FY 2006/2007 through FY 2012/2013 as this is when 2007 Permit required this activity.

a. Watershed Workgroup Cost Share Contributions

The formula and components of the formula were determined by reviewing the County Watershed Workgroup Expenditure Records and the Cost-Sharing MOU. Using this information, I have determined that a reasonable reimbursement formula for the costs of cost share contributions for watershed activities and

collaboration in the WURMP is:

$$Reimbursement = \sum_{t=2007}^{2013} [(Watershed Lead Costs)(MOUs)]_t$$

where “*Watershed Lead Costs*” are the actual annual shared costs for the Watershed Workgroup; and “*MOU*” is the Municipal Claimant’s proportional share of the cost based on the applicable MOUs. Based on the review of this documentation, the yearly *Watershed Lead Costs* are:

Fiscal Year	Watershed Lead Costs
FY 2006/2007	\$32,010.99
FY 2007/2008	\$48,472.41
FY 2008/2009	\$89,970.10
FY 2009/2010	\$100,683.32
FY 2010/2011	\$122,830.52
FY 2011/2012	\$120,652.56
FY 2012/2013	\$101,696.31

When the costs are added across the time the mandate applied for all Municipal Claimants, the total is:

$$Reimbursement = \$616,316.21$$

b. Jurisdictional Watershed Activities

The formula and components of the formula were determined by reviewing the Co-permittees Declarations and County Watershed Activities Database. Using this information, I have determined that a reasonable reimbursement formula for the jurisdictional watershed activities are as follows:

$$Reimbursement = \sum_{t=2007}^{2013} [4 * Jurisdictional Activities]_t$$

where “*Jurisdictional Activities*” are the costs to perform one jurisdictional activity per Co-Permittee adjusted annually for the CPI. The value of the *Jurisdictional Activities* represents the average cost to perform one jurisdictional activity in FY07-08. The *Jurisdictional Activities* are multiplied by the number of activities required per year. The average amount spent on the *Jurisdictional Activities* was eight thousand one hundred and twenty-five dollars (\$8,125).

When the *Jurisdictional Activities* are added across the time the mandate applied and all the Municipal Claimants, the total is:

$$Reimbursement = \$4,207,768.50$$

Using this formula, each Co-Permittee would receive two hundred and twenty-one thousand, four hundred and sixty-one dollars and fifty cents (\$221,461.50).

c. Regional Watershed Activities – WURMP

The formula and components of the formula were determined by reviewing the County Watershed Workgroup Expenditure Records. Using this information, I have determined that a reasonable reimbursement formula for the Regional WURMP is as follows:

$$Reimbursement = \sum_{t=2007}^{2013} [(WURMP \text{ Costs})(MOU)]_t$$

where “*WURMP Costs*” are the actual annual costs for the Regional WURMP Working Group costs; and “*MOU*” is the Municipal Claimant’s proportional share of the cost based on the applicable MOUs. The average amount spent on the *WURMP Costs* are:

Fiscal Year	Cost Share for Regional Workgroup Watershed Activity Support Costs
FY 2008/2009	\$2,737.91
FY 2009/2010	\$3,287.23

Although reimbursement would be proper from halfway through FY 2006/2007 through FY 2012/2013, there were only actual costs for a portion of this time.

When the *WURMP Costs* are added across the time the mandate applied and all the Municipal Claimants, the total is:

$$Reimbursement = \$6,025.14$$

d. Watershed Workgroup Meetings

The formula and components of the formula were determined by reviewing the Co-Permittees Declarations, County 2011 Co-Permittee Surveys, and WURMP Annual Reports. Using this information, I have determined that a reasonable reimbursement formula for the costs of the watershed activities and collaboration in the WURMP meetings is as follows:

$$Reimbursement = \sum_{t=2007}^{2013} [(Rate)(\# \text{ Attendees})(\# \text{ Meetings})]_t$$

where “*Rate*” is the cost of the Municipal Claimant employee time per regional workgroup meeting; “*# Attendees*” is the number of attendees each Co-Permittee had attend the watershed workgroup meeting; and “*# Meetings*” is the number of meetings per year. The value of the *Rate* represents the average cost for a

Municipal Claimant employee to attend a meeting between FY 2007/2008. The *Rate* was two hundred and sixty-two dollars and eighty-eight cents (\$262.88). Precise records of individual Co-Permittee meeting attendance was not available so the # *Attendees* was conservatively assumed to be one. The # *Meetings* each year are:

Fiscal Year	Number of Meetings
FY 2007/2008	369
FY 2008/2009	312
FY 2009/2010	334
FY 2010/2011	338
FY 2011/2012	355
FY 2012/2013	320

Although reimbursement would be proper from halfway through FY 2006/2007 through FY 2012/2013, there were only actual costs for a portion of this time.

When the watershed workgroup meeting costs are added across the time the mandate applied and all the Municipal Claimants, the total is:

$$\text{Reimbursement} = \$560,630.93$$

16. RURMP (Parts F.1., F.2. & F.3).

The formula and components of the formula were determined by reviewing the County Watershed Workgroup Expenditure Records. Using this information, I have determined that a reasonable reimbursement formula for the costs of the RURMP is as follows:

$$\text{Reimbursement} = \sum_{t=2007}^{2013} [(\text{Cost Share})(\text{MOU})]_t$$

where “*Cost Share*” is the actual annual cost share values as invoiced by County; and “*MOU*” is the Municipal Claimant’s proportional share of the cost based on the applicable MOUs. The yearly Watershed Lead Costs are:

Fiscal Year	Cost Share for Regional Workgroup RURMP Costs
FY 2008/2009	\$2,928.91
FY 2009/2010	\$5,230.98
FY 2010/2011	\$1,926.50

The time period of the reimbursement for RURMP is halfway through FY 2006/2007 through FY 2012/2013 as this is when 2007 Permit required this activity. Although reimbursement would be proper from halfway through FY 2006/2007 through FY 2012/2013, there were only actual costs for a portion of this time.

When the RURMP costs are added across the time the mandate applied for all Municipal Claimants, the total is:

$$Reimbursement = \$10,086.39$$

17. Program Effectiveness Assessment (Parts I.1 & I.2).

The total reimbursable for the program effectiveness assessment is:

$$Reimbursement = \$26,934,622.86$$

The total is determined by combining the jurisdictional program effectiveness assessment and regional FRA workgroup expenditures as described in detail below. The time period of the reimbursement for program effectiveness is halfway through FY 2006/2007 through FY 2012/2013 as this is when 2007 Permit required this activity.

a. Jurisdictional Program Effectiveness Assessment

The formula and components of the formula were determined by reviewing the JRMP Annual Reports and the D-Max Proposals. Using this information, I have determined that a reasonable reimbursement formula for the costs of the jurisdictional program effectiveness assessment is as follows:

$$Reimbursement = \sum_{t=2007}^{2013} [(Effectiveness)(Total)]_t$$

where “*Effectiveness*” is the percentage of the total stormwater budget all Co-Permittees spent on assessing if the jurisdiction program was effective and “*Total*” is the Municipal Claimant’s total stormwater budget. The yearly *Effectiveness* is three and seventy-two hundredths percent (3.72%) of the total annual stormwater budget for all Municipal Claimants is listed in 15.b.

When the costs for developing and implementing the Residential Education Program is added across the time the mandate applied for all Municipal Claimants, the total is:

$$Reimbursement = \$26,804,749.26$$

b. Regional Fiscal, Reporting, and Assessment (“FRA”) Workgroup Expenditures

The formula and components of the formula were determined by reviewing the County Watershed Workgroup Expenditure Records. Using this information, I have determined that a reasonable reimbursement formula for the costs of Regional FRA Workgroup Expenditures is:

$$Reimbursement = \sum_{t=2007}^{2015} [(FRA \text{ Workgroup Costs})(MOU)]_t$$

where “*FRA Workgroup Costs*” are the shared costs for developing and implementing the Regional FRA Workgroup Expenditures; and “*MOU*” is the Municipal Claimant’s proportional share of the cost based on the applicable MOUs. The yearly *FRA Workgroup Costs* are:

Fiscal Year	Cost Share for Program Effectiveness Assessment-Related Costs
FY 2008/2009	\$24,466.92
FY 2009/2010	\$32,423.11
FY 2010/2011	\$72,983.57

Although reimbursement would be proper from halfway through FY 2006/2007 through FY 2012/2013, there were only actual costs for a portion of this time.

When the costs for developing and implementing the Residential Education Program is added across the time the mandate applied for all Municipal Claimants, the total is:

$$Reimbursement = \$129,873.60$$

18. Long-Term Effectiveness Assessment (Part I.5).

The formula and components of the formula were determined by reviewing the Regional Workgroup Expenditure Records. Using this information, I have determined that a reasonable reimbursement formula for the costs of the long-term effectiveness assessment is as follows:

$$Reimbursement = \sum_{t=2007}^{2013} [(Contractor \text{ Costs})(MOU)]_t$$

where “*Contractor Costs*” are the actual annual costs of the contractors needed to assess the long-term effectiveness of the projects as reported by County; and “*MOU*” is the Municipal Claimant’s proportional share of the cost based on the applicable MOUs. The yearly *Contractor Costs* are:

Fiscal Year	Contractor Costs for Long-term Effectiveness Assessment
FY 2008/2009	\$344,539.21

The time period of the reimbursement for the long-term effectiveness assessment is halfway through FY 2006/2007 through FY 2012/2013 as this is when 2007 Permit required this activity. Although reimbursement would be proper from halfway through

FY 2006/2007 through FY 2012/2013, there were only actual costs for a portion of this time.

When the costs for preparing the plan is added across the time the mandate applied for all Municipal Claimants, the total is:

$$\text{Reimbursement} = \$344,539.21$$

19. All Permittee Collaboration (Part L.1.a.(3)-(6)).

The total reimbursable for the all permittee collaboration is:

$$\text{Reimbursement} = \$2,315,471.69$$

The total is determined by combining the support for the costs for the regional workgroup meetings, the regional work group meetings, and the workgroup expenditures as described in detail below. The time period of the reimbursement for program effectiveness is 2007 through 2013 as this is when 2007 Permit required this activity.

a. Support for Regional Workgroup Meeting

The formula and components of the formula were determined by reviewing the Regional Cost Sharing Documentation. Using this information, I have determined that a reasonable reimbursement formula for the costs of the long-term effectiveness assessment is as follows:

$$\text{Reimbursement} = \sum_{t=2007}^{2013} [(\text{County Cost})(\text{MOU})]_t$$

where “County Cost” are the actual costs spent to support the various all Co-Permittee meetings; and “MOU” is the Municipal Claimant’s proportional share of the cost based on the applicable MOUs. The yearly County Costs are:

Fiscal Year	Cost Share for Co-Permittee Workgroup Meeting Support Costs
FY 2008/2009	\$57,285.40
FY 2009/2010	\$69,576.92
FY 2010/2011	\$44,665.30
FY 2011/2012	\$56,311.45

Although reimbursement would be proper from halfway through FY 2006/2007 through FY 2012/2013, there were only actual costs for a portion of this time.

When the costs for preparing the plan is added across the time the mandate applied, the total is:

$$\text{Reimbursement} = \$277,839.07$$

b. Regional Workgroup Meetings

The formula and components of the formula were determined by reviewing the Co-Permittees Declarations and County Fiscal Analysis Documents. Using this information, I have determined that a reasonable reimbursement formula for the costs of the watershed activities and collaboration in the WURMP meetings is as follows:

$$Reimbursement = \sum_{t=2007}^{2013} [(Rate)(\# Meeting Attendances)]_t$$

where “*Rate*” is the cost of the Municipal Claimant employee time per regional workgroup meeting; “*# Meeting Attendances*” is the number of times a representative from a Municipal Claimant attend a regional workgroup meeting. The value of the *Rate* represents the average cost for a Municipal Claimant employee to attend a meeting between FY 2007/2008. The *Rate* was two hundred and sixty-two dollars and eighty-eight cents (\$262.88). The *# Meeting Attendances* for all Municipal Claimants each year are:

Fiscal Year	Number of Meetings
FY 2007/2008	1179
FY 2008/2009	1386
FY 2009/2010	1238
FY 2010/2011	1263
FY 2011/2012	1260
FY 2012/2013	1218

When the meeting costs are added across the time the mandate applied for all Municipal Claimants, the total is:

$$Reimbursement = \$2,087,214.52$$

c. Workgroup Expenditures

The formula and components of the formula were determined by reviewing the Regional Cost Sharing Documentation. Using this information, I have determined that a reasonable reimbursement formula for the costs of the long-term effectiveness assessment is as follows:

$$Reimbursement = \sum_{t=2007}^{2017} [(Workgroup Cost)(MOU)]_t$$

where “*Workgroup Cost*” are the actual costs of activities performed by the workgroup; and “*MOU*” is the Municipal Claimant’s proportional share of the cost based on the applicable MOUs. The yearly *Workgroup Costs* are:

Fiscal Year	Cost Share for Regional Working Group Coordination Costs
FY 2008/2009	\$270.97
FY 2009/2010	\$147.13

Although reimbursement would be proper from halfway through FY 2006/2007 through FY 2012/2013, there were only actual costs for a portion of this time.

When the costs for preparing the plan is added across the time the mandate applied for all Municipal Claimants, the total is:

$$\text{Reimbursement} = \$418.10$$

20. Total Reimbursement (Part L.1.a.(3)-(6)).

Based on the foregoing RRM's, the total reimbursement for the items mandated by the 2007 Permit would be:

$$\text{Reimbursement} = \$252,762,731.82$$

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

2/16/2024

(Date and Place)



(Signature)

John Quenzer

(Name)

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 March 29, 2024, I served the:

- **Current Mailing List dated March 28, 2024**
- **Notice of Waiver of Procedural Requirements, Extension Request Approval, and Postponement of Hearing issued March 29, 2024**
- **Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines (Volumes 1-14) filed February 20, 2024**

San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6), 07-TC-09-R 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

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 March 29, 2024 at Sacramento, California.



Jill Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/28/24

Claim Number: 07-TC-09-R

Matter: 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.

Claimants: City of Carlsbad
City of Chula Vista
City of Del Mar
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

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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