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California Regional Water Quality Control Board
Santa Ana Region

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Edmund G. Brown, Jr.
Governor

SENT VIA E-FILE

March 9, 2011

Drew Bohan, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
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Dear Mr. Bohan:

SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD RESPONSE TO SANTA ANA REGION WATER PERMIT—***ORANGE COUNTY***, TEST CLAIM 09-TC-03

I. Introduction

The Santa Ana Regional Water Quality Control Board ("Santa Ana Water Board" or "Board") files this opposition to Santa Ana Region Water Permit—***Orange County***, Test Claim 09-TC-03 ("Test Claim"). This Test Claim arises from a single federal permit that the Santa Ana Water Board issued as Order No. R8-2009-0030, Waste Discharge Requirements for the County of Orange, Orange County Flood Control District and the Incorporated Cities of Orange County within the Santa Ana Region (the "Permit" or "2009 Permit").[1] The Test Claim seeks reimbursement of over $219 million in estimated costs of implementing multiple Permit requirements during fiscal years 2009-2011.[2]

The Santa Ana Water Board issued the Permit pursuant to legal requirements contained in the federal Clean Water Act ("CWA"),[3] its implementing regulations, and guidance from the United States Environmental Protection Agency ("U.S. EPA"). U.S. EPA is the federal agency responsible for administering the CWA. Pursuant to federal law, U.S. EPA authorized the Santa Ana Water Board to issue the Permit in lieu of issuance by U.S. EPA itself. The Permit regulates the discharge of storm water runoff from the municipal separate storm sewer systems ("MS4s") of the County of Orange, the Orange County Flood Control District, and 26 cities within the County of Orange (collectively, "Co-Permittees" or "Claimants") to waters of the United States.

The CWA requires that local agencies that discharge pollutants from their MS4s to waters of the United States apply for and receive permits regulating these discharges.[4] Local agencies,

[1] The Permit serves as National Pollutant Discharge Elimination System ("NPDES") permit No. CAS618030. It was issued by the Santa Ana Water Board on May 22, 2009.

[2] Test Claim, Exhibit A to the Narrative Statement.

[3] Federal Water Pollution Control Act (FWPCA; 33 U.S.C.A. §§ 1251 et seq.) The federal Act is referred to herein by its popular name, the Clean Water Act ("CWA") and the code sections used are those for the CWA.

[4] CWA, § 402(p); *NRDC. v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1295-96.

MS4.[5] As required by federal statute, regulations, and guidance, the Permit requires numerous actions the Co-Permittees must take to reduce the flow of pollutants into waters in the Santa Ana Water Board's jurisdictional watershed. This Test Claim seeks reimbursement by the State of California for expenses the Claimants either have incurred or will incur in implementing numerous requirements of the Permit.

In order to obtain reimbursement, Claimants must show that the requirements constitute a new program or higher level of service. They must prove either that: (1) the program must carry out a governmental function of providing services to the public; or (2) the requirements, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. The Claimants must also prove that the costs are mandated on them by the state, rather than by federal law, and must prove that any additional costs beyond the federal mandate are substantial and not *de minimis*. Finally, they must establish that they are required to use tax monies to pay for permit implementation.

Federal law, not state law, mandates the issuance of the Permit as a whole, including the challenged provisions. This federal mandate applies to many dischargers of storm water, both public and private, and is not unique to Claimants. The CWA requires that the Permit be issued to the local governments: it is not a question of "shifting" the costs from the state to the local agencies. The specific requirements challenged are consistent with the requirements of federal law, its implementing regulations, and federal agency guidance. Even if the Permit was interpreted as going beyond federal law, any additional state requirements for each requirement are *de minimis*. Moreover, the costs are not subject to reimbursement because the Claimants proposed many of the same programs challenged by the Test Claim. Finally, the challenged provisions are not subject to reimbursement because the Co-Permittees have the ability to comply with these requirements through charges and fees, and are not required to raise taxes.

The 2009 Permit resulted from a multi-year, collaborative process involving Claimants, the Santa Ana Water Board, and other members of the public.[6] This process entailed countless meetings, discussions, and workshops involving Board staff, Claimants, U.S. EPA, non-governmental organizations, local business interests, outside technical consultants, and other members of the public. The transcript of the two public hearings the Santa Ana Water Board held during the Permit issuance process[7] reflects the scientifically complex nature of controlling storm water discharges. In large part, the two public hearings focused on what management strategies were practicable, achievable, and necessary to reduce the discharge of pollutants through the MS4—which remains a significant cause of water quality impairment.[8] Despite the enormity of the task, what emerged was a permit that, aside from two very specific sub-sections, was enthusiastically supported by Claimants.[9]

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[5] CWA, § 402(p)(3)(B)(i).

[6] Co-Permittees submitted their application for the permit on July 22, 2006. (2009 Permit, Finding B.6.)

[7] Transcript of 2009 Permit Hearing (April 24, 2009); Transcript of 2009 Public Hearing (May 22, 2009).

[8] U.S. EPA Memorandum, Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load (TMDL) Waterload Allocations (WLAs) for Storm Water Sources And NPDES Permit Requirements ("U.S. EPA 2010 Memorandum"), pp. 1-2.

[9] At the April 24, 2009 public hearing on the Permit, Orange County, one of the principal permittees, made the following statement:

II. Description of the Test Claim

The Test Claim focuses on the following six general sections of the Permit, most with multiple sub-sections:

1. Watershed Action Plans and TMDL Implementation (Section XVIII)
2. Provisions Requiring Public Projects to Comply with Low Impact Development and Hydromodification Requirements (Section XII)
3. Public Education Requirements (Section XIII)
4. Reduction of Pollutant Discharges From Residential Facilities (Section XI)
5. Municipal Inspections of Industrial Facilities (Section IX)
6. Municipal Inspections of Commercial Facilities (Section X)

Claimants contend that the provisions in the above sections are subject to reimbursement because they are not required under federal law, that these are new programs or existing programs that constitute a higher level of service, and that they have no fee authority to offset the costs of compliance.

III. History and Issuance of the Permit

In 1990, pursuant to the CWA amendments of 1987, the Santa Ana Water Board issued the first municipal storm water permit to the County of Orange and Co-Permittees.[10] The Board modified and reissued the permit in 1996,[11] 2002 ("2002 Permit"),[12] and 2009. The 2009 Permit contains requirements to implement certain pollutant control measures and other effluent limitations designed to comply with the minimum federal standards set forth in CWA section 402(p)(3)(B)(iii). The Permit is based largely on the 2002 Permit. Following issuance of the Permit, some of the Claimants filed petitions for review of the Permit by the State Water Resources Control Board ("State Water Board") pursuant to CWA section 13320.[13] All petitions are currently in abeyance[14] at the request of the various petitioners. The Santa Ana Regional

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> At 9:00 o'clock this morning, the County of Orange, all of the permittee cities, I think were enthusiastic and supported adoption. And that included the errata sheet and all the additional provisions in the errats sheet, including, I think, what must be a rarity for a regulated agency, asking for something that was previously optional be made mandatory, the watershed action planning process.

Transcript of April 24, 2009 Public Hearing, p. 161. Orange County's resistance to fully endorsing the Permit was due to some last minute changes to sections XII.C.1 and XII.C.2. The Santa Ana Water Board conducted a second public hearing on issues related to those specific issues on May 22, 2009. Claimants challenge both of those sections in this Test Claim.

[10] Santa Ana Water Board Order No. 90-71 (NPDES No. 8000180).

[11] Santa Ana Water Board Order No. 96-31 (NPDES No. CAS618030),

[12] Santa Ana Water Board Order No. R8-2002-0010 (NPDES No. CAS618030).

[13] Some of these petitions can be found at the State Board Website: http://www.waterboards.ca.gov/public_notices/petitions/water_quality/petitions.shtml

[14] "Held in abeyance" means that the petitions are not being actively considered by the State Water Board. (Cal. Code of Regs., tit. 23, § 2050.5, subd. (b), (d).) Water Code section 13330, subdivision (d), creates a jurisdictional bar to permit challenges unless a petition is filed with the State Water Board within 30 days after permit issuance.

Board is unaware of any other legal challenge to the Permit, and no such challenge would be proper in any other administrative or judicial venue.[15]

On July 21, 2006, the County, on behalf of all Co-Permittees, submitted a Report of Waste Discharge ("ROWD") containing Co-Permittees' collective reapplication for renewal of their 2002 Permit and including their proposals for modification or continuation of permit elements. Essentially, the ROWD sets forth the Co-Permittees' recommendations for control measures and other provisions that should be included in the Permit.[16] It contains a discussion of issues and concepts the Co-Permittees identified as key factors to improve their management programs, which have general applicability across multiple program elements. As will be explained more fully below in the discussion of the challenged permit provisions, the ROWD reflects the Co-Permittees' acknowledgment and expectation that the 2009 Permit would build and improve upon the 2002 Permit. In the ROWD, the Co-Permittees proposed many of concepts that were incorporated into and form the basis of the provisions for which they now seek reimbursement. The permit the Santa Ana Water Board ultimately issued was based on the ROWD and the 2002 Permit, with revisions and additions necessary to meet minimum federal requirements.

IV. Federal Law Requirements for Municipal Storm Water Permits

The principal question at issue in this Test Claim is whether the Santa Ana Water Board included provisions in the Permit which are not required by federal law. In order to understand the federal mandate that required the Permit, including the specific provisions challenged by Claimants, some background of the regulatory scheme and applicable federal law for MS4 permits is necessary.

1. Regulatory Overview of the CWA

In 1972, the CWA was extensively amended to implement a permitting system for all discharges of pollutants from "point sources"[17] to waters of the United States.[18] These permits, issued pursuant to the National Pollutant Discharge Elimination System, are known as "NPDES permits." The 1972 amendments specifically allowed U.S. EPA to authorize states to administer the NPDES program in lieu of U.S. EPA, and to issue permits pursuant to this authority.[19] California was the first state in the nation to obtain such authorization. In order to obtain this authorization, the California Legislature amended the California Water Code, finding that the state should implement the federal law in order to avoid direct regulation by the federal government.[20] The California Legislature mandated that California's permit program must

Petitioners commonly request that a petition be held in abeyance to give the parties an opportunity to resolve issues prior to consideration by the State Water Board.

[15] Wat. Code § 13330, subd. (d).

[16] The ROWD is attached hereto.

[17] CWA, § 502(14). The Co-Permittees' MS4 is a point source. (CWA, § 402(p); 40 CFR § 122.26(b)(4).)

[18] CWA, §§ 301 and 402.

[19] *Id.*, § 402(b).

[20] Wat. Code, § 13370 *et seq.*, adding Chapter 5.5 to the Porter-Cologne Water Quality Control Act.

ensure consistency with federal law.[21] Federal law also requires that, when a Regional Water Board issues a NPDES permit, it must issue as stringent a permit as U.S. EPA would have.[22]

The Water Boards are the state agencies charged with implementing the federal NPDES program.[23] The State Water Board's regulations incorporate U.S. EPA regulations for implementing the federal permit program,[24] and do not impose any additional state requirements. Therefore, both the CWA and U.S. EPA regulations apply to the permit program in California.[25] In California, permits to allow discharges into state waters are termed "waste discharge requirements."[26] When issuing permits for discharges to waters of the United States, the term "waste discharge requirements" equates to the term "permit" in the CWA.[27] Waste discharge requirements issued for discharges to waters of the United States are NPDES permits under federal law.

The Clean Water Act prohibits the discharge of pollutants from point sources to waters of the United States, except in compliance with a NPDES permit.[28] In 1973, U.S. EPA issued regulations that exempted certain types of discharges it determined were administratively infeasible to regulate, including storm water runoff. Such regulation is difficult because storm water runoff generally is not subjected to any treatment prior to discharge. Instead, it simply runs off urban streets or developed properties, into gutters and drainage ways, and flows directly into streams, lakes, and the ocean.[29] This exemption was overruled in *Natural Resources Defense Council v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, which held that the exemption was illegal, and ordered U.S. EPA to require NPDES permits for storm water runoff. In *Costle*, the court suggested innovative methods for permitting storm water discharges, including using general permits for numerous sources and issuing permits that "proscribe industry practices that aggravate the problem of point source Pollution."[30] Where permits require dischargers to implement actions to control discharges or meet performance standards, these requirements are commonly called "best management practices" ("BMPs").[31]

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[21] Wat. Code, § 13372.

[22] CWA, § 402(b).

[23] Wat. Code, § 13370.

[24] Cal. Code Regs., tit. 23, § 2235.2.

[25] The permits *may* also include additional state requirements. (Cal. Code Regs., tit. 23, § 2235.3; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.)

[26] *Id.*, § 13263.

[27] Wat. Code, § 13374.

[28] CWA, § 301(a). In general, "navigable waters" or "waters of the United States," includes all surface waters, such as rivers, lakes, bays and the ocean. (CWA, § 502.)

[29] The chief traditional categories of discharges subject to NPDES permits are industrial process wastewater and sanitary sewer effluent. Both of these discharges are typically processed in a treatment plant before they are discharges to surface waters.

[30] *NRDC v. Costle*, *supra*, 568 F.2d at p.1380.

[31] 40 CFR § 122.2. ("Best management practices ("BMPs") means 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.")

Despite the *Costle* decision, U.S. EPA had not adopted regulations implementing a permitting program for storm water runoff by 1987. That year, the United States Congress amended the CWA to require storm water permits for industrial and municipal storm water runoff.[32] The amendments require NPDES permits for "[a] discharge from a municipal separate storm sewer system [MS4] serving a population of 250,000 or more."[33] The CWA contains three provisions specific to permits for MS4s: (1) permits may be issued on a system- or jurisdiction-wide basis; (2) permits must include a requirement to effectively prohibit non-storm water discharges into storm sewers; and (3) permits "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 [permit writer] determines appropriate for the control of such pollutants."[34]

In 1990, U.S. EPA adopted regulations to implement section 402(p).[35] The regulations define which entities need to apply for permits and also the information they must include in permit applications. The regulations define "industrial activity" to include numerous categories of manufacturing, construction, and other typically private enterprises.[36] The regulations define MS4s as storm sewer systems operated by numerous public agencies, including cities, counties, states, and the federal government.[37] While both industrial dischargers and MS4s must obtain permits, the requirements in the industrial permits must be more stringent than in MS4 permits.[38] Large and Medium MS4s may obtain individual or systemwide MS4 permits.[39] As a practical matter, most large and medium MS4s in California have chosen to be regulated as Co-Permittees under area-wide MS4 permits. Because many MS4 systems are connected, this allows Co-Permittees to take advantage of economies of scale and achieve cost-savings over individual regulation of each city or county.

In order to obtain a NPDES permit, as required by the CWA, entities seeking coverage file an application with the permitting authority and the permitting authority holds a public hearing on contested permits.[40] U.S. EPA regulations specify the information that applicants for MS4 permits must include in their applications.[41] For large and medium MS4s, the application

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[32] CWA, § 402(p).

[33] *Id.*, § 402(p)(2)(C). U.S. EPA defines municipal separate storm sewer systems (MS4s) that serve a population over 250,000 as "large" MS4s.

[34] *Id.*, § 402(p)(3)(B)(iii).

[35] Vol. 55, Federal Register (Fed.Reg.) 47990 *et seq.*

[36] 40 C.F.R. § 122.26(b)(14).

[37] 40 C.F.R. § 122.26(b)(8).

[38] *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3rd 1159. The differences between municipal and industrial permits are complicated, but are relevant to the question whether this permit addresses a uniquely governmental program, and are therefore discussed in more detail below.

[39] CWA, § 402(p)(3)(B)(i).

[40] CWA, § 402(b)(3).

[41] 40 C.F.R. § 122.26(a)(4). The U.S. EPA regulations have varied requirements depending on the size of the population served by the MS4. A "large" MS4 serves a population of 250,000 or more. (40 C.F.R. §

requirements are extensive.[42] Some of the federal application requirements relevant to the Test Claim are: management programs including procedures to control pollution resulting from construction activities[43]; legal authority to control the contribution of pollutants associated with industrial activity[44]; legal authority to "[c]ontrol through interagency agreements among co-applicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system"[45]; and a description of maintenance activities and a maintenance schedule for structural controls, as well as a description of practices for operating and maintaining public streets, roads and highways to reduce pollutants in discharges from MS4s.[46] The management programs must address oversight of discharges into the system from the general population, and from industrial and construction activities within its jurisdiction, and also maintenance and control activities by the permittees. Permit applications must describe programs for education and outreach to the general public, and to certain categories of municipal workers.[47] The initial requirements for small MS4s were considered to be less stringent than those for Phase I MS4s, such as Co-Permittees.

2. Legal Standards for MS4 Permit Provisions

The CWA does not provide a specific set of permit terms that the permitting agency must include in each MS4 permit. Rather, the NPDES permitting program mandates that the permitting agency exercise discretion and choose specific controls, generally BMPs, to meet a legal standard. The applicable legal standard that permitting authorities must meet when issuing MS4 permits is set forth in CWA section 402(p)(3)(B)(iii), and mandates that MS4 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.

When interpreting this provision, federal and state courts have found that this section includes two independent requirements: (1) the permit must include controls to reduce the pollutants to the MEP; and (2) the permit must include such other provisions as the permit writer deems appropriate for controlling pollutants.[48] The word "shall" modifies both statements, and therefore

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122.26(b)(4).) Orange County and the cities regulated by the Permit far exceed the minimum population for a large MS4.

[42] 40 C.F.R. § 122.26(d).

[43] 40 C.F.R. § 122.26(d)(1)(v).

[44] 40 C.F.R. § 122.26(d)(2)(i)(A).

[45] 40 C.F.R. § 122.26(d)(2)(i)(D).

[46] 40 C.F.R. §§ 122.26(d)(2)(iv)(A)(1) and (2).

[47] 40 C.F.R § 122.26(v)(A)(6), (B)(6), (C)(4); *see also*, 40 C.F.R .§ 122.34(b)(1), establishing public education and outreach as a minimum control measure for small MS4s.

[48] See *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166 (concluding that "'such other provisions as the Administrator. . . determines appropriate for the control of such pollutants,'" and not MEP, provides a basis for

mandates that the permitting agency comply with both parts of section 402(p)(3)(B)(iii). Both federal and state permit writers must comply with these legal standards.[49]

(a) The MEP Standard

The MEP standard, which is akin to a technology-based standard, has been in effect since it was first established in the CWA in 1987. The fundamental requirement that municipalities reduce pollutants in MS4s to the MEP remains a cornerstone of the mandate imposed upon municipalities by the federal CWA and implementing NPDES regulations. MEP is generally a result of emphasizing pollution prevention and source control BMPs as the first lines of defense in combination with appropriate structural and treatment methods serving as additional lines of defense. The MEP approach is an ever evolving, flexible, and advancing concept, which considers technical and economic feasibility. As technical knowledge about controlling urban runoff continues to advance and change, so does that which constitutes compliance with the MEP standard.

While MEP as a legal requirement has not changed since MS4 permits were first issued, what has changed in successive permits is the level of specificity included in the permit to define what constitutes MEP. This change over time is consistent with U.S. EPA's guidance that successive permits for the same MS4 must become more refined and detailed.

> The EPA also expects stormwater permits to follow an iterative process whereby each successive permit becomes more refined, detailed, and expanded as needed, based on experience under the previous permit. See, 55 Fed. Reg. 47990, 48052 ("EPA anticipates that storm water management programs will evolve and mature over time."); 64 Fed. Reg. 67722, 68754; Dec. 8, 1999) ("EPA envisions application of the MEP standard as an iterative process.") Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits (Sept. 1, 1996) ("The interim permitting approach uses BMPs in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.")[50]

The need to specify, expand or better-tailor permit requirements as necessary to achieve the federal MEP standard does not mean that the permits are imposing a new program or higher level of service.

In 2001, the Building Industry Association and Building Industry Legal Defense Fund (collectively Building Industry) challenged numerous aspects of an MS4 Permit issued by the

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strict compliance with water quality standards); see, also, *Building Industry of America of San Diego v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 885-87 (assuming that the "and other such provisions as the Administrator or State determines appropriate" language contained in CWA section 402(p)(3)(B)(iii) is not part of the MEP standard.).

[49] CWA, § 402(b).

[50] See Letter from Alexis Strauss to Tam Doduc and Dorothy Rice, April 10, 2008, concerning Los Angeles County Copermittee Test Claims Nos. 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, attached hereto.

San Diego Water Board and the process by which it was issued, culminating in a court of appeal decision upholding the permit in its entirety.[51] The San Diego Water Board argued that the Court must give special deference to its determination that the Permit did not exceed the MEP standard. The *Building Industry* court acknowledged the lower court's finding that "Building Industry failed to establish the Permit requirements were 'impracticable under federal law or unreasonable under state law,' and noted that there was evidence showing the Regional Water Board considered many practical aspects of the regulatory controls before issuing the Permit."[52] The lower court found that Building Industry failed to show infeasibility or impossibility with regard to the 2001 Permit requirements.[53]

In rejecting Building Industry's challenge, the court recognized that the federal MEP requirement "is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. *This definition conveys that the Permit's maximum extent practicable standard is a term of art. . .*" (Emphasis added.)[54] Thus, the Court of Appeal's *Building Industry* decision demonstrates that the Santa Ana Water Board is entitled to considerable deference in its determination of what practices are within the federal minimum requirements.

(b) Such Other Provisions as the Administrator or the State Determines Appropriate for the Control of Such Pollutants

In addition to requiring controls to reduce the discharge of polluants to MEP, CWA section 402(p)(3)(B)(iii) requires that MS4 permits shall contain such other provisions as the permit writer determines appropriate for the control of pollutants. There are two important aspects of this provision that warrant discussion as the nature of this provision and its resulting requirements are critical to the issues raised in the Test Claim.

First, this provision is mandatory and binding on the Santa Ana Water Board as the authorized NPDES permit writer. Just as CWA section 402(p)(3)(B)(iii) requires controls to reduce pollutants to the MEP, the same federal mandate requires such other provisions as U.S. EPA or, in this case, the Santa Ana Water Board, determines is appropriate to control such pollutants. The word "shall" creates a mandatory duty, as opposed to a permissive act, that must be undertaken by the permitting agency. Thus, contrary to what Claimants appear to argue in their Test Claim,[55] when relying on this provision, the state does not exceed federal law in using its discretion to impose permit provisions that are necessary to control pollutants. Rather, federal law mandates that the permitting agency, be it the Santa Ana Regional Board or U.S. EPA, exercise its discretion in determining permit requirements. If the Board failed to determine appropriate provisions to control pollutants, it would violate the CWA's specific mandate to do so.

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[51] *Building Industry Association of San Diego County v. State Water Board, supra,* 124 Cal.App.4th 866.

[52] *Id.,* at p. 878-879.

[53] *Id.,* at p. 888.

[54] *Id.,* at p. 889.

[55] See the highlighted sections of CWA section 402(p)(3)(B)(iii) on page 11 of the Test Claim.

Second, this provision requires the Santa Ana Water Board, when appropriate, to include provisions that go beyond MEP. The permittees in *Building Industry* argued that the Water Boards lacked authority under federal law to impose conditions more stringent than MEP. The court found that the Clean Water Act provided such authority, and that it was not necessary to resort to state law to justify the disputed permit provisions.[56] In rejecting the challenge to the Water Boards' authority, the court had no occasion to consider whether, once the permitting agency determines that more stringent controls are necessary to protect water quality, federal law requires or merely allows the agency to include such provisions. As the court noted, however, EPA interprets section 402(p)(3)(B)(iii) to mandate "... 'controls to reduce the discharge of pollutants to the maximum extent practicable, *and where necessary water quality-based controls* ....'"[57] Thus, even if the Commission finds that any Permit provisions go beyond MEP, the Santa Ana Water Board was bound by the federal mandate to include appropriate provisions necessary to control pollutants.

V. General Responses

Article XIIIB, Section 6 of the California Constitution requires subvention of funds to reimburse local governments for state-mandated programs in specified situations. There are several exceptions and limitations to the subvention requirements that provide bases for the Commission to determine that the Test Claim is not subject to subvention. Article XIIIB, Section 6 provides, "[w]henever 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." Implementing statutes clarify that no subvention of funds is required if: (1) the mandate 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;[58] or (2) the local agency proposed the mandate;[59] or (3) the local agency has the authority to levy service charges, fees, or assessments sufficient to pay.[60]

Claimants contend that all of the activities for which they seek reimbursement exceed federal law requirements and that the Permit imposes many new programs and activities not required by the 2002 Permit. Claimants assert that they cannot assess a fee to recover the costs of the mandates activities. The Test Claim challenges multiple sections and subsections in the Permit. Because many of the responses apply to all of the challenged provisions, the Santa Ana Water Board has endeavored to avoid repetition by responding generally to these assertions. When necessary, individualized responses follow in the next section.

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[56] *Building Industry Association of San Diego County v. State Water Board, supra,* 124 Cal.App.4th at p. 881.

[57] *Id.*, at p. 886, citing 55 Fed.Reg. 47990, 47994 (Nov. 16, 1990), italics added in *BIA*); see also, *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159 at 1166.

[58] Govt. Code, § 17556, subd. c.

[59] *Id.*, § subd. (a).

[60] *Id.*, § subd. (d).

The Permit does not require subvention for six separate reasons. First, as a threshold matter, it does not require a new program or higher level of service. Second, the challenged requirements are federal mandates. Third, the Co-Permittees requested the Board to include most of the permit provisions for which they now seek subvention. Fourth, the requirements are not unique to local entities. Fifth, the Co-Permittees can avoid the expenditure of tax monies by raising stormwater fees to pay for the requirements. Finally, any cost increases that result solely from state law requirements are *de minimis*.

The Commission has previously rendered decisions on two test claims involving challenges to MS4 permits.[61] In both decisions, the Commission found that some of the challenged provisions were unfunded mandates. Both of these decisions have been appealed and are currently subject to judicial review. To the extent that the Santa Ana Water Board's positions differ from the prior Commission decisions, the Board respectfully requests that the Commission reconsider its analytical approach in light of the arguments made herein.

1. The Challenged Provisions Do Not Impose New Programs or Higher Levels of Existing Service

Claimants seek to distinguish the 2009 Permit from the 2002 Permit in an effort to demonstrate that the Permit imposes new programs or requirements to provide higher levels of service. As a general matter, the Claimants have not established that the challenged provisions impose new programs or higher levels of service. Many of the provisions are nearly identical to those in the 2002 permit, and other activities, even if not previously required, are already being carried out by some of the Co-Permittees.

As explained above, federal law requires permitting authorities to include in MS4 permits controls to reduce the discharge of pollutants to the MEP and other appropriate provisions.[62] This standard has not changed since first established in the CWA. What has changed is that the Permit contains additional BMPs, and other appropriate provisions, designed to meet the MEP standard. Where the Co-Permittees recommended a BMP and the Santa Ana Water Board included the BMP as a Permit requirement, the Santa Ana Water Board is not expanding upon the proposal. All challenged permit provisions comply with federal mandate set forth in 402(p)(3)(B)(iii) and, as such, do not constitute new programs or higher levels of service.

In the San Diego MS4 Permit Decision, the Commission found that the "permit activities were not undertaken at the option or discretion of the Claimants."[63] In reaching this conclusion, the Commission relied on federal and state law requirements that an existing or prospective discharger shall submit a permit application in the form of a ROWD.[64] For legal support, the Commission relied primarily on the decision in *Department of Finance v. Commission on State*

[61] In Re Test Claim on Los Angeles Regional [Water] Quality Control Board Order No. 01-182, Adopted July 31, 2009 ("L.A. MS4 Permit Decision"); In Re Test Claim on San Diego Regional Water Quality Control Board Order No. 01-182, Adopted July 31, 2009 ("San Diego MS4 Permit Decision"); CWA § 402(p)(3)(B)(iii).

[62] CWA, § 402(p)(3)(B)(iii).

[63] San Diego MS4 Permit Decision, p. 34.

[64] Cal. Wat. Code, § 13260.

Mandates (Kern High School Dist.) (2003) 30 Cal.4th 727. However, the decision in *Kern High School Dist* .supports the opposite conclusion: that the entire Permit itself is the result of a discretionary act by Claimants—the voluntary decision to discharge pollutants to waters of the United States.

In *Kern High School Dist.*, the California Supreme Court addressed the question of whether two statutes requiring school site councils and advisory committees to provide notice of meetings and to post agendas for those meetings constituted unfunded mandates. In determining that these statutes were not unfunded mandates, the California Supreme Court held that:

> [T]he statutes require that districts adopt policies or plans for school site councils—but the statutes do not require that districts adopt councils themselves unless the district first elects to participate in the underlying program.[65]

Similarly, federal and state law require parties to submit a permit application in the form of a ROWD when there is an existing or threatened discharge to waters of the United States—but neither federal nor state law requires that parties discharge to waters of the United States.[66] Thus, by electing to discharge pollutants to the waters of the United States, Claimants' have elected to create the condition triggering federal and state requirements to obtain an MS4 permit. Accordingly, because Claimants' discretionary acts led to the issuance of the permit challenged here, none of these provisions are unfunded state mandates subject to reimbursement.

2. <u>The NPDES Permitting Program Represents a Federal Mandate that Applies Directly to Local Governments; the State Has Not Shifted the Burden; and the Mandates Do Not Exceed Federal Law</u>

The central issue before the Commission is whether the challenged requirements exceed the federal mandate for MS4 permits. Claimants assert that federal law does not specify these particular requirements, and therefore they exceed federal law.

Federal law requires that permits be issued to the local governments that operate MS4s that discharge to waters of the United States. These NPDES permits must reduce the discharge of pollutants to the MEP.[67] The Santa Ana Water Board issued the permit pursuant to this clear federal mandate. Thus, the permit is a direct federal mandate on the local governments. Federal law requires the local government dischargers -- not the state -- to apply for and obtain permits if the local governments discharge storm water to waters of the United States. If U.S. EPA had not approved California's NPDES permitting program, the Clean Water Act would prohibit the MS4 discharges unless U.S. EPA itself issued a similar permit directly to the Claimants. As explained in more detail below, U.S. EPA supported this permit and specifically endorsed many of the provisions challenged in the Test Claim.

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[65] *Kern High School Dist., supra,* 30 Cal.4th at p. 745.

[66] The fact that the discharges in this case result from weather-induced stormwater runoff is immaterial to this conclusion. While the Co-Permittees cannot control the weather, they do have the discretion to require on-site containment of stormwater runoff or to convey their stormwater runoff to a publicly owned treatment works.

[67] CWA, § 402(p)(3)(B)(iii).

U.S. EPA has issued regulations and guidance documents that discuss the types of management strategies and other provisions that must be included in storm water permits in order to comply with CWA section 402(p)(3)(B)(iii). Pursuant to the CWA and federal regulations, the Permit contains numerous requirements for the Co-Permittees to take actions (implement BMPs) to reduce the flow of pollutants to waters of the United States. For municipalities, federal law requires municipalities to take actions that will lessen the incidence of pollutants entering storm drains, and, ultimately, the waters of the state. Federal law also specifically mandates that the Water Boards prescribe the BMPs that the MS4 must implement.[68]

Therefore, the Santa Ana Water Board exercised its duty under federal law and issued the Permit provisions to comply with federal requirements. The fact that the Santa Ana Water Board exercised its discretion, as required by federal law, to impose requirements that comply with MEP does not support the conclusion that the provisions are unfunded state mandates. As the Ninth Circuit Court of Appeals held in *Natural Resources Defense Council v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, "Congress did not mandate a minimum standards approach."[69] Rather, Congress mandated that the Santa Ana Regional Board exercise discretion in determining appropriate provisions designed to control pollutants.[70] Therefore, the exercise of some discretion in implementing this federal program does not mean that the Permit exceeds federal law or that subvention is required.

In decisions on prior MS4s, the Commission relied heavily on decisions in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 and *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155 in determining whether specific permit provisions constitute unfunded mandates. This discussion of the San Diego MS4 permit's requirement for the development of a hydromodification management plan ("HMP") is an example of the Commission's analytical approach and subsequent conclusions:

> Overall, there is nothing in 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."[Citation omitted] As in *Long Beach Unified School Dist. v. State of California*, [Citation omitted] the permit requires specific actions, i.e., required acts that go beyond the

[68] The Court of Appeal stated in *Rancho Cucamonga v. Regional Water Quality Control Bd., Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389:

> In creating a permit system for dischargers from municipal storm sewers, Congress intended to implement actual programs. [Cite to NRDC.] The Clean Water Act authorizes the imposition of permit conditions, 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." [Cite to CWA § 402(a)(1).] The Act authorizes states to issue permits with conditions necessary to carry out its provisions. [Cite to NRDC.] The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants. [Citation.]

[69] *Id.* at p. 1308.

[70] *Ibid.*

> requirements of federal law. In adopting these permit provisions, the state has freely chosen [Citation to *Hayes*] to impose these requirements. Thus, the Commission finds that the [HMP requirements] of the permit is not a federal mandate.[71]

The Commission did not include any analysis of the MEP standard, but rather appeared to focus on the fact that neither the CWA nor its implementing regulations specifically mention the word hydromodification. In citing to *Hayes* and *Long Beach*, the Commission interpreted these cases to support a finding that a permit provision is an unfunded state mandate unless that exact permit provision is clearly prescribed in federal law or regulations. The Santa Ana Water Board respectfully requests that Commission reconsider its approach in light of the following.

In *Long Beach*, the Court of Appeal held that a State of California Executive Order requiring local school boards to expend efforts to alleviate racial and ethnic segregation in its schools was an unfunded state mandate. By the mid-1970s, several federal courts had held that school districts had a constitutional obligation to alleviate racial segregation.[72] The Executive Order responded to this federal constitutional requirement by requiring that all school districts take specific actions to remedy this condition.[73] In finding that the Executive Order constituted an unfunded state mandate, the court explained:

> [A]lthough school districts are required to "take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause" [citations omitted], the courts have been wary of requiring specific steps in advance of a demonstrated need for intervention. [Citations omitted.][74] ...
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> [¶]However, 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. Where courts have *suggested* that certain steps and approaches may be helpful, the Executive Order and guidelines *require* specific actions ... These requirements constitute a higher level of service.[75] (Emphasis in original.)

Thus, by turning court recommendations for alleviating segregation into mandatory acts, the Executive Order created an unfunded state mandate. The Santa Ana Water Board suggests that, in applying the narrow holding in *Long Beach* to the HMP requirements in the San Diego MS4 permit, the Commission should have considered the significant differences between the natures of the respective underlying federal mandates.

In *Long Beach*, the federal requirements at issue stemmed from general constitutional obligations to alleviate racial segregation articulated in several federal court decisions. These

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[71] San Diego MS4 Permit Decision, pp. 44-45.

[72] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d at p. 173.

[73] *Ibid.*

[74] *Ibid.*

[75] *Ibid.*

court decisions did not impose any specific requirements on the school districts in California. *Long Beach* included no comprehensive federal program that required specific steps and specific standards to be met by all schools and school districts. There was, in fact, no federal mandate on the school districts at all. Thus, with its Executive Order, the State of California created a state mandate where no federal mandate previously existed. Accordingly, any specific provisions would necessarily be a state mandate because the state took a vague federal constitutional obligation, along with suggestions from federal court decisions, and translated it into very specific requirements.

This Test Claim, on the other hand, involves two separate and clear federal mandates—one for the permittee and one for the permitting agency. The first is the unambiguous federal mandate directly on permittees (Claimants) to obtain a NPDES permit that imposes requirements that control pollutants to the MEP and any other appropriate water quality control measures.[76] As opposed to general constitutional obligations at issue in *Long Beach*, the CWA, as implemented by EPA's regulations, creates a comprehensive regulatory strategy including very specific permit requirements that apply directly to local agencies' storm sewer discharges. Therefore, to the extent that the CWA and the United States Constitution both mandate specific actions by local agencies or school districts, the CWA requires a much more specific set of actions. Second, the CWA contains a separate mandate on the permitting agency, whether federal or state, to issue permits pursuant to the same standards set forth in CWA section 402(p).

The fact that the CWA contains two separate mandates marks the critical difference between Long Beach and the instant claim. Even if the State of California did not administer the NPDES program, Claimants would have been required to obtain an MS4 permit for their discharges. Thus, when the Santa Ana Water Board issued the Permit, it did so pursuant to the federal mandate for permit writers, not for permittees. Importantly, Claimants do not challenge the federal mandate to obtain the Permit. Rather, they challenge the Santa Ana Water Board's execution of the federal mandate as a permit writer.

Where the Santa Ana Water Board contends the Commission erred in its analytical approach is in applying *Long Beach* holding to the wrong federal mandate. In *Long Beach*, the federal mandate at issue was from the United States Constitution directly to the school districts. Thus, when the State of Calfornia issued the Executive Order in *Long Beach*, it did so pursuant to absolutely no federal mandate on the state itself. Put another way, the federal court decisions required no additional state involvement in order to meet the constitutional obligations regarding racial segregation. Accordingly, an Executive Order including more specific requirements than those suggested by the federal courts was *de facto* an unfunded state mandate.

On the contrary, when the San Diego Water Board (or Santa Ana Water Board in this case) established specific provisions in the MS4 permit, it did so pursuant to the CWA's specific mandate for the permitting agency. As explained above, this federal mandate specifically requires the permitting agency to establish permit provisions to control pollutants to the MEP and such other provisions as appropriate to control such pollutants. Thus, as opposed to *Long Beach*, where the State of California translated a general constitutional obligation into specific requirements absent any federal mandate to do so, the Santa Ana Water Board established

[76] CWA, §402(p)(3)(B)(iii).

permit provisions pursuant to CWA's direct mandate on permitting agencies. Accordingly, unlike *Long Beach*, the mere act of selecting specific permit provisions itself cannot *de facto* create an unfunded mandate. An unfunded mandate can only exist if, in establishing the permit provisions, the Santa Ana Water Board includes provisions that go beyond federal requirements. Therefore, in determining whether an unfunded mandate exists, the Commission must analyze whether the challenged provision goes beyond the legal standards set forth in 402(p)(3)(B)(iii).

Similar to *Long Beach*, the Board contends that the Commission's prior decisions misapplied the holding in *Hayes*. *Hayes* involved claims by two county school superintendents for reimbursement for special education requirements.[77] After concluding that the special education requirements constituted a federal mandate on the state, the court discussed whether the state had shifted costs associated with complying with the federal mandate to the school districts and whether such a shift required reimbursement:

> When 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. This should be true even thought the state has adopted an implementation statute or regulation pursuant to the federal mandate so long as the state had no "true choice" in the manner of implementation of the federal mandate . . . [Citations omitted.]
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> [T]he reasoning would not hold true where the manner of implementation of the federal program was left to the true discretion of the state. A central purpose of the principle of state subvention is to prevent the state from shifting costs of government from itself to local agencies. [Citations omitted.]. . . If the state freely chose to impose the costs upon the local agency as a means of implementing the federal program then the costs are result of a reimbursable state mandate regardless if the costs were imposed by the state by the federal government.[78]

Thus, *Hayes* resolves the issue of when a federal mandate on a state becomes an unfunded mandate on a local agency. If the state had no "true choice" in adopting implementing regulations on a local agency, then no unfunded mandate exists. However, if the state had "true discretion" in determining whether to shift the shift costs from the state to the local agency, then such a shift would create an unfunded mandate.

The problem with applying *Hayes* here is that, unlike *Hayes*, the 2009 Permit did not shift any federal mandate from the state to the Claimants. As explained in the above discussion of *Long Beach*, the CWA includes two federal mandates—the requirement on the permittee to obtain the permit and the requirement for the permitting agency to issue the permit. If the Santa Ana Water Board had not issued the Permit, Claimants would still have needed to obtain a permit from U.S. EPA. When applying *Hayes* in the San Diego MS4 Permit Decision above, the Commission mistakenly equates the choice that the state made in *Hayes,* to shift costs of

[77] *Hayes v. Commission on State Mandates, supra,* 11 Cal.App.4th at p. 1570

[78] *Id.*, at p. 93-94.

complying with the federal mandate from the state to the school districts, to the choice that the San Diego Water Board made in determining appropriate permit provisions in compliance with the MEP standard. These choices are not the same. As explained above, federal law specifically requires that the permitting agency select the BMPs and other appropriate provisions necessary to control the discharge of pollutants—the CWA does not do this for the permitting agency. The state does not have the choice to avoid imposing pollution controls in MS4 permits. The Commission's approach creates the untenable result that the State creates unfunded state mandates when it imposes permit provisions to comply with federal mandates in a manner consistent with federal agency guidance.

Apparently relying on the Commission's San Diego MS4 Permit and Los Angeles MS4 Permit Decisions, Claimants advance similar arguments based on *Hayes* and *Long Beach* in the Test Claim. For the reasons above, the Santa Ana Water Board requests the Commission to reject these arguments.

3. The Permit Provisions Do Not Impose Requirements Unique to Local Agencies and Are Not Mandates Peculiar to Government

None of the challenged provisions is subject to reimbursement because the Permit does not involve requirements imposed uniquely upon local government. Reimbursement to local agencies is required only for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not entitled to subvention.[79] The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required.[80] Compliance with NPDES permits, and specifically with storm water permits, is required of private industry as well. In fact, the requirements for industrial and construction entities are more stringent than for government dischargers. In addition, the government requirements apply to all governmental entities that operate MS4s, including state, Tribal and federal facilities; local government is not singled out.

The NPDES permit program, and the storm water requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES storm water permits. These permits are actually more stringent than municipal permits because the federal law requires that they meet more stringent technology-based standards by including numeric effluent limitations, and that they include more stringent water quality-based effluent limitations ("WQBELs") to ensure compliance with water quality standards in receiving waters.[81] Even where construction or industrial permits impose WQBELs in the form of BMP-based requirements, the BMPs must be designed to attain water quality standards, whether attainment is "practicable" or not.[82] The vast majority of Claimants' permit requirements are based on the less stringent MEP standard.

[79] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

[80] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[81] *Defenders of Wildlife v. Browner, supra,* 191 F.3d. at p. 1159.

[82] CWA, §§ 301, 402.; 40 C.F.R. § 122.44(k) (providing that BMPs may be allowed for non-MS4 dischargers only if numeric effluent limits are "infeasible.").

4. The Claimants have the Authority to Levy Service Charges, Fees, or Assessments to Pay for the Programs

As indicated above, the Santa Ana Water Board maintains that all of the contested requirements are federal, not state, mandates, and thus not subject to reimbursement. Even assuming, *arguendo*, that the provisions are state mandates, the Board believes that the local agencies possess fee authority within the meaning of section 17556, subdivision (d), of the Government Code such that no reimbursement by the state is required. All of the Claimants have the ability to charge fees to businesses to cover inspection costs. Depending on the circumstances, there may be limitations concerning the percent of voters or property owners who must approve assessments under California law, but cities and counties can and do adopt fees from their residents and businesses that fund their storm water programs. The cities and the County have failed to show that they must use tax monies to pay for these requirements.

Any "additional" costs that could conceivably be considered additional to the federal mandate would be *de minimis* and would not require payment from tax monies. While the Claimants estimate the costs to implement the challenged provisions at more than $200 million over the Permit's term, the Permit largely continues and refines the requirements of the 2002 permit. Thus the vast majority of the costs to implement the Permit are not new. Indeed, urban runoff management programs have been in place in Orange County for over 15 years, so increased costs are expected to be modest.[83] In addition, previously reported program costs are not all attributable to compliance with MS4 permits. Many program components, and their associated costs, existed before any MS4 permits were ever issued. Therefore, true program cost resulting from MS4 permit requirements is some fraction of reported costs. To the extent only a portion of the provisions is found to exceed federal law, the cost will be *de minimis*.

5. Claimants Have Not Exhausted their Administrative Remedies nd, Therefore, Cannot Collaterally Attack the Validity of the Permit in this Proceeding

Claimants' challenge to the Permit requires a finding that permit provisions exceed the minimum federal requirements established by the MEP standard.[84] Determinations of whether permit provisions are within the scope of the MEP standard are within the administrative jurisdiction of the State Water Board.[85] The Water Code provides an administrative remedy to a party challenging a Regional Water Board decision.[86] By contrast, the Commission "is the administrative agency which now has jurisdiction over local agency claims for reimbursement for

[83] 2009 Permit Fact Sheet, p. 11.

[84] Finding A.2 of the Permit provides that "this order requires the permittees to develop and implement programs and policies necessary to reduce the discharge of pollutants in urban storm water runoff to waters of the US to the maximum extent practicable (MEP) [Footnote omitted]."

[85] See generally Cal. Wat. Code, § 13140 ("The state board shall formulate and adopt state policy for water quality control").

[86] Cal. Wat. Code, § 13320(a).

state-mandates costs."[87] Therefore, the question of whether permit provisions exceed the MEP standard is more properly brought before the State Water Board.

Although Claimants have petitioned the State Water Board to review the Permit, to the extent that some of the Claimants have challenged the Permit, it is currently in abeyance. Allowing the Commission to adjudicate a matter properly within the expertise and jurisdiction of the State Water Board offends the basic policies of the doctrine of exhaustion.[88] Therefore, because petitioners have failed to exhaust their administrative remedy before the State Water Board, the test claim constitutes an impermissible collateral attack on the Permit.[89] For the foregoing reasons, the Commission must abstain from hearing the Test Claim until the State Water Board has determined whether the provisions of the permit exceed the MEP standard.

VI. Challenged Provisions

1. Section XVIII: Watershed Action Plans and TMDL Implementation

Section 303(d) of the CWA requires states to identify waterbodies that do not or are not expected to meet applicable water quality standards and are not supporting their beneficial uses. These waters are placed on the CWA section 303(d) List of Water Quality Limited Segments, also known as the 303(d) List. Placement on the 303(d) List generally triggers development of a pollution control plan called a Total Maximum Daily Load ("TMDL") for each waterbody and associated pollutant/stressor on the 303(d) List.

Claimants challenge several TMDL-derived provisions in the Permit. Before addressing each contested provision individually, it is appropriate to respond to two major themes that underpin Claimants' arguments: (1) that including TMDL-derived numeric effluent limits in an MS4 permit constitutes an unfunded mandate subject to subvention; and (2) that numeric effluent limits for California Toxics Rule ("CTR") constituents, whether based on a TMDL or not, are unfunded mandates.

(a) The TMDL-Derived Numeric Effluent Limits are Not Unfunded Mandates

i. TMDL Program

The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[90] The CWA contains two broad strategies for establishing effluent limitations to achieve these goals. The first is a technology-based approach that envisions requirements to maintain a minimum level of pollutant management using the best available technology.[91] The second, a water quality-based approach, relies on evaluating the

[87] *Hayes v. Commission on State Mandates,* (1992) Cal.App.4th 1564 *citing* Gov. Code, § 17525)

[88] *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391 (exhaustion is rooted in concerns favoring administrative autonomy and judicial efficiency)

[89] *Hazon-Iny Development, Inc. v. Unkefer* (1980) 116 Cal.App.3d Supp. 1, 5 ("Administrative decisions are not subject to collateral attack"), *citing Nelson v. Oro Loma Sanitary District* (1950) 101 Cal.App.2d 349, 357-358.

[90] *Id.*, § 101.

[91] *Id.*, § 301.

condition of surface waters and setting limitations on the amount of pollution that the water can be exposed to without adversely affecting the beneficial uses of those waters.[92] Section 303(d) of the CWA bridges these two strategies. Section 303(d) requires that the states prepare a list of waters that are not attaining water quality standards after the technology-based limits are put into place. For waters on the 303(d) List (and where the U.S. EPA Administrator deems they are appropriate) a TMDL is prepared.

Fundamentally, the purpose of a TMDL is to determine how much of a specific pollutant a waterbody can tolerate and still meet water quality standards and protect beneficial uses, and then to allocate portions of the pollutant load to various point and nonpoint source dischargers.[93] Point source dischargers who have been issued NPDES permits, such as Claimants, receive a wasteload allocation ("WLA").[94] Nonpoint source dischargers receive a load allocation ("LA").[95] Thus, the TMDL process leads to a "pollution budget" designed to restore the health of a polluted body of water, and provides a quantitative assessment of water quality problems, contributing sources of pollution, and the pollutant load reductions or control actions needed to restore and protect the beneficial uses of an individual waterbody impaired from loading of a particular pollutant.

In California, TMDLs are developed by either the Regional Water Boards or U.S. EPA. Regional Water Board-adopted TMDLs are subject to approval by the State Water Board, the State of California Office of Administrative Law, and U.S. EPA. The primary difference between TMDLs developed by the Regional Water Boards and those developed by U.S. EPA is that Regional Water Board TMDLs are adopted with comprehensive implementation plans, while U.S. EPA TMDLs typically contain only WLAs and LAs.[96] This stems, in part, from the U.S. EPA's limited authority under the CWA to regulate nonpoint sources of pollution.

TMDLs are not self-executing and are generally incorporated as enforceable provisions in NPDES permits, including MS4 permits. Federal law contains one single provision regarding how this should be accomplished: NPDES permits must contain effluent limits that are

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[92] *Id.*, §§ 301(b)(1)(C), 302(a).

[93] *Total Maximum Daily Load (TMDL).* The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs. (40 C.F.R. § 130.2(i).)

[94] *Wasteload allocation (WLA).* The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation. (40 C.F.R. § 130.2(h).)

[95] *Load allocation (LA).* The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished. (40 C.F.R. § 130.2(g).)

[96] U.S. EPA developed TMDLs are often referred to as technical or "tech" TMDLs.

"consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA."[97]

ii. Consistent With MEP, the TMDL-Derived Provisions Actually Require the BMP-based Iterative Approach Claimants Desire

Although the Permit incorporates the WLAs as numeric effluent limitations, the Permit actually requires an iterative BMP-based approach for compliance with these effluent limitations. Section XVIII.E.2 of the Permit, which sets forth the compliance determinations for TMDLs and BMP Implementation, provides:

> Based on the TMDLs, effluent limits have been specified to ensure consistency with the wasteload allocations. If the monitoring results indicate an exceedance of the wasteload allocations, the permittees shall reevaluate the current control measures and propose additional BMPs/control measures. This reevaluation and proposal for revisions to the current BMPs/control measures (revised plan) shall be submitted to the Executive Officer within 12 months of determining that an exceedance has occurred. Upon approval, the permittees shall immediately start implementation of the revised plan.

Thus, the Permit explicitly allows for an iterative BMP-based approach for complying with the numeric effluent limitations—these are not end-of-pipe requirements. If compliance with the WLAs is not achieved by the dates specified in the Permit,[98] the remedy is the development and implementation of a revised BMP-based plan for meeting the WLAs. A cooperative, iterative approach to identify violations of water quality standards does not exceed the MEP standard.[99]

The Permit's BMP-based iterative approach for complying with numeric effluent limits is generally not allowed in non-MS4 NPDES Permits.[100] Most NPDES permits incorporate WLAs as numeric effluent limits that must be met by certain dates. Compliance is measured by sampling the treated effluent, which is discharged from a treatment plant into surface waters. These permits are written assuming that an engineered treatment plant can be built and operated to obtain a specified effluent. Such provisions require strict compliance with the numeric limits, and dischargers cannot demonstrate compliance through an iterative process of modifying BMPs.[101] Rather, violations trigger enforcement under both state and federal law, as

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[97] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[98] Please note that some of the compliance dates for the WLAs fall outside of the permit term.

[99] *Rancho Cucamonga v. Regional Water Quality Control Bd., supra* (2006) 135 Cal.App.4th at 13389.

[100] 40 CFR 122.44(k) provides several exceptions, including when numeric effluent are infeasible. (40 CFR § 122.44(k)(3).) Many construction and industrial stormwater permits include BMP-based effluent limits based on infeasibility, but such BMP-based effluent limits must achieve compliance with water quality standards. (CWA § 402(p)(3)(A).) Such storm water permits, like MS4 permits, usually require dischargers to implement BMPs that will result in lessening the pollutants in the runoff, since without a treatment plant the pollutants can flow directly into surface waters. For municipalities that operate MS4s, the BMPs require the municipalities take actions that will lessen the incidence of pollutants entering storm drains by regulating the behavior and practices of the municipalities, their residents, and their businesses.

[101] 40 C.F.R. § 122.44(d).

well as third-party citizen suits under CWA section 505. The less stringent BMP-based iterative approach is consistent with the MEP standard applicable to MS4 permits.

iii. The TMDL-Derived Provisions are Required by Federal Law and Supported by Recent U.S. EPA Guidance

As explained above, section 303(d) of the CWA requires the development and adoption of TMDLs for impaired waterbodies on the 303(d) List. Once the TMDL is approved by U.S. EPA, any NPDES permit, including MS4 permits, must include effluent limits "consistent with the assumptions and requirements of any available wasteload allocations."[102] Therefore, 40 C.F.R. section 122.44(d)(1)(vii)(B) provides an alternative and independent federal authority for the TMDL-derived effluent limitations.

Furthermore, in late 2010, U.S. EPA released an updated memorandum on how to incorporate WLAs into MS4 permits.[103] This represents U.S. EPA's most recent guidance on the subject, and is important for several reasons. First, it directly addresses Claimants' argument that numeric effluent limits in MS4 permits are beyond what federal law requires. U.S. EPA's 2010 Memorandum, which applies to all permitting agencies, recommends "that, where feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards."[104] Even more directly on point, the memorandum recommends that where the TMDL includes WLAs for stormwater sources that provide numeric pollutant load or numeric surrogate parameter objectives, "the WLA should, where feasible, be translated into numeric [water quality based effluent limitations] in the applicable stormwater permits."[105] As the federal agency charged with interpreting and implementing the CWA, U.S. EPA and its guidance should be accorded considerable deference.[106]

Second, U.S. EPA's 2010 Memorandum exemplifies the evolving nature of the CWA's legal standard for MS4 permits, as discussed above. U.S. EPA's 2010 Memorandum, which updated aspects of a prior U.S. EPA memorandum on the same subject, expressly acknowledges the need for revised strategies and recommended permit provisions to better reflect current practices and trends in permits. The background section of U.S. EPA's 2010 Memorandum provides, in part:

> Since 2002, States and EPA have obtained considerable experience in developing TMDLs and WLAS that address stormwater sources. The technical capacity to monitor stormwater and its impacts on water quality has increased...Better information on the effectiveness of stormwater controls to

[102] 40 C.F.R . § 122.44(d)(1)(vii)(B).

[103] U.S. EPA 2010 Memorandum. Although formally issued after the Board issued the Permit, the recommendations contained in the memorandum reflected "current practices and trends in permits and WLAs for stormwater discharges." (*Id.*, at p. 2.) As discussed below, U.S. EPA supported this permit, including the specific provisions challenged herein.

[104] *Ibid.*

[105] *Id.*, at p. 3.

[106] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837.

> reduce pollutant loadings and address water quality impairments is now available. In many parts of the country, permitting agencies have issued several rounds of permits for Phase I municipal separate storm sewer systems (MS4s), Phase II MS4s, and stormwater discharges with industrial activity, including stormwater from construction activities. Notwithstanding these developments, stormwater discharges remain a significant cause of water quality impairment in many places, *highlighting a continuing need for more useful WLAs and better NPDES permit provisions to restore impaired waters to their beneficial uses.* (Emphasis added.)[107]

These "more useful and better NPDES permit provisions to restore impaired waters to their beneficial uses" include the use of numeric effluent limits for WLAs in applicable stormwater permits. Thus, while the legal standard mandated by section 402(p)(3)(B)(iii) has not changed, the nature of what constitutes compliance in the eyes of the federal government has. In implementing the federal NPDES program, the Santa Ana Water Board grants U.S. EPA considerable deference in interpreting the requirements of the CWA.[108]

In supporting their argument that including numeric effluent limitations in the Permit is an unfunded state mandate, Claimants cite to and discuss a litany of federal and state cases and authorities, some of which appear to rely on the prior version of U.S. EPA's 2010 Memorandum.[109] Claimants ultimately conclude that, "neither State nor federal law or policy provides for the incorporation of wasteload allocations as numeric limits in an MS4 permit."[110] However, as explained above, this is patently incorrect in light of U.S. EPA's recent updated guidance on this subject. Moreover, U.S. EPA's 2010 Memorandum is consistent with the input the agency provided to the Santa Ana Water Board during the development and issuance of the Permit. In a comment letter on the first draft of the Permit, dated February 13, 2009, Douglas E. Eberhardt, Chief of the U.S. EPA, Region 9, NPDES Permits Office ("U.S. EPA February 13, 2009 Letter"), provided specific recommendations regarding incorporating WLAs as numeric effluent limits:

> The permit appropriately includes the relevant TMDLs, but the permit should more explicitly state that the wasteload allocations (WLAs) established by these

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[107] U.S. EPA 2010 Memorandum, pp. 1-2.

[108] CWA § 402, subd. (b); Wat. Code § 13372, subd. (a).

[109] The U.S. EPA 2010 Memorandum revised portions of a prior U.S. EPA memorandum on Establishing Total Maximum Daily Load (TMDL) Waterload Allocations (WLAs) for Storm Water Sources andd NPDES Permit Requirements Based on Those WLAs, dated November 22, 2002 ("U.S. EPA 2002 Memorandum.") As Claimants correctly note, the U.S. EPA 2002 Memorandum provided that, generally, "numeric effluent limits will only be used in rare circumstances," and that NPDES permits for municipal dischargers "should be expressed as best management practices (BMPs), rather than as numeric effluent limits." (U.S. EPA 2002 Memorandum, pp. 4, 6.) The EPA Draft Handbook, cited by Claimants, includes the above quoted language from the U.S. EPA 2002 Memorandum almost verbatim, including the signature phrase "rare circumstances." (Test Claim, p. 15). Moreover, that some prior State Water Board orders emphasize the appropriateness of a BMP-based approach is not surprising considering the prior U.S. EPA guidance to that effect.

[110] Test Claim, p. 16.

> TMDLs are intended to be enforceable permit effluent limits and that compliance is a permit requirement.[111]

The comment letter also included suggested language intended to clarify that the WLAs were being incorporated as numeric effluent limitations.[112] Furthermore, at both public hearings on the Permit, John Kemmerer expressed U.S. EPA's support for the Permit as drafted.[113]

To be fair, Claimants submitted their Test Claim prior to the issuance of U.S. EPA's 2010 Memorandum; thus, Claimants did not have an opportunity to review this most recent federal guidance prior to their filing the Test Claim. However, U.S. EPA updated its memorandum in part to "better reflect current practices and trends in permits and WLAs for stormwater dischargers." Again, the Santa Ana Water Board grants U.S. EPA considerable deference in interpreting the requirements of the CWA, and especially what constitutes compliance with section 402(p)(B)(3)(iii).

Additionally, Claimants' reliance on *Tualatin Riverkeepers et. al v. Oregon Department of Environmental Quality (April 28, 2010) 235 Ore.App. 132* is misplaced. As Claimants correctly explain, the Court in *Tualatin* held that the CWA does not require WLAs to be included in NPDES permits as numeric effluent limits. However, this is not the same as concluding that including WLAs as numeric effluent limits is beyond federal law, which is the principal inquiry here. While federal law does not strictly mandate implementing WLAs as numeric effluent limits in every case, it does mandate that NPDES permits include water quality based requirements appropriate to control pollutants.[114] And, according to recent U.S. EPA guidance, compliance with section 402(p)(3)(B)(iii) should include, where feasible, numeric effluent limits—especially for TMDL-based WLAs. Additionally, U.S. EPA's direct support of the Permit is evident from its comments letters and testimony.

iv. Should the Commission Find the Provisions Exceed MEP, They are Nonetheless Consistent with CWA Section 402(p)

CWA section 402(p)(3)(B)(iii) requires that, beyond MEP, permits shall require such other provisions as the permit writer determines appropriate to control pollutants. As explained above, federal law requires the development of TMDLs for impaired waterbodies and federal regulations require the inclusion of effluent limits in an NPDES permit consistent with the assumptions and requirements of any WLAs. The challenged provisions in the 2009 Permit are not only consistent with the assumptions and requirements of the applicable WLAs, they are consistent with the most recent U.S. EPA guidance. Accordingly, even if the Commission finds that the challenged provisions exceed the requirements of the MEP standard, the Santa Ana Water Board acted pursuant to its mandate to include any such provisions as appropriate to control the discharge of pollutants into impaired waterbodies.

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[111] U.S. EPA February 13, 2009 Letter, p. 3.

[112] *Id.*, at pp. 3-6.

[113] April 24, 2009 Public Hearing Transcript, pp. 45-55; May 22, 2009 Public Hearing Transcript, pp. 41-43.

[114] CWA, § 402(p)(3)(B)(iii).

(b) CTR Constituents and Numeric Effluent Limits

Claimants contend that any TMDL-derived numeric effluent limits, whether based on the numeric criteria themselves or based on a TMDL, for a CTR constituent is an unfunded mandate. To support this position, Claimants cite to provisions of the CTR itself, comments and responses to comments during U.S. EPA's approval process for the CTR, and the State Water Board's policy for implementing the CTR. Claimants' reliance on its supporting authorities indicates a serious misunderstanding of the nature of the relevant effluent limits in the Permit and the applicability of the CTR to MS4 permits. None of these authorities support Claimants' position.

On May 18, 2000, U.S. EPA promulgated numeric water quality criteria for priority toxic pollutants and other provisions for water quality standards to be applied to waters in the state of California—the CTR.[115] U.S. EPA promulgated this rule based on its determination that the numeric criteria were necessary in the state to protect human health and the environment. The rule fills a gap in California water quality standards that was created in 1994 when a state court overturned the state's water quality control plans containing water quality criteria for priority toxic pollutants. The CTR criteria are legally applicable in the state for inland surface waters, enclosed bays and estuaries for all purposes and programs under the CWA.[116]

In constructing their argument, Claimants confuse TMDL-derived effluent limitations for CTR constituents with the effluent limitations derived from CTR numeric objectives themselves. These are not the same thing. The CTR specifies numeric water quality objectives directly applicable to point source discharges to waters of the United States. Consistent with State of California's *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* ("SIP"), the State and Regional Water Boards include end-of-pipe numeric effluent limits based directly on these numbers. The State and Regional Boards follow a formulaic process, set forth in the SIP, when translating the CTR numeric objectives to end-of-pipe numeric effluent limits. Claimants' authorities appear to refer exclusively to this scenario, when CTR objectives are applied directly as end-of-pipe numeric effluent limitations.[117] However, this is not how the Santa Ana Regional Water Board developed effluent limitations for the CTR constituents.

Rather, the Permit's numeric effluent limits for CTR constituents were derived from WLAs established in TMDLs, not from the CTR numeric objectives themselves. As explained above, the TMDL process requires the creation of a "pollution budget" that represents that total amount of the specific pollutant for which the water body is impaired, followed by the allocation of portions of this budget to point and nonpoint dischargers as WLAs and LAs, respectively. When read carefully, the comments and responses to comments cited by Claimants contain an

[115] 65 Fed. Reg. 31682.

[116] *Ibid.*

[117] For example, "[t]he commenter appears to assume that storm water discharge would be subject to numeric water quality based effluent limits which would be equivalent to the criteria values and applied as effluent limits never to be exceeded or calculated in the same manner that effluent limits are calculated for other point sources, such as POTWs. (Test Claim, citing U.S. EPA's response to the County of Ventura's comments at the CTR hearing, p. 20.)

underlying assumption that the CTR criteria would be directly applied to MS4 permits as numeric effluent limitations. That is not the case here.

Claimants' reliance on the footnote contained in the SIP, that the SIP does not apply to storm water discharges, is similarly misplaced. This footnote means that the permitting agency should not use the SIP to translate CTR numeric objectives to numeric effluent limits in an MS4 permit. However, the CTR criteria themselves still apply to all waterbodies, and must be implemented in stormwater permits, albeit in a different manner.[118] As explained in the prior paragraph, the numeric effluent limits for the CTR constituents were derived from TMDLs, not through the process outlined in the SIP. The footnote in the SIP in no way precludes TMDL-derived numeric effluent limitations for CTR constituents in stormwater permits.

Finally, by consistently emphasizing the word "discretion" and references to BMP-based effluent limits in their discussion regarding the CTR, Claimants appear to argue that, because the Santa Ana Water Board had the discretion to implement the WLAs through BMPs instead of numeric effluent limitations, these provisions are unfunded mandates. As explained previously, federal law and regulations require that the Permit meet the standards set forth in CWA section 402(p)(3)(B)(iii), and that permit provisions are consistent with the assumptions of available WLAs. Thus, not only does federal law mandate the use of discretion when determining appropriate permit provisions, the most recent federal guidance on this specific subject, underscored by U.S. EPA's support of the Permit's approach, confirms that numeric effluent limits for CTR constituents, to be achieved thorough a BMP-based iterative approach, are consistent with federal requirements.

(c) Changes from the 2002 Permit

Claimants correctly note that many of the TMDL-derived provisions in section XVIII.B contain new requirements not found in the 2002 Permit. Since 2002, several new TMDLs have been adopted. Federal law mandates that the applicable WLAs be included in provisions that are consistent with the assumptions of the WLAs.[119] Moreover, incorporating the WLAs as numeric effluent limitations is not new to the Permit. Section XVI of the 2002 Permit required the Co-Permittees[120] to meet "target load allocations" for nutrients and sediment, based on adopted TMDLS.[121] The target load allocations were the WLAs allocated to the permittees' MS4 discharges. Therefore, as with the Permit, the 2002 Permit also incorporated the applicable WLAs as numeric effluent limitations.

Additionally, none of these new provisions can be considered a higher level of service or new program. As explained above, MEP is intended to be an evolving standard where "each successive permit becomes more refined, detailed, and expanded as needed, based on experience under the previous permit."[122] Therefore, while the Permit does contain new TMDL-

[118] CWA, § 402.

[119] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[120] The 2002 Permit used the term permittees instead of Co-Permittees.

[121] 2002 Permit, pp. 35-37.

[122] 55 Fed. Reg. 47990, 48052

related provisions, not only are these provisions required by federal law and incorporated in the same manner as in the 2002 Permit, all of these provisions are fully consistent with the federal requirement to establish requirements that control the discharge of pollutants to the MEP, and other such appropriate provisions.

(d) Sections XVIII.B.1 Through B.4

Sections XVIII.B.1-B.4 implement U.S. EPA developed TMDLs for toxic pollutants in San Diego Creek and Newport Bay, including metals, organochlorine compounds, selenium and organophosphorate pesticides, and TMDLs for metals in Coyote Creek developed by the Los Angeles Regional Water Board and U.S. EPA. Sections XVIII.B.1-4 provide:

1. As required under a consent decree, in 2002, the EPA promulgated technical TMDLs for toxic pollutants in San Diego Creek and Newport Bay, including metals, organochlorine compounds, selenium and organophosphate pesticides. EPA and the Los Angeles Regional Water Quality Control Board established technical TMDLs for metals in Coyote Creek. Technical TMDLs do not include implementation plans or compliance schedules.

2. In collaboration with stakeholders, Regional Board staff are developing revised TMDLs that are expected to supplant the toxics TMDLs promulgated by EPA for the Newport watershed. The TMDLs will include implementation plans and compliance schedules. Implementation plans for the Coyote Creek TMDLs are also being developed.

3. In summary, work related to the following established TMDLs is ongoing:

   a) Metals (San Diego Creek and Newport Bay (including Rhine Channel))
   b) Metals (Mercury, Chromium) (Rhine Channel)
   c) Organochlorine compounds (San Diego Creek and Newport Bay; also see Paragraphs 5 and 6, below)
   d) Selenium (San Diego Creek and Newport Bay)
   e) Copper, lead and zinc (Coyote Creek, TMDL developed by the EPA and the Los Angeles Regional Water Quality Control Board for wet weather)
   f) Copper (Coyote Creek, TMDL developed by the EPA and the Los Angeles Regional Water Quality Control Board for dry weather)

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

Claimants contend that all of these provisions include requirements that are unfunded mandates because the provisions incorporate the applicable WLAs as numeric effluent limits. Claimants argue that federal law requires only a BMP-based approach and not numeric effluent limits.

As discussed above, the challenged provisions require a BMP-based iterative approach to compliance consistent with the minimum federal requirement of establishing controls to the MEP. Furthermore, including the WLAs as numeric effluent limitations squares directly with the recommendations in U.S. EPA's 2010 Memorandum. Furthermore, to the extent that including numeric effluent limitations goes beyond the minimum federal requirements of establishing controls to the MEP, it is consistent with the federal requirement to include other provisions appropriate to control pollutants.[123]

(e) Section XVIII.B.5

Section XVIII.B.5 incorporates WLAs from a TMDL adopted by U.S. EPA, and provides for the transition from these provisions to provisions based on WLAs from a Santa Ana Water Board TMDL. Section XVIII.B.5, in its entirety, provides

> The Regional Board adopted TMDLs, including an implementation plan, for organochlorine compounds in September 2007. These TMDLs must be submitted for approval by the State Board, Office of Administrative Law and EPA. These TMDLs have not yet been submitted to the State Board for its approval. However, stakeholders in the watershed are already taking steps to implement the TMDLs through a Toxicity Reduction and Investigation Program (TRIP) that will address the organochlorine compounds and other toxic pollutants, including metals, in the Newport Bay watershed. These TMDLs will become effective upon approval by the State Board and Office of Administrative Law but will not supplant the EPA organochlorine compounds TMDLs until they are approved by EPA. Accordingly, upon approval of the Regional Board-adopted organochlorine compounds TMDLs by the State Board and the Office of Administrative Law, the permittees shall comply with both the EPA and Regional Board wasteload allocations specified in Tables 2 A/B/C/D and Table 4, respectively. In accordance with the Regional Board TMDLs, compliance with the allocations specified in Table 4 shall be achieved as soon as possible but no later than December 31, 2015. Upon approval of the Regional Board-approved organochlorine compounds TMDLs by EPA, the applicable wasteload allocations shall be those specified in Table 4.

Claimants challenge this transition process and the Permit's inclusion of the WLAs as numeric effluent limits as unfunded mandates that go beyond federal law.

TMDLs adopted by Regional Water Boards are subject to approval by the State Water Board, the Office of Administrative Law, and ultimately, U.S. EPA.[124] Once the Regional Water Board TMDL has been submitted to U.S. EPA for consideration, U.S. EPA has 30 days within which to approve or disapprove of the TMDL.[125] The federal requirement that NPDES permits, including

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[123] CWA, § 402(p)(3)(B)(iii).

[124] 40 C.F.R. § 130.7(d)(2).

[125] *Id.*

MS4 permits, include provisions that are consistent with the assumptions of any applicable WLAs is triggered once U.S. EPA approval is granted. However, the Permit's required compliance with the Santa Ana Regional Board TMDL during U.S. EPA's consideration period only briefly accelerates the time for compliance. Even in the unlikely event this increases compliance costs, such increases are *de minimis*.

Moreover, Claimants and other stakeholders have already engaged in good-faith efforts to implement the Santa Ana Regional Board TMDL.[126] Accordingly, formally requiring them to continue this early implementation during this brief window is appropriate to reduce the discharge of pollutants to the impaired waterbody. Furthermore, in light of the fact that Claimants and other stakeholders are already taking steps to implement the Santa Ana Water Board TMDL, it is likely that any additional costs associated with this provision would be *de minimis* and not subject to reimbursement.

Claimants' argument that numeric effluent limits for WLAs are beyond federal law has been addressed previously. Those arguments are incorporated herein.

(f) Sections XVIII.B.7 and XVIII.B.8

Sections XVIII.B.7 and XVIII.B.8 include requirements for addressing selenium impairment in the watershed. Sections XVIII.B.7 and XVIII.B.8 provide:

> 7. Regional Board staff, in collaboration with the stakeholders, is developing TMDLs for metals and selenium that will include implementation plans and monitoring programs and that are intended to replace the EPA TMDLs. The permittees within the Newport Bay watershed shall continue to participate in the development and implementation of these TMDLs. This Order will be reopened to incorporate revised allocations based upon TMDLs, including implementation plans, for metals and selenium approved by the Regional Board, State Board and Office of Administrative Law. As for the organochlorine compounds, the EPA promulgated allocations for these constituents will also remain in effect unless and until EPA approves the Regional Board's TMDLs for these constituents.
>
> 8. Selenium is a naturally occurring element in the soil but its presence in surface waters in the Newport Bay watershed is largely the result of changes in the hydrologic regime as the result of extensive drainage modifications. Selenium-laden shallow and rising groundwater enters the storm water conveyance systems and flows into San Diego Creek and its tributaries. Groundwater inputs are the major source of selenium in San Diego Creek and Newport Bay. Currently, there are no economically and technically feasible treatment techniques to remove selenium from the water column. The stakeholders have initiated pilot studies to determine the most efficient methods for treatment and removal of selenium. Through the Nitrogen and

[126] Note the following language in the challenged provision, "stakeholders in the watershed are already taking steps to implement the TMDLs through a Toxicity Reduction and Investigation Program (TRIP) that will address the organochlorine compounds and other toxic pollutants, including metals, in the Newport Bay watershed."

> Selenium Management Program, the watershed stakeholders are developing comprehensive selenium (and nitrogen) management plans, which are expected to form the basis, at least in part, for the selenium implementation plan (and a revised nutrient TMDL implementation plan). A collaborative watershed approach to implement the nitrogen and selenium TMDLs for San Diego Creek and Newport Bay is expected. A proposed Cooperative Watershed Program that will fulfill applicable requirements of the selenium TMDL implementation plan must be submitted by the stakeholders covered by this order within 24 months of adoption of this order, or one month after approval of the selenium TMDLs by OAL, whichever is later. The Program must be implemented upon Regional Board approval. As long as the stakeholders are participating in and implementing the approved Cooperative Watershed Program, they will not be in violation of this order with respect to the nitrogen and selenium TMDLs for San Diego Creek and Newport Bay. In the event that any of the stakeholders does not participate, or if the collaborative approach is not approved or fails to achieve the TMDLs, the Regional Board will exercise its option to issue individual waste discharge requirements or waivers of waste discharge requirements.

Claimants contend that the requirements contained in these provisions exceed the requirements of federal law. The challenge to these provisions is somewhat curious considering these provisions were included specifically to save the Claimants money and to give them regulatory compliance credit for ongoing efforts (prior to the issuance of the Permit) to address selenium impairment in the watershed. An explanation of the underlying history will be helpful in determining that these provisions are consistent with federal law.

The greater Newport Bay Watershed is listed as impaired for selenium on the 303(d) List. On June 14, 2002, U.S. EPA established selenium TMDLs for San Diego Creek and Newport Bay, California. These TMDLs include WLAs and LAs for San Diego Creek, which is the major source of freshwater and selenium inflow to Newport Bay. For municipal storm water discharges, as well as for other point sources of selenium input to San Diego Creek and Newport Bay, four wasteload allocations that differ based on flow conditions as measured in San Diego Creek at Campus Drive were established. These WLAs were calculated using four flow "tiers": base flows, small storm flows, medium storm flows and large storm flows. Mean annual flow volumes for each of these flow tiers were used to calculate the WLAs. Santa Ana Water Board permitting staff encountered serious difficulties with implementing the WLAs in NPDES permits because there is no practical, timely or effective way to determine compliance with effluent limitations for specific discharges based on allocations that vary based on flow conditions at a specific location. Additionally, various stakeholders in the watershed, including some of the Claimants, raised concerns that there existed no economically or technologically feasible treatment technology for removing selenium from point source discharges.

In response to these difficulties, and recognizing the need to collect, analyze and consider additional data concerning selenium sources, transport, fate and potential ecological effects in San Diego Creek and Newport Bay, Regional Board staff determined that review and likely revision of the US EPA selenium TMDLs was warranted. Regional Board staff also recognized that the US Fish and Wildlife Service had questioned the efficacy of the applicable water quality

objectives for selenium established by the U.S. EPA in the CTR and National Toxics Rule. This, coupled with knowledge of the highly site-specific nature of selenium chemistry and toxicity, led Regional Board staff to consider alternative, site-specific objectives for selenium in the Newport Bay watershed.

To aid in this collaborative effort, numerous dischargers and other stakeholders in the Newport Bay watershed proposed to form the Nitrogen and Selenium Management Program ("NSMP") Working Group that would be responsible to develop, submit to the Santa Ana Water Board for approval, and implement upon that approval, a Work Plan to address selenium issues in the Newport Bay watershed.[127] The NSMP Working Group, which includes many of the Co-Permittees, has been engaged with Regional Board staff in intensive efforts to implement an approved Work Plan. The elements of that Work Plan include consideration of site-specific objectives for selenium, the investigation and pilot testing of technology that could reasonably achieve selenium reductions, and the development of a comprehensive selenium management plan for the watershed. The Work Plan was designed to inform review and revision of the U.S. EPA TMDLs. Revised TMDLs, which will likely include a revised WLA for the MS4 discharges, are expected to be considered in late 2011.

Owing to the efforts described above, during permit development, some Claimants voiced concerns that if the Permit incorporated the WLAs for selenium contained in the U.S. EPA as numeric effluent limitations, Claimants would be required to develop and implement control strategies for complying with the WLAs and at the same time continue to participate in the development of a replacement TMDL that would likely contain very different BMPs.[128] The Santa Ana Water Board found this argument persuasive in terms of allocating funds most efficiently for water quality-related activities. Accordingly, the Santa Ana Water Board expressly did not require compliance with the existing WLAs for selenium as numeric effluent limitations as long as the Claimants were "participating in and implementing the approved Cooperative Watershed Program." This is an example of a particularly complex impairment problem, which is why the U.S. EPA 2010 Memorandum recognized the need for flexibility in establishing permit requirements derived from WLAs. Claimants now challenge this provision, included at Claimants' urging, that allows them to continue efforts to develop a TMDL to replace the 2002 U.S. EPA TMDL without simultaneously expending funds to implement BMPs that will likely become obsolete if/when a revised TMDL is adopted and approved by U.S. EPA.[129]

CWA section 402(p)(3)(B)(iii) requires the Permit to include "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices control techniques and system, design and engineering methods. . ." This language is broad enough to include the requirements challenged here. Given the difficulties in and shared concerns with implementation and effectiveness of the 2002 U.S. EPA TMDL WLAs for selenium, and ongoing efforts focused on developing revised TMDLs for selenium, allowing all available resources to

[127] Information regarding the NSMP is available at the following website: http://www.ocnsmp.com/.

[128] Although still in development, the implementation planning for the revised TMDLs has focused on the possibility of using large regional treatment BMPs which, to the knowledge of the Santa Ana Water Board, had not been contemplated as compliance methods with the 2002 U.S. EPA TMDLs by any of the Co-Permittees absent revised TMDLs and an implementation plan expressly providing for this implementation strategy.

be directed to the NSMP efforts is an appropriate exercise of the discretion allowed under the CWA. Consequently, none of the provisions in sections XVIII.B.7or XVIII.B.8 are unfunded mandates subject to reimbursement.

(g) Section XVIII.B.9

Section XVIII.B.9 incorporates WLAs for a TMDL that was jointly developed by the Los Angeles Water Board and U.S. EPA. Section XVIII.B.9 provides:

> The permittees with discharges tributary to Coyote Creek or the San Gabriel River shall develop and implement a constituent-specific source control plan for copper, lead and zinc until a TMDL implementation plan is developed. The source control plan shall include a monitoring program and shall be completed within 12 months from the date of adoption of this order. The source control plan shall be designed to ensure compliance with the following wasteload allocations: [Table 6 omitted.]

Claimants challenge this provision as going beyond the requirements of federal law because the provision requires Claimants to develop and implement a "constituent-specific source control plan," including a "monitoring program."

These specific provisions were supported by U.S. EPA as consistent with federal requirements under the CWA. In his February 3, 2009 comment letter on the first draft of the Permit, Douglas E. Eberhardt stated:

> We support the approach provided by incorporating the Coyote Creek WLAs, by establishing a date certain for source control plan and a monitoring plan.[130]

U.S. EPA's support of this provision as meeting the requirements of the CWA should be afforded considerable deference.

Furthermore, as explained previously, CWA section 402(p)(3)(B)(iii) allows the Santa Ana Water Board discretion to include appropriate provisions to control pollutants. Given U.S. EPA's direct support of these provisions, and the water quality benefits to be achieved for waters that are currently impaired and must be brought into compliance with applicable water quality standards, these provisions are appropriate requirements pursuant to section 402(p)(3)(B)(iii). Consequently, this provision does not constitute an unfunded state mandate.

(h) Section XVIII.C.1

Section XVIII.C.I includes requirements based on WLAs for a Santa Ana Water Board adopted TMDL for fecal coliform bacteria in Newport Bay.[131] Section XVIII.C.I provides:

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[130] U.S. EPA February 13, 2009 Letter, p. 5.

[131] Santa Ana Water Board Order R8-99-0010.

> The Regional Board adopted a TMDL implementation plan for fecal coliform bacteria in Newport Bay that included a compliance date for water contact recreation standards no later than December 30, 2013 (within the permit term), and with shellfish standards no later than December 30, 2019. The allocations are shown in the tables below. The permittees shall comply with the wasteload allocations for urban runoff in Tables 8A and 8B in accordance with the deadlines in Tables 8A and 8B. Compliance determination for fecal coliform shall be based on monitoring conducted at representative sampling locations within San Diego Creek and Newport Bay. (The permittees may use the current sampling locations for compliance determination.)

Claimants contend that this provision contains unfunded mandates because: (1) U.S. EPA never approved the TMDL; and (2) incorporating WLAs as numeric effluent limits is beyond the requirements of federal law. Neither of these claims is true.

First, U.S. EPA did approve the TMDL for fecal coliform bacteria in Newport bay. In a February 28, 2000 letter to Walt Pettit, Executive Director of the State Water Board, U.S. EPA approved the fecal coliform TMDL for Upper Newport Bay and Lower Newport Bay.[132] Second, Claimants' argument that numeric effluent limits for WLAs are beyond federal law has been addressed previously. Those arguments are incorporated herein.

(i) Section XVIII.D.1

Section XVIII.D.1 includes requirements based on WLAs for Santa Ana Water Board adopted TMDLs for diazinon and chloropyrifos in San Diego Creek and chlorpyrifos in Newport Bay.[133] Section XVIII.D.1 provides:

> The Regional Board/EPA developed TMDLs for diazinon and chlorpyrifos in San Diego Creek and for chlorpyrifos in Newport Bay. The following allocations are included in the TMDLs (Tables 9A and 9B are extracted from the Implementation Plan). The permittees in the Newport Bay Watershed shall comply with the allocations in Tables 9 A and B.
>
> The Regional Board adopted an implementation plan for these TMDLs. In accordance with the implementation plan, the Regional Monitoring Program was modified to include analysis for organophosphate pesticides and toxicity. The Regional Board also performed simulation studies to predict contaminant concentrations in the Bay. Based on the results of these studies, the Regional Board will reevaluate the TMDLs every three years. The permittees shall continue to participate in any additional monitoring that is needed to confirm that the permittees are in compliance with the allocations.
>
> Compliance determination for diazinon and chlorpyrifos for San Diego Creek shall be based on monitoring conducted at representative monitoring locations

[132] Attached.

[133] Santa Ana Water Board Order R8-99-0010.

> within San Diego Creek (the permittees may use current monitoring locations for this purpose). Compliance determination for chlorpyrifos for Upper Newport Bay shall be based on monitoring conducted at representative monitoring locations within Upper Newport Bay (the permittees may use current monitoring locations for this purpose).

Claimants contend that this provision contains unfunded mandates because the WLAs have been incorporated as numeric effluent limitations into the Permit. This contention has been addressed previously, and those responses are incorporated herein.

2. Sections XII.B through XII.E: Provisions Requiring Public Projects to Comply with Low Impact Development and Hydromodification Requirements

Sections XII.B through XII.E of the Permit contain requirements for new development and significant re-development. As with the 2002 Permit, the 2009 Permit requires the development of a revised and updated Water Quality Management Plan ("WQMP"). The WQMP is a guide for managing post construction runoff from new urban development/significant redevelopment projects. A WQMP typically includes various BMPs and other requirements for mitigating the impacts of post construction runoff on water quality. Sections XII.B through XII.E require the inclusion of Low Impact Development[134] ("LID") principles and provisions regarding hydrologic conditions of concern (hydromodification) in the revised WQMP. Importantly, Claimants only challenge these requirements as applied to municipal projects. As explained below, these provisions are consistent with the minimum federal requirements of establishing controls to reduce the discharge of pollutants to the MEP and do not constitute unfunded state mandates.

(a) The LID and Hydromodification Requirements are Necessary to Meet the Minimum Federal MEP Standard

Broad federal authority exists for including the challenged provisions in the Permit.[135] In addition, 40 C.F.R. section 122.26(d)(2)(iv)(A)(2) requires Co-Permittees to develop and implement a proposed management program which should include:

> 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.

Most if not all of the hydromodification requirements were added to implement the requirements in 40 C.F.R. section 122.26(d)(2)(iv)(A)(2). Additionally, U.S. EPA has developed a significant

[134] LID is an approach to land development (or redevelopment) that works with nature to manage storm water as close to its source as possible by using structural and non-structural BMPs to reduce environmental impacts. (Permit Fact Sheet, p. 21, fn. 10.)

[135] CWA, §§ 402(a), 402(p)(3)(B)(ii)-(iii); see also 40 C.F.R. § 122.26(d)(2)(i)(B)-(C), (F), and (F); 40 C.F.R. §131.12; 40 C.F.R. § 122.26(d)(2)(iv).

amount of guidance regarding the importance of addressing LID and hydromodification in MS4 permits.[136]

During the permit development and issuance process, U.S. EPA provided extensive comments on and support for the LID and hydromodification provisions.[137] At the second (and final) public hearing prior to the Santa Ana Water Board's issuance of the Permit, John Kemmerer, representing U.S. EPA, endorsed the LID and hydromodification provisions:

> We're working very closely the Regional Boards across the state and with the State Board on storm water permits, and I want to really commend the work that your staff has done on this permit, which I believe is really a model for how low impact development can be addressed for permits really across the state and country...I definitely agree with [the Santa Ana Water Board's Executive Officer's] analysis of the fact that using LID and trying to use these on-site containment approaches is MEP–is consistent with the MEP approach.[138]

As stated previously, U.S. EPA's and the Board's determination of what permit provisions meet the MEP standard should receive considerable deference.

In addition, the authority to regulate flow under the federal Clean Water Act in order to protect water quality standards has been confirmed by the United State Supreme Court in *PUD No. 1* v. *Washington Department of Ecology,* 511 U.S. 700 (1994). Further, the restrictions on effluent flows are supported by U.S. EPA in the Preamble to the Phase II federal storm water regulations, which states: "[i]n many cases, consideration of the increased flow rate, velocity, and energy of storm water discharges must be taken into consideration in order to reduce the discharge of pollutants, to meet water quality standards, and to prevent the degradation of receiving streams."[139] Claimants have not alleged that the consideration of the physical impacts of flow have led to any requirements that go beyond those required for pollutant reduction.

In 2008, the State of Washington, Washington Pollution Control Hearings Board ("PCHB") issued a decision addressing a Phase I MS4 Permit that included provisions to promote, but not require, implementation of LID.[140] The PCHB considered LID and found that the permit failed to satisfy the federal MEP standard and Washington state law because it only included provisions to promote LID, but did not require LID at the parcel and subdivision level.[141]

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[136] See Copy of U.S. EPA Presentation on Hydromodification by Dr. Cindy Lin (Sept. 4, 2008); see also U.S. EPA website regarding LID, http://www.epa.gov/owow/NPS/lid/.

[137] U.S. EPA February 13, 2009 Comment Letter, pp. 1-3; U.S. EPA May 8, 2009 Comment Letter.

[138] May 22, 2009 Public Hearing Transcript, pp. 42-43.

[139] See Vol. 64 Fed. Reg. 68761.

[140] State of Washington, Pollution Control Hearing Board (PCHB), Findings of Fact, Conclusions of Law and Order, Puget Soundkeeper Alliance, et al v. State of Washington, Department of Ecology, PCHB Nos. 07-21, et al., August 7, 2008.

[141] *Id.*, Conclusion of Law No. 17, p. 58.

The PCHB noted: "[t]he Environmental Protection Agency (EPA) has not required the use of LID in its stormwater rules or EPA permits, but it is increasingly supporting and encouraging the use of LID approaches in municipal stormwater programs on its website and through numerous publications."[142] It also identified other jurisdictions with permits requiring, not just encouraging, LID.[143] In reaching its conclusions, the PCHB refers to the LID requirements in the 2007 Permit issued by the Santa Ana Water Board, noting that it "requires all new and redevelopment projects to implement LID BMPs where feasible. The Permittees are given the responsibility of defining the applicability and feasibility of LID BMPs, including the minimum standards to ensure maximum implementation."[144] The PCHB observed that a requirement to impose parcel and subdivision-level LID BMPS "represents a cost effective, practical advancement in stormwater management."[145]

The PCHB decision supports the Santa Ana Water Board's determination that the LID provisions are required to implement the MEP standard. As mentioned above in the general discussion on the federal MEP standard, the inclusion of LID requirements is an appropriate exercise of the Santa Ana Water Board's discretion, the exercise of which federal law mandates, in establishing requirements to meet the MEP standard. For these reasons, the requirements in sections XII.B through XII.E meet, but do not exceed, federal law.

The Santa Ana Water Board incorporates the prior discussion of the federal MEP standard herein. As with all of the Permit provisions, inclusion of the LID and hydromodifcation requirements that are more explicit than the federal NPDES storm water regulations is for the purpose of achieving compliance with the Clean Water Act's provision that MS4 permits require controls to reduce the discharge of pollutants to the MEP

(b) The LID and Hydromodification Provisions Do Not Create a New Program or Higher Level of Service

The 2009 Permit makes more specific the existing 2002 Permit requirements set forth in section XII to accomplish the same purpose of ensuring that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. Section XII of both the 2002 and 2009 Permits require revisions to the WQMP to include requirements for implementing structural and non-structural BMPs designed to control erosion and to otherwise protect water quality by setting performance metrics for the fate and transport of storm water. The challenged provisions in the 2009 Permit merely clarify the Santa Ana Water Board's framework for determining compliance with the MEP standard. Thus, the Permit does not impose a new program or higher level of service since it merely adds additional details in implementing the same minimum federal MEP standard.

(c) The ROWD Contains Commitments to Include Provisions Implementing LID and Hydromodification Principles

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[142] *Id.*, Finding of Fact No. 45, p. 32.

[143] *Id.*, Finding of Fact No. 65, pp. 45-46

[144] *Id.*, Finding of Fact No. 59, p. 42.

[145] *Id.*, Finding of Fact No. 60, p. 42.

The ROWD, submitted by the Co-Permittees, contains commitments to include provisions consistent with LID and Hydromodification principles. For example, Claimants agreed to:

> Develop recommendations (through cooperative Stormwater Monitoring Coalition project) for incorporation of LID techniques into resource and water quality protection requirements.[146]

Additionally, the ROWD contains the following acknowledgment:

> While the major development projects in Orange County have now been entitled, the Permittees recognize that hydromodification is an emerging issue of concern as the future regulation and management of runoff from urban areas is increasingly considered with respect to the overarching objective of the CWA, i.e. maintenance of the chemical, physical and biological integrity of the nation's waters.

Therefore, the ROWD emphasized the importance of the addressing LID and Hydromodification principles in the Permit, and the Permit provisions were developed on that basis.

(d) Municipal Development Projects are Not State Mandates Because Such Projects are Discretionary

In the San Diego MS4 Permit Decision, the Commission found that the San Diego County large municipal stormwater permit's LID and hydromodification requirements were not reimbursable state mandates when applied to municipal projects because the permittees were not obligated to undertake any of the construction projects.[147] The Commission should apply this holding to the challenged LID and hydromodification provisions and similarly conclude that the challenged provisions do not represent reimbursable state mandates because of the underlying discretion exercised by the Co-Permittees in constructing municipal projects.

3. Section XIII: Public Education Requirements

Section XIII of the Permit includes requirements for public education and outreach. Claimants contend six of the seven public education provisions constitute unfunded mandates because these provisions exceed federal law and are more comprehensive than similar education provisions contained in the 2002 Permit.

First, as an initial matter and as Claimants correctly note, federal regulations require the Co-Permittes to include a description of the programs for public education in the permit application.[148] When translating these application requirements into permit terms, the Santa Ana Water Board must comply with the MEP standard. As explained above, MEP is an

[146] ROWD, p. 7-5.

[147] San Diego MS4 Permit Decision, p. 45.

[148] 40 C.F.R. § 122.26(d)(2)(iv)(A)(6) and 122.26(d)(2)(iv)(B)(6).

iterative, evolving standard that requires new and more specific controls that reflect increased understanding of pollution problems and associated control measures. That the 2009 Permit, which is a fourth-term permit, contains additional or better-tailored requirements as necessary to achieve the federal MEP standard does not mean that the Permit is going beyond federal law, or imposing a new program or higher level of service.

Second, comparing the public education requirements in the 2002 Permit[149] with those in the 2009 Permit yields few discernible differences. In fact, it can be fairly stated that the 2009 Permit generally requires continuation and fine-tuning of the ongoing efforts developed pursuant to the 2002 Permit. The 2009 Permit requirements are consistent with Claimants' description of the public outreach program and recommendations for improvement.[150] Accordingly, the 2009 Permit contains requirements beyond those in the 2002 Permit, these additional provisions are consistent with suggested improvements contained in the ROWD.

4. Section XI: Reduction of Pollutants From Residential Facilities

Section XI of the Permit includes requirements to reduce pollutants from residential facilities. Claimants contend these provisions constitute unfunded mandates because they exceed federal law and are more comprehensive than similar provisions contained in the 2002 Permit.

As Claimants correctly note, federal regulations require the Co-Permittes to include a description of the structural and source control measures to reduce pollutant runoff from residential areas.[151] When translating these application requirements into permit terms, the Santa Ana Water Board must comply with the MEP standard. As explained above, MEP is an iterative, evolving standard that requires new and more specific controls that reflect increased understanding of pollution problems and associated control measures. That the 2009 Permit, which is a fourth-term permit, contains additional or better-tailored requirements as necessary to achieve the federal MEP standard does not mean that the Permit is going beyond federal law, or imposing a new program or higher level of service. Indeed, the fact that the ROWD clearly states that a Model Residential Program exists in compliance with the prior term San Diego MS4 Permit strongly indicates that a challenged provisions requiring such a program for the areas within the Santa Ana Water Board's jurisdiction are consistent with the iterative nature of the federal MEP standard.[152]

5. Sections IX and X: Municipal Inspections of Commercial and Industrial Facilities

Claimants challenge provisions requiring the implementation of a Geographical Information System ("GIS") program as part of municipal inspections of commercial and industrial facilities, as set forth in sections IX and X of the Permit. Claimants argue that these provisions are unfunded mandates because these provisions exceed federal law and are not contained in the 2002 Permit.

[149] 2002 Permit, section XIII.

[150] ROWD, section 6.0.

[151] 40 C.F.R. § 122.26(d)(2)(iv)(A)(6) and 122.26(d)(2)(iv)(A)

[152] ROWD, pp. 9-4, 9-10.

With regard to the use of GIS to allow the analysis of data in relation to the spatial positioning of that data, the inclusion of latitude and longitude information for industrial and commercial facilities in the databases produced by the Co-Permittees was first introduced as a recommendation in the 2002 Permit.[153] The 2002 Permit also required Co-Permittees to prioritize these site/facilities for inspection frequency.[154] One of the criteria included in the prioritization process was the proximity of the site/facility to its receiving waterbody and whether that receiving waterbody was an Environmentally Sensitive Area, be that an Area of Biological Significance, 303(d) listed impaired waterbody, or a waterbody with an adopted/approved TMDL.[155] The use of latitudes/longitudes of a facility and Environmentally Sensitive Areas would aid in the determination of the proximity of these areas in prioritization efforts.

Along with the ROWD, the Co-Permittees submitted a proposed Drainage Area Management Plan ("DAMP"), dated 2007.[156] The DAMP is a document that the Co-Permittees prepare, and update, as a roadmap for how the Co-Permittees will implement the applicable MS4 permit. The Co-Permittees provided the Proposed 2007 DAMP to advise Regional Board staff on how they envisioned their storm water program moving forward during the next permit term. That document included several uses of GIS. These uses included the mapping of Home Owner Association common areas, the mapping of Sensitive Environmental Areas,[157] and the 'optional' inclusion of latitude/longitude coordinates for industrial and commercial facilities in the inspection database.[158] Importantly, the 2007 DAMP proposed the prioritization methodology for industrial and commercial facilities inspections. That methodology specifically identifies the distance between the facility and a sensitive waterbody as one of the major factors in the prioritization ranking.[159] The proposed industrial and commercial facility prioritization system would partially rank facilities based on whether they were greater than 1 mile away from sensitive water, between 1 mile and 500 feet away from a sensitive water, or within 500 feet of a sensitive water. It is difficult to envision how this information would be calculated, recorded and documented for verification without the use of GIS. Thus, the challenged permit provisions flow directly from Claimants' proposal.

Additionally, as explained above, MEP is an iterative, evolving standard that requires new and more specific controls that reflect increased understanding of pollution problems and associated control measures. That the 2009 Permit, which is a fourth-term permit, contains additional or better-tailored requirements as necessary to achieve the federal MEP standard does not mean that the Permit is going beyond federal law, or imposing a new program or higher level of service.

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[153] 2002 Permit, pp. 21-22, 24.

[154] *Id.*, pp. 21-23, 25.

[155] *Ibid.*

[156] The DAMP, dated 2007, comprises approximately 400 pages. Specifically cited sections of the DAMP are attached to this response. The entire DAMP may be found at the following link: http://www.waterboards.ca.gov/santaana/water_issues/programs/stormwater/docs/ocpermit/2007/2007_damp.pdf

[157] *Id.*, § 9.5.3.1.

[158] *Id.*, § 9.2.1.3

[159] *Id.*, §§ 9.2.2.2 and 9.2.2.3

Conclusion

For all of the reasons set forth above, the Test Claim must be dismissed. The Claimants have not established that the Test Claim provisions impose new programs or higher levels of service on the Co-Permittees. Importantly, the Permit reflects the Clean Water Act's requirements for municipal storm water permitting. The Permit in its entirety, including the Test Claim provisions, reflects the federally mandated, federal minimum standard of reducing pollutants to the "maximum extent practicable." To the extent that any of the provisions exceed the MEP standard, they are independently required by federal law or properly included as requirements appropriate to control pollutants. Further, the Co-Permittees can pay for any costs associated with the requirements by levying service charges or fees. Finally, to the extent that any portion of the claims would otherwise qualify for subvention, the associated costs are *de minimis* and therefore do not warrant subvention.

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

Sincerely,

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Attachments

cc: Service List, Exhibit A to Proof of Service

Received
March 9, 2011
Commission on
State Mandates

PROOF OF SERVICE

I, Gabrielle Kolitsos, 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 March 9, 2011, I served the within documents:

SANTA ANA REGION WATER PERMIT – ORANGE COUNTY, TEST CLAIM NO. 09-TC-03 [CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION, ORDER NO. R9-2009-030, (NPDES NO. CAS618030)]

DISCHARGE OF STORM WATER RUNOFF, STORM WATER POLLUTION CONTROL REQUIREMENTS: RESPONSE TO TEST CLAIMS 09-TC-03 THROUGH 09-TC-17

	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.
	BY FIRST CLASS MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

Received
March 9, 2011
Commission on
State Mandates

TO:

Commission on State Mandates, 980 Ninth Street, Suite 300, Sacramento, CA 95814, by uploading a true copy thereof to the CSM Dropbox at the Commission on State Mandates' web site to be posted and the Commission on State Mandates to transmit notice via electronic mail to all parties and interested parties on its mailing list in accordance with the Commission on State Mandates' Procedures For Electronic Filing of Documents [Cal. Code Regs., tit. 2, § 1181.2, subd. (c)(1)(E)].

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 March 9, 2011, at Sacramento, California.

Gabrielle Kolitsos
Senior Legal Typist

Commission on State Mandates

Original List Date: 7/9/2010
Last Updated: 1/31/2011
List Print Date: 03/10/2011
Claim Number: 09-TC-03
Issue: Santa Ana Region Water Permit - Orange County

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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano 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 10, 2011, I served the:

Department of Finance Comments on Test Claim; and
State Water Resources Control Board Comments on Test Claim
***Santa Ana Region Water Permit*, 09-TC-03**
California Regional Water Quality Control Board, Santa Ana Region,
Order No. R8-2009-0030
County of Orange, Orange County Flood Control District, Cities of Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Huntington Beach, Irvine, Lake Forest, Newport Beach, Placentia, Seal Beach and Villa Park, 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 10, 2011 at Sacramento, California.

Heidi J. Palchik