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June 17, 2011

Nancy Patton, Acting Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Joint Narrative Statement by County and Other Claimants In Rebuttal to Santa Ana Regional Water Quality Control Board's and the Department of Finance's Responses to Test Claim 09-TC-03 Santa Ana Regional Water Permit – Orange County

Dear Ms. Patton:

Enclosed you will find the Narrative Statement with the Rebuttal to the response to the above captioned Unfunded Mandate Claim. We will also be mailing a hardcopy of this document and a disc containing electronic copies of the exhibits and authorities referenced in the rebuttal that were not included in the authorities provided the Commission when we filed our original claim.

This response is intended as the joint response on behalf of all the claimants. Interested parties are being served through the CSM Drop Box at the Commission on State Mandates' website.

Very truly yours,

NICHOLAS S. CHRISOS
COUNTY COUNSEL

By _____
Geoffrey K. Hunt, Supervising Deputy

GKH:da

Enclosure

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Narrative Statement in Rebuttal to Santa Ana Regional Water Quality Control Board's and the Department of Finance's Responses to Test Claim 09-TC-03 Santa Ana Regional Water Permit – Orange County

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I. INTRODUCTION

The Municipal and County Co-Permittees (the "Permittees") under Order No. R8-2009-0030 (NPDES No. CAS 618030) (the "2009 Permit" or "Permit") submit the following rebuttal to the responses to Test Claim 09-TC-03 filed by the Department of Finance for the State of California ("DOF") and by the State Water Resources Control Board ("State Water Board") and the Santa Ana Regional Water Quality Control Board ("Regional Board") jointly, collectively referred to herein as the "State."

The State's main argument in their Responses is that the 2009 Permit cannot constitute a state mandate because it was issued pursuant to the federal Clean Water Act ("CWA"). The State improperly equates its broad *authority* to impose requirements under state and federal law with the federal *mandate* to impose municipal NPDES permits but which leaves to the state discretion as to what requirements to include in those permits. This argument was previously raised before this Commission (after having been exhaustively briefed and argued) in a prior test claim and the Commission ruled against the State on this issue. In that prior test claim involving a very similar permit issued to municipalities in San Diego County the Commission held that parts of the San Diego permit constituted unfunded state mandates, this Commission recognized that "the federal Clean Water Act authorizes states to impose more stringent measures than required by federal law."[1] Accordingly, the Commission found that NPDES "permits may include state-imposed [measures], in addition to federally required measures. Those state measures . . . may constitute a state mandate if they 'exceed the mandate in . . . federal law.'"[2]

The Commission's finding on this issue in connection with the San Diego permit applies equally here. As set forth in Permittees' Narrative Statement and further explained in this Rebuttal, all of the challenged provisions of the 2009 Permit are new terms that are not required by federal law. All of the challenged measures were imposed by the Regional Board as an exercise of the admitted "discretion" of the Regional Board.

The State's remaining arguments are also without merit. For example, the State asserts that "none of the challenged provisions is subject to reimbursement because the 2009 Permit does not involve requirements imposed uniquely upon local government."[3] The State's argument relies on the fact that NPDES Permits are also issued to industrial dischargers. This argument is inconsistent with the Commission's prior decisions, including the San Diego test claim case mentioned above. The State's argument fails to acknowledge that the 2009 Permit governs discharges from municipal separate storm sewer systems and this type of permit may *only* be issued to governmental entities.[4] The State in fact recognizes in its Opposition the

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1 Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 41 (included within the "Rebuttal – Federal and State Cases, Statutes, Constitutional References and other Authority" submitted concurrently herewith).

2 Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 41 (finding individual permit terms must be analyzed "to determine whether the state requirements exceed the federal requirements imposed on local agencies").

3 Board Response, p. 17.

4 *See* 40 Code of Federal Regulations section 122.26(b)(8).

difference between the 2009 Permit and permit governing industrial operations. In their Opposition the State states, "[w]hile both industrial dischargers and MS4s must obtain permits, the requirements in the industrial permits must be more stringent than the MS4 permits."[5]

Equally baseless is the State's assertion that "neither federal nor state law requires that parties discharge to waters of the United States. 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."[6] This argument by the State assumes that the Permittees have the ability to stop the rain from falling, and to lawfully prohibit and prevent all non-rain water discharges from entering into and being discharged from their MS4 systems.

Lastly, the State's claim that Permittees were required to take their unfunded claims to the State Water Board first is not supported by the plain language of the California Government Code that clearly provides that a test claim is the "sole and exclusive procedure by which a local agency" may bring an unfunded mandate claim.[7] Likewise, the State's argument that the Permittees have the ability to collect fees to pay for the programs at issue is not supportable in light of Constitutional provisions severely restricting the Permittees' ability to charge fees and case law interpreting those Constitutional restrictions as they apply to stormwater related fees.[8]

In short, there is no basis for the State's assertion that the challenged provisions are anything other than unfunded State mandates, for which Permittees are Constitutionally entitled to reimbursement.

II. CALIFORNIA'S STORMWATER REGULATORY STRUCTURE

Before specifically addressing the State's Responses, it is important to again emphasize the origin and structure of the State regulatory scheme as well as the more limited scope of the applicable federal law.

California adopted the Porter-Cologne Water Quality Control Act ("Porter-Cologne") in 1969, three years prior to the adoption of the Clean Water Act ("CWA") and eighteen years before federal law expressly regulated municipal separate storm sewer systems ("MS4s"). When it adopted the Porter-Cologne Act in 1969, the Legislature made the express finding that California had to be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the state from degradation originating inside or outside the boundaries of California. The Legislature further found that a framework of statewide coordination and policy, with regional administration, was the most effective way to achieve its goal.

On the other hand, the regulatory scope of the CWA and its National Pollutant Discharge Elimination System ("NPDES") program is more limited than the comprehensive statewide program enacted through Porter-Cologne. The CWA took a federalist approach to water quality

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5 Board Response, p. 6.

6 Board Response, p. 12.

7 Gov. Code § 17552, emphasis. Added.

8 *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1355-58; California Constitution, Article XIII C.

regulation and allowed states to both operate major programs under the Act and enforce more stringent state standards. Thus, California elected to graft the CWA's NPDES program into its existing regulatory structure. For example, Porter-Cologne provides broader authority to regulate non-point sources of pollution such as urban and agricultural runoff, discharges to ground water and discharges to land overlying ground water. Similarly, Porter-Cologne's regulatory structure extends this broader authority to all waters of the State, not just to those waters that qualify as waters of the United States. Therefore, Porter-Cologne not only establishes broader regulatory authority than does the CWA, but also extends that broader regulatory authority to a larger class of waters.

California's expansive and comprehensive system for protecting water quality is implemented primarily through a permitting process in which nine Regional Boards issue "waste discharge requirements" to dischargers, pursuant to statewide requirements and policies established by the State Water Board. These "waste discharge requirements" and accompanying discharge prohibitions apply to both surface water and ground waters.[9] The CWA, however, only applies to surface waters.[10]

The various regional boards have acknowledged in official documents that many of the requirements of MS4 permits exceed the requirements of federal law and are, therefore, based on the broader authority of Porter-Cologne. For example, in a December 13, 2000 staff report to the San Diego Regional Water Quality Control Board regarding the draft 2001 Permit, the San Diego Regional Board's own staff concluded that 40% of the draft permit requirements "exceed the federal regulations" because they are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.[11]

Section 402(p)(3)(B) of the CWA provides that permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." For a state such as California that administers the NPDES program in conjunction with a broader state regulatory program, this portion of ***the CWA must be read in conjunction with Section 510 of the Act, which reserves to the states the authority to adopt state law requirements that are more stringent than the federal law***.

It is this broader State law regulatory structure that provides California with the statutory authority to impose additional requirements than those specified under federal law, namely the regulations to the CWA. In *Burbank v. State Board, supra,* 35 Cal. 4th 613, 620, the California Supreme Court expressly recognized that not everything in an NPDES permit is required by federal law when it found that under the CWA, "each state is free to enforce its own water

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9 Cal. Water Code § 13050.

10 See *Rice v. Harken Exploration Co.* (5th Cir. 2001) 250 F.3d 264, 269 ["Ground waters are not protected waters under the CWA."]

11 See San Diego Regional Board Staff Report, p. 3, ¶ 14, included as Exhibit 18 to the Miscellaneous Authorities included with the Test Claim. All Exhibit references hereinafter will be to exhibits in either the initially submitted Miscellaneous Authorities or in the Rebuttal Miscellaneous Authorities.

quality control laws," so long as its requirements are not less stringent "than those set out in the [Clean Water Act]."[12]

Given the broad regulatory structure of Porter-Cologne, Congress' clear intent under the CWA to allow states to impose requirements not contained in federal law, and given the consistent acknowledgement of the broader authority established by Porter-Cologne, the State's contention that all the conditions of the 2009 Permit are "mandated" by federal law is without merit. The Regional Board only had the power to issue the Permit through the combined authority of federal and State law.[13] When, in the exercise of its discretion under such laws, it elects to impose terms and conditions that exceed the requirements of the CWA, it must use State law as the basis of its authority and must comply with applicable State law requirements, including Article XIII B, section 6 of the California Constitution.

As explained in more detail in the Test Claim and in this Rebuttal, the State has exceeded the requirements of federal law in a number of areas. While the State may have the authority to impose these conditions under State law, the California Constitution requires that the State must pay for these State mandated programs.

III. STANDARD OF REVIEW

Article XIII B section 6 of the California Constitution requires the Legislature to reimburse local government agencies, including the Permittees, whenever it imposes a new program or higher level of service:

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

[12] See also *City of Arcadia v. EPA* (9th Cir. 2005) 411 F.3d 1103, 1107 ["So long as the State does not attempt to adopt lenient pollution control measures than those already in place under the Act, the Clean Water Act does not prohibit State Action."].

[13] See *Burbank v. State Board* (2005) 35 Cal.4th 613, 618-621.

The California Legislature created the Commission on State Mandates ("Commission") to adjudicate disputes over the existence of a state mandated program and to adopt procedures for submission and adjudication of reimbursement claims.[14] Pursuant to Commission regulations, before the hearing on the test claim, Commission staff is required prepare a final written analysis of the test claim.[15] The final staff analysis is required to describe and analyze the test claim to assist the commission in determining whether the alleged statutes or executive orders contain a reimbursable state-mandated program under Article XIII B, section 6 of the California Constitution.[16] As in court proceedings, the moving party—that is, the party asserting the claim or making the charges—generally has the burden of proof in an administrative hearing.[17]

Because administrative proceedings are civil in nature,[18] the standard of proof used in most cases is a preponderance of the evidence.[19] The question of whether a statute or executive order is a State-mandated program or higher level of service under Article XIII B, Section 6 of the California Constitution, however, is a question of law.[20] Generally any new program or higher level of service will qualify for reimbursement[21] unless the Commission first finds that one or more of the following apply:

> (a) The claim is submitted by a local agency or school district that requests or previously requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this subdivision.

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14 Cal. Gov. Code §§ 17525, 17551, 17553, 17557.

15 2 Cal. Code Regs § 1183.07(a).

16 2 Cal. Code Regs § 1183.07(a).

17 *Schaffer v Weast* (2005) 546 US 49; *Bode v Los Angeles Metro. Med. Ctr.* (2009) 174 Cal.App.4th 1224, (in hospital peer review disciplinary proceeding, hospital bears burden of proof unless doctor has not yet been granted staff privileges); *Brown v City of Los Angeles* (2002) 102 Cal.App.4th 155; *Parker v City of Fountain Valley* (1981) 127 Cal.App.3d 99; *Pipkin v Board of Supervisors* (1978) 82 Cal.App.3d 652

18 *Hughes v Board of Architectural Exam'rs* (1998) 17 Cal.4th 763, 784.

19 See Evid Code §115 [preponderance of evidence standard]; see also *Skelly v State Personnel Bd.* (1975) 15 Cal.3d 194, [dismissal of state-employed medical consultant]; *Owen v Sands* (2009) 176 Cal.App.4th 985, 989 [citation proceeding imposing civil penalties against contractor]; *Gardner v Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035, 1039 [dismissal of teacher]; *Perales v Department of Human Resources Dev.* (1973) 32 Cal.App.3d 332 [denial of unemployment benefits]; *Pereyda v State Personnel Bd.* (1971) 15 Cal.App.3d 47 [state action against employee]].

20 *City of Richmond v. Comm'n on State Mandates* (1998) 64 Cal.App.4th 1190, 1195; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810.

21 See Cal. Gov. Code § 17514.

(b) The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.[22]

When a new program or higher level of service is only in part federally required, courts have held that the authority to impose the condition does not equate to a federal order or mandate to impose the entire condition. This principle was expressly recognized in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564. In that case, the Appellate Court held "[i]f the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[23] As a result, when a state agency exercises "discretion" in choosing which requirements to impose in an executive order, those aspects that were not strictly required by the federal scheme are state mandates. (*Id*.)

Similarly, when a State law or order mandates changes to an existing program that requires an increase in the actual level or quality of governmental services provided, that

[22] Cal. Gov Code § 17556.

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

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increase will represent a "higher level of service" within the meaning of Article XIII B § 6 of the California Constitution. For example, in *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155 ("*Long Beach*"), an executive order required school districts to take specific steps to measure and address racial segregation in local public schools. The Appellate Court held that this requirement constituted a "higher level of service" to the extent the order's requirements exceeded federal requirements by mandating school districts to undertake defined remedial actions that were merely advisory under prior governing law.[24]

The DOF in its Response asserted that "[u]nlike the situation in *Long Beach*, federal law requires NPDES permits to include ***specific requirements***. Because federal law requires ***specific provisions*** in a NPDES permit, and the permit was issued consistent with that federal requirement, the permit is a federal mandate and not a State reimbursable mandate." (DOF Response, p. 2.) The DOF unwittingly makes the Permittees argument by conceding that it is only where "federal law ***requires*** NPDES permits to include ***specific requirements***" that the mandate in question can properly be characterized as a federal mandate, meaning in the absence of such a "***specific requirement***," the mandate is a State mandate, not a federal one. Here, as discussed in detail below, none of the mandated Permit terms in issue are "specific requirements" imposed under any federal law, and the State admits as much when it argues that the various Permit terms in issue "are not expressly stated in the federal CWA." (DOF Response, p. 1.)

The State's response confuses the issue through the use of selective language. For example, the DOF argues that the "provisions of the permit do not exceed federal law even though they are not expressly stated in the CWA."[25] The State is seeking to shift the focus of the issue from what federal law "specifically requires" to what federal law expressly "allows." As discussed herein, and as held by the California Supreme Court in *Burbank v. State Board*, *supra*, 35 Cal. 4th 613, 628, the CWA "does not prescribe or restrict the factors that a state may consider" when imposing permit terms. In effect, CWA "allows" a State to impose permit terms that are not required by federal law, so long as those terms are not in conflict with federal law.[26] Thus, the only conclusion that matters in this Test Claim on this issue is whether the Permit terms in issue are themselves "specifically required" by federal law, which, as admitted by the State in their briefing, they are not.[27]

Because the State has failed to show that any of the above listed exceptions apply to the 2009 Permit, the Permittees are entitled to a subvention of funds for all aspects of the 2009 Permit that exceed the requirements of federal law.

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

[25] DOF Response, p. 1.

[26] See *City of Arcadia v. EPA*, *supra*, 411 F3d 1103, 1007 [outside of imposing conflicting more lenient standards, "the Clean Water Act does not prohibit State Action."].

[27] DOF Response, p. 1 ["They are not expressly stated in the CWA"].

IV. THE STATE'S CLAIM THAT ALL CLEAN WATER ACT PERMIT TERMS IT DECIDES TO IMPOSE ARE REQUIRED UNDER FEDERAL LAW IS BASELESS

The Board makes two related but contradictory arguments in contending that all of the 2009 Permit terms are mandated by the Clean Water Act. First, the Board claims that although it admittedly has complete ***discretion*** in determining what is required in a stormwater permit under the "maximum extent practicable" or "MEP" standard, it is "mandated" to exercise that "discretion," and thus, any CWA permit term it concludes is necessary to protect water quality is required by federal law.[28]

Second, the Board argues (inconsistently) that to the extent it imposes any provisions in the Permit that go beyond the MEP standard, said provisions are nonetheless required by federal law because, according to the Board, the CWA requires that the Board exercise its discretion to go beyond MEP as necessary to control pollutants.[29] Neither of these arguments is supported by the facts or the law.

A. The Authority To Impose Requirements Under State And Federal Law Does Not Equate To A Federal Mandate

California law is clear that whenever the State exercises its discretion to impose a new program or higher level of service, that program or service will represent a state mandate even if it is imposed as part of a federally mandated regulatory scheme. Thus, the authority to exceed federal requirements does not equate to a federal mandate to impose the condition. This principle was expressly recognized in *Long Beach Unified School Dist. v. State of California*, (1990) 225 Cal.App.3d 155. In that case, the court found that an executive order that required school districts to take specific steps to measure and address racial segregation in local public schools constituted a reimbursable mandate to the extent the order's requirements exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial actions and measures that were merely advisory under the prior governing law.[30] There was no question that the State had the authority to impose the challenged requirement, and yet the authority to impose the requirement did not equate to federal mandate.

The Commission's decisions on other municipal NPDES permits have likewise recognized that the authority to impose a requirement does not equate to a federal mandate. In its decision on Test Claim 07-TC-09, regarding the San Diego County municipal NPDES permit the

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[28] See, *e.g.*, Board Response, p. 7 ["The NPDES permitting program ***mandates*** that the permitting agency exercise ***discretion*** and choose specific controls, generally BMP's, to meet a legal standard."], p. 9 ["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."].

[29] See, *e.g.*, Board Response, p. 10 ["Thus, even if the Commission finds that any permit provision goes beyond MEP, the Santa Ana Water Board ***was bound by the federal mandate*** to include appropriate provisions necessary to control pollutants."]; p. 24 [arguing that the 2009 Permit terms are federal mandates "even if the Commission finds that the challenged provisions exceed the requirements of the MEP standard."].

[30] *Long Beach Unified School Dist. v. State of California*, *supra*, at 173.

Commission addressed this issue in the context of the United States Supreme Court's decision in *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700. The Commission held:

> Staff agrees with claimants about the applicability of the P.U.D. case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. ***Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it.*** This was not addressed in the P.U.D. decision.
>
> Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation." As in *Long Beach Unified School Dist. v. State of California*, the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen to impose these requirements. Thus, staff finds that part D.1.g. of the permit is not a federal mandate.[31]

As the State concedes, it is only where "federal law requires NPDES permits to include "specific requirements"[32] that the State can avoid having to pay the Permittees to fund the mandate. None of the challenged programs in the 2009 Permit are specifically required by the CWA or its implementing regulations. For that reason, the State's claim that all of the required permit conditions are federally mandated is without merit.

B. The Board Has A "True Choice" In Deciding What Permit Terms To Impose To Meet The Maximum Extent Practical Standard.

The Board admits that it has virtually unlimited "discretion" to determine what is required by MEP, asserting that because "[t]he MEP approach is an ever evolving, ***flexible***, and advancing concept," the Board "is entitled to ***considerable deference*** in its determination of what

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[31] Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 45 [internal citations omitted].

[32] DOF Response, p. 2.

practices are within the federal minimum requirements."[33] Further, the Board admits: "This [MEP] standard has not changed since first established in the CWA."[34]

The Board's contention that all permit terms are federal mandates because federal law "mandates" that the Board exercise its "discretion" to impose permit terms is nonsensical. By definition, having "discretion" to impose a permit term means the permit term is not "mandated" by federal law. "Discretionary acts are those wherein there is no hard and fast rule as to the course of conduct that one must or must not take and, if there is a clearly defined rule, such would limit the discretion."[35]

Further, the law is clear that unless the CWA or the federal regulations expressly require a particular permit term, the Board has wide discretion in imposing permit requirements. For example, in their Response Brief, the Board cites to the Court of Appeal decision in *Rancho Cucamonga v. Regional Water Quality Control Board, Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389 ("*Rancho Cucamonga*") as support for the proposition that federal law "mandates" that the Water Boards prescribe Best Management Practices ("BMP's") for the Permittees to implement. (Response, p. 13, fn. 68.) Yet a review of the *Rancho Cucamonga* decision, particularly those portions quoted in the Board's Response, shows that the case stands for the exact opposite conclusion.

In *Rancho Cucamonga*, the Court of Appeal held that for municipal NPDES permits: "The Act authorizes States to issue permits with conditions necessary to carry out its provisions. [Citation] ***The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants***."[36] Similarly, as recognized in the Board's Response, in *Natural Resources Defense Council v. U.S. EPA* (Ninth Cir. 1992) 966 F.2d 1292, the Ninth Circuit Court of Appeal found that when it comes to municipal stormwater dischargers, "***Congress did not mandate a minimum standards approach***."[37] Indeed, as acknowledged by the Board in its Response Brief, on more than one occasion this Commission has previously found that various terms of similar MS4 Permits exceed federal requirements and thus constitute unfunded State mandates.[38]

The plain language of the Act shows precisely what it requires, *i.e.*, the Board "shall require controls to reduce the discharge of pollutants ***to the maximum extent practicable*** … and such other provisions ***as the Administrator or the State determines appropriate*** for the control

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33 Board Response, pp. 8-9; see also, *Divers' Environmental Conservation Organization v. State Water Resources Control Board* (*"Divers' Environmental"*) (2006) 145 Cal.App.4th 246, 251 ["Congress intended to permit the EPA and permitting authorities ***wide discretion*** in regulating runoff."].

34 Board Response, p. 11.

35 *Elderverse v. Anderson* (1962) 205 Cal.App.2d 326, 331; see also *Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, 942-43 ["A discretionary act is one which requires 'personal deliberation, decision and judgment' while an act is said to be ministerial when it amounts but only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own."].

36 *Cucamonga v. Regional Water Quality Control Board, Santa Ana Region, supra,* at p. 1389.)

37 *Natural Resources Defense Council v. U.S. EPA, supra,* at p. 1308.

38 See Board Response, pp. 11, 17.

of such pollutants."[39] As such, the only mandate required of the Board when developing NPDES permits is compliance with the general MEP standard, and, as recognized by controlling law and the Board itself, the Board has "***wide discretion***" in determining what permit terms to include to meet the MEP standard. (*See* Response, p. 8 ["The MEP approach is an ever evolving, ***flexible***, and advancing concept, which considers ***technical and economic feasibility***."]; and p. 32 [the CWA "allows the Santa Ana Board ***discretion*** to include appropriate provisions to control pollutants."].)

Congress deliberately determined that stormwater permits be required to reduce pollutants only to "the maximum extent practicable" based on its recognition of the difference between stormwater discharges and traditional point source (industrial) discharges and its acknowledgment of the difficulty of controlling pollutants in stormwater.[40] In a February 11, 1993 Memorandum issued by the State Board's Office of Chief Counsel by Elizabeth Jennings (the "MEP Memo"), the chief counsel's office examined the meaning of the term "maximum extent practicable."[41] After noting that neither Congress nor US EPA had defined the term "MEP," the MEP Memo found that the following factors should be considered in making a determination on whether a BMP is consistent with the "MEP" standard:

1. Effectiveness: Will a BMP address a pollutant of concern?

2. Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?

3. Public acceptance: Does the BMP have public support?

4. **Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefit to be achieved?**

5. **Technical feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?**[42]

The Chief Counsel's office further recognized as follows in discussing the MEP Standard:

> **On its face, it is possible to discern some outline of the intent of Congress in establishing the MEP standard. First the requirement is to <u>reduce</u> the discharge of pollutants, rather than totally prohibit such discharge. Presumably, the reason for this standard (and the difference from the more stringent standard applied to industrial dischargers in Section**

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39 33 U.S.C. §1342(p)(3)(B)(iii).

40 See *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165 [discussed below].

41 <u>Exhibit 21</u>, MEP Memo.

42 <u>Exhibit 21</u>, MEP Memo, pp. 4-5, emphasis added.

> **402(p)(3)(A)), is the knowledge that it is not possible for municipal dischargers to prevent the discharge of all pollutants in storm water**.[43]

The MEP Memo is consistent with the Board's own recognition that MEP is to be "flexible" and must take into consideration "technical and economic feasibility." (Response, p. 8.) The factors spelled out in the MEP Memo, *i.e.*, a consideration of the BMP's effectiveness, its public acceptance and whether the BMP is economically and technically feasible, all require the Board to exercise its discretion when evaluating a BMP for inclusion in a municipal stormwater permit such as the 2009 Permit. Given the wide discretion the Board is required to exercise in selecting permit terms, the claim that the Boards were "mandated" by federal law to impose the precise permit terms in issue is an absurd contention.

Given the "wide discretion" and "flexibility" the Board has in developing permit terms under the MEP standard, as well as the fact that the Board may impose controls that go beyond the MEP standard as it "determines appropriate,"[44] the Board plainly had a "true choice" when developing the 2009 Permit terms that are the subject of this Test Claim.

As discussed above, in *Hayes v. Commission on State Mandates*, *supra,* 11 Cal.App.4th 1564 ("*Hayes*"), the Court of Appeals established the standard for the Commission to follow when determining whether a State mandate is required under federal law, particularly when a general federal requirement is imposed upon the State. Specifically, the Court found as follows:

> When the federal government imposes costs on local agencies, those costs are not mandated by the State and thus would not require State subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. **This should be true even though 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 the implementation of the federal mandate**….
>
> **[T]he reasoning would not hold true where the manner of implementation was left to the true discretion of the State.**

Here, the Board has repeatedly admitted it has the "discretion" to develop NPDES permit terms in accordance with the MEP standard, but asserts that it is "required" to exercise that discretion as needed to meet the MEP standard. Under the Court's holding in *Hayes*, however, a mandate is considered a state mandate even where it is designed to comply with an overarching general federal requirement (such as meeting the "MEP" standard), so long as the State has a "'***true choice' in the manner of implementation of the federal mandate***." As put another way by the Court in *Hayes*, where ***"the manner of implementation of the federal program was left to***

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[43] Exhibit 21, MEP Memo, p. 2, underline in original, bolding added.

[44] 33 U.S.C. § 1342(p)(3)(B)(iii).

the true discretion of the State," the mandate is a State mandate, not a federal one, and thus must be funded under the California Constitution.

C. The Challenged Permit Terms Exceed The Requirements Of Federal Law

California Government Code section 17556 provides that a new program or higher level of service is a reimbursable state mandate if it is implemented as part of a federal program but exceeds the requirements of that program. Section 17556(c) states:

> The commission shall not find costs mandated by the state . . . if, after a hearing, the commission finds any one of the following:
>
> * * *
>
> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, **unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation**.[45]

Because all of the challenged portions of the 2009 Permit exceed the requirements of federal law, they are state mandates for which the Cities are entitled to a subvention of funds. Section 402(p)(3)(B) of the CWA states:

> (B) Municipal discharge. Permits for discharges from municipal storm sewers
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

Thus the only mandate imposed by the CWA itself is compliance with the general "maximum extent practicable" or "MEP" standard. US EPA, and in California, the State, have "wide discretion" in determining what permit conditions are required under the MEP standard.[46] In California, as in most states, the State retains the authority to impose requirements that exceed the strict requirements of the CWA and its implementing regulations.

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45 Cal Gov Code § 17556(c) [emphasis added].

46 See Board Response, p. 8; and p. 32.

The State's discretion on this issue was described by the Ninth Circuit Court of Appeals decision in *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159. There, the Ninth Circuit held that the US EPA (or a state implementing agency) has the authority to impose numeric effluent limits in MS4 Permits, but that Congress did not mandate effluent limits if the US EPA (or the state implementing agency) determined they were not necessary.[47] The Ninth Circuit made clear that Congress did not impose a "minimum standards approach" on US EPA or the states when it created the MEP standard, and that US EPA had the discretion to choose which programs to include in its regulations establishing minimum requirements for MS4 permits.[48]

The Ninth Circuit also implicitly recognized that although Congress did not create a "minimum standards" approach when passing the CWA, the US EPA did when it issued regulations for the baseline requirements for Large MS4 permits.[49] Both the CWA and the US EPA's own regulations expressly state that state programs can and often do exceed the minimum requirements of federal law.[50] US EPA regulations on certification of state programs state:

> (i) Nothing in this part precludes a State from:
>
> (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;
>
> (2) Operating a program with a greater scope of coverage than that required under this part. **If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program**.[51]

This relationship between the mandatory requirements of federal law and the more expansive authority provided by state law has also been recognized by the California Supreme Court. In *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613 the California Supreme Court held:

> When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit **more stringent than federal law requires**, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance.

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47 *Defenders of Wildlife v. Browner*, *supra*, at pp. 1166-67.

48 *Id*.

49 See *Natural Resources Defense Council, Inc. v. United States EPA* (1992) 966 F.2d 1292, 1308; *see also Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1166-67 [citing *id*.].

50 See CWA section 510.

51 40 CFR § 123.1(i) [emphasis added].

* * *

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "less stringent" than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state—when imposing effluent limitations that are more stringent than required by federal law—from taking into account the economic effects of doing so.[52]

The analysis of whether a federal mandate exists therefore requires an analysis of what standards Congress and the federal government have required for inclusion in MS4 permits. For MS4 Permits, that is the plain language of the Clean Water Act, and its associated regulations. Any requirements that exceed those specific federal mandates are State mandates for which the Cities are entitled to reimbursement.

D. EPA Guidance Documents Are Merely Advisory

Despite the clearly discretionary nature of the 2009 Permit, the State argues that those requirements in the Permit that are not expressly required by the CWA or its implementing regulations are required to comply with EPA guidance documents, and thus represent a federal mandate. The State further claims that the same requirements would be imposed directly by US EPA if the State did not act as the permitting authority within California. As described more fully below, these claims are not supported by the plain language of the US EPA Guidance the State relies upon.

There is no question that without the State of California's voluntary decision to have the State Water Resources Control Board and the individual Regional Water Quality Control Boards administer the NPDES program in California, NPDES permits would be issued directly by the US EPA.[53] However, the fact that the Permittees would be required to obtain an NPDES permit from US EPA does not mean every permit requirement is federally mandated. US EPA has never stated that the 2009 Permit includes every requirement that it would impose if it were the permitting authority. Moreover, US EPA is very clear that even the suggested programs in the guidance documents upon which the State relies are merely advisory. For example, US EPA's MS4 Permit Improvement Guide expressly states that the guidance contained within the manual is not mandatory:

> **The permit language suggested in this Guide is not intended to override already existing, more stringent or differently-worded provisions** that are equally as compliant in meeting the applicable regulations and protective of water quality standards. EPA expects

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52 *City of Burbank v. State Water Resources Control Bd., supra,* at pp. 618, 628.

53 40 CFR § 123.1; 33 USC 1342(p); Regional Board Response, p. 16.

> the permitting authority to ensure that the intent of all applicable regulations is captured in the permit. States with more stringent permit provisions should continue to strengthen these provisions as the permits are reissued. This Guide includes suggestions on how to develop permit language for MS4 permittees. **This Guide does not impose any new legally binding requirements on EPA, States, or the regulated community, and does not confer legal rights or impose legal obligations upon any member of the public.** In the event of a conflict between the discussion in this Guide and any statute, regulation, or permit the statute, regulation or permit controls.[54]

The US EPA guidance in place at the time the Regional Board drafted the 2009 Permit also acknowledged the advisory nature of the guidance documents and the flexibility the State has in choosing which requirements to impose in an MS4 permit:

> Each permittee may have a different approach to complying with a specific permit requirement based on MS4-specific traits or issues. For example, EPA regulations require permittees to develop "procedures for site inspection and enforcement" for addressing construction activities. MS4 permits will likely elaborate on this requirement in more detail, such as by specifying a minimum frequency for inspection. However, few MS4 permits will specify how the permittee should inventory their active construction projects or track enforcement activities. A permittee with only a few construction projects a year may be able to use a paper system to inventory and track construction projects.[55]

Applicable guidance on incorporating TMDLs into municipal storm water permits that was also in place at the time the 2009 Permit was drafted includes similar caveats:

> This document provides technical information to TMDL and NPDES practitioners who are familiar with the relevant technical approaches and legal requirements pertaining to developing TMDLs and NPDES stormwater permits, and refers to statutory and regulatory provisions that contain legally binding requirements. **This document does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally binding requirements on EPA or**

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[54] Exhibit 19, United States Environmental Protection Agency Office of Water, Office of Wastewater Management, Water Permits Division, MS4 Permit Improvement Guide, April, 2010, p. 3. (Exhibits 1-18 were included with the initial Test Claim filing under Section 7. Exhibits 19 and following will be included under a separate cover as Rebuttal Miscellaneous Authorities.)

[55] Exhibit 20, US EPA Office of Wastewater Management, MS4 Program Evaluation Guidance, January, 2007, p. 3.

> **States**, who retain the discretion to adopt approaches on a case-by-case basis, that differ from this information. Interested parties are free to raise questions about the appropriateness of the application of this information to a particular situation, and EPA will consider whether or not the technical approaches are appropriate in that situation.[56]

As a result, the Regional Board's claim that it was required to impose requirements in the 2009 Permit that exceed federal law in order to comply with US EPA Guidance is baseless. The guidance relied upon is entirely advisory, and in no way mandatory. Moreover, the US EPA routinely encourages state implementing agencies to include programs in municipal NPDES permits that the US EPA has questionable authority to impose. As stated in the most recent EPA NPDES permit writer's guide:

> **EPA encourages states, where possible, to go beyond these example provisions and to achieve even better watershed planning and water quality outcomes**. For these reasons, this chapter presents the minimum permit provisions EPA currently recommends to be included in permits in order for permittees to reduce their discharges to the maximum extent practicable as well as the optional, more stringent, requirements.[57]

The US EPA guidance in place at the time the 2009 Permit was drafted includes similar acknowledgements:

> This Guidance is intended to provide information to evaluators to help them objectively evaluate if the permittee is implementing the SWMP to the MEP. This is going to vary from state to state and by permittee. **For example, some states have requirements that go beyond the federal regulations**, or have state programs or policies that affect the way in which certain requirements are articulated in a permit.[58]

One example of this phenomenon is the Permit's hydromodification requirements. The State's Response specifically calls out the Commission's past decisions on hydromodification as failing to consider the MEP standard. The State flatly ignores the discretionary nature of the hydromodification requirements, and the fact that volume-based controls aimed strictly at limiting the volume of water leaving a project site exceed the scope of the NPDES program.

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[56] Exhibit 3, US EPA, TMDLs to Stormwater Permits Handbook, November 2008, p. ii; *see also* discussion on TMDLs in Section VI.A.3, *infra*.

[57] Exhibit 19, US EPA Office of Water, Office of Wastewater Management, Water Permits Division, MS4 Permit Improvement Guide, April, 2010, p. 50.

[58] Exhibit 20, US EPA Office of Wastewater Management, MS4 Program Evaluation Guidance, January, 2007, p. 3.

The CWA was designed to preserve and restore the biological integrity of the nation's waters.[59] To help achieve this goal, Congress required all persons or entities that discharge pollutants into a Water of the United States to obtain an NPDES permit.[60] NPDES permits for discharges from MS4s must include requirements to reduce ***the discharge of pollutants*** to the maximum extent practicable.[61] In contrast, hydromodification requirements are designed to limit the volume of water that leaves a developed site, regardless of the pollutant load that the water contains.[62] Hydromodification requirements therefore exceed the scope and intent of the NPDES program. US EPA nonetheless encourages state agencies to include hydromodification requirements in municipal NPDES permits.[63]

US EPA's guidance documents on MS4 permits clearly state that the suggested requirements contained in the guidance are merely advisory and do establish federal mandates. Accordingly, the State's claim that everything in the 2009 Permit is a federal mandate and is necessary to comply with US EPA guidance is without merit.

E. The State's Claim That Federal Law Requires The Board To Impose Permit Terms That Go Beyond The MEP Standard Is Baseless.

The Board's second argument, that federal law mandates that the Board impose requirements that go beyond the MEP standard, is even more egregious than its MEP argument. According to the Board, federal law requires that it go beyond the MEP standard "***as the permit writer determines appropriate*** for the control of pollutants."[64]

The Board's acknowledgement that it has "discretion" regarding whether to impose permit terms that go beyond the MEP standard (*e.g.*, requiring strict compliance with numeric limits in a TMDL, rather than requiring its implementation through the use of deemed compliant BMPs) is an admission that going beyond the MEP standard is ***not*** required by federal law.[65] Simply put, the Board cannot plausibly claim that it has "no true choice" regarding whether to impose permit terms that are admittedly "discretionary."

Moreover, despite its argument that the Permit terms are federal mandates "even if the Commission finds that any Permit provisions go beyond MEP"[66], elsewhere the Board tacitly

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59 33 USC § 1251(a).

60 33 USC § 1342(a)(1).

61 33 USC § 1342(p)(3)(B)(iii).

62 2009 Permit pp. 22-23; see also 2009 Permit Fact Sheet p. 22.

63 See Board Response p 35 [citing US EPA comments at permit adoption hearing].

64 Board Response, p. 9; see also p. 10 ["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"]), p. 28 ["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."].

65 See, e.g., Board Response, p. 32 ["Furthermore, as explained previously, CWA section 402(p)(3)(B)(ii) allows the Santa Ana Water Board ***discretion*** to include appropriate provisions to control pollutants."].

66 Board Response, pp. 10, 24, 28.

admits that those permit terms that exceed MEP are not federal mandates.[67] If the Board truly believed that federal law required it to go beyond MEP in adopting permit terms, it would not be arguing that the State Board should have first "determined whether the provisions of the permit exceed the MEP standard," but that the State Board was required to determine whether such provisions exceed federal requirements. The Board's claim that federal law requires that the Board go beyond the MEP standard is meritless because, on its face, the CWA does not so require. Further, the Board has cited absolutely no authority of any kind that supports the proposition that the Act requires the Board to impose any requirements that go beyond the MEP standard.

In fact, as discussed in the Permittees' Narrative Statement and in this Rebuttal, the opposite is true. The Courts have repeatedly held that federal law only requires controls be included in municipal NPDES Permits "to reduce the discharge of pollutants to the maximum extent practicable," and have explicitly held that requiring Permittees to comply with numeric limits, from a TMDL or otherwise, is not required by the Clean Water Act.[68]

In *City of Burbank v. State Water Resources Control Board*, *supra*, 35 Cal.4th 613 ("*Burbank*"), the California Supreme Court clearly confirmed that not everything in an NPDES permit is required by federal law. In fact, according to the *Burbank* Court, "each state is free to enforce its own water quality control laws," so long as its requirements are not less stringent "than those set out in the [Clean Water Act]."[69] The *Burbank* Court went on to find that the California Porter-Cologne Act provides California with broader authority to regulate water quality than the State would have if it were operating exclusively under the Clean Water Act, finding:

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (33 U.S.C. § 1370, italics added). **It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority. . .**[70]

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[67] See, e.g., Board Response, pp. 18 ["Claimants' challenge to the Permit requires a finding that permit provisions exceed the ***minimum federal requirements established by the MEP standard***"], and p.19 [arguing "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.***"

[68] See e.g., *Divers' Environmental Conservation Organization v. State Water Resources Control Board* (*"Divers' Environmental"*) (2006) 145 Cal.App.4th 286, 261 [holding "it is now clear that in implementing numeric water quality standards, … ***permitting agencies are not required to do so*** solely by means of corresponding ***numeric WQBELs***" and that, "Congress intended to permit the EPA and permitting authorities ***wide discretions*** in regulating stormwater runoff."]. (All statutes and legal authority not included with the initial Test Claim filing will be included under separate cover entitled "Rebuttal – Federal Non State Cases, Statutes, Constitutional References and other Authority.")

[69] *City of Burbank v. State Water Resources Control Board, supra,* at p. 620.

[70] *City of Burbank v. State Water Resources Control Board, supra,* at pp. 627-628.

The *Burbank* Court thus specifically distinguished between permit mandates required by federal law and those which exceed federal requirements, holding that the State and regional water boards are required to comply with California law when exercising their discretion to adopt permit terms that are more "stringent than those required under federal law."[71]

Moreover, a review of sections 1251(b) and 1370 of the Clean Water Act, both of which were relied upon by the Supreme Court in *Burbank*, makes clear that the states do and can exercise authority to impose requirements not required by federal law.[72] If all permit requirements developed by the Board in the exercise of its discretion were required under the CWA, then there would be no room for State law, thereby rendering sections 1251(b) and 1370 to the Act meaningless. Yet as the Ninth Circuit found in *City of Arcadia v. EPA* (9th Cir. 2005) 411 F.3d 1103, 1107: "So long as the State does not attempt to adopt more lenient pollution control measures than those already in place under the Act, the Clean Water Act does not prohibit State action." In short, the Board's argument so twists the requirements of the Clean Water Act and its relationship to the California Porter-Cologne Act that the Board's interpretation would render all of the authority given to the Board under the California Porter-Cologne Act entirely meaningless when developing an NPDES Permit.

In addition, while arguing that every requirement in the Permit is a federal mandate, the Board has repeatedly admitted that it had significant discretion in adopting such permit requirements.[73] Finally, the Board's current position that permit terms imposed in the Board's discretion are nonetheless federal mandates, has already been rejected by this Commission in two recent decisions, with the Commission concluding that certain permit terms included at the discretion of the Water Boards were in fact not required under federal law.[74]

In short, the Board's claim that all permit provisions it chooses to develop are compelled by federal law, whether or not they are consistent with the MEP standard, is entirely meritless.

F. Whenever The State Chooses To Impose Requirements That Are Not Specifically Required Under Federal Law, It Imposes A State Mandate

In its Response, the State argues that its obligations under the CWA are mandatory and that because all BMPs in the 2009 Permit are imposed to comply with the MEP standard, it had no "true choice" on whether to impose the requirements in the Permit. As described above, there

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71 *City of Burbank v. State Water Resources Control Board, supra,* at pp. 627-628.

72 33 U.S.C. § 1251(b) & 1370.

73 See, e.g., Board Response, p. 13 ["the Santa Ana Board ***exercised its discretion***"]; and p. 22 ["U.S. EPA's 2010 Memorandum, which applies to all permitting agencies, recommends . . . the NPDES permitting authority ***exercise its discretion*** to include numeric effluent limitations"]; p. 26 ["federal law mandate[s] ***the use of discretion*** when determining appropriate permit provisions"]; p. 32 ["CWA section 402(p)(3)(B)(iii) ***allows the Santa Ana Water Board discretion*** to include appropriate provisions to control pollutants"].

74 Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 1, 46, 52 [finding numerous permit provisions to be reimbursable state mandates]; In Re Test Claim on Los Angeles Regional Quality Control Board *Order No. 01-182,* pp.1-2 [finding trash receptacle requirement to be a reimbursable state mandate].

is no mandatory requirement that the State impose the specific terms included in the 2009 Permit. As a result all of the challenged programs represent state mandates.

In *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, the California Court of Appeals held that whenever the State exercises choice in implementing a federal program, those aspects of the program that exceed federal requirements represent state mandates:

> [T]he determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate . . .[75]

Despite the Court of Appeals' direction to focus on impacts to the local agencies, the Regional Board claims its own obligations under the CWA make the 2009 Permit an entirely federal requirement. The State tries to distinguish the *Hayes* decision by implying that another element is required to demonstrate a state mandate: whether the State shifted a federal mandate from itself to the Permittees. While this can also create a state mandate[76], this was not the dispositive issue in *Hayes*. Clearly, if a challenged program shifts a federal mandate from the State onto local agencies then, pursuant to Hayes, it represents a state mandate for the local agencies.[77] However, *Hayes* also makes clear that if the State exercises choice in imposing requirements that exceed the strict requirements of a federal mandate, the additional requirements will represent a state mandated program or higher level of service.[78] As stated in *Hayes*:

> [T]he Commission must focus upon the costs incurred by local school districts and whether those costs were imposed on local districts by federal mandate or by the state's voluntary choice in its implementation of the federal program.[79]

Here, the State has freely chosen to impose numerous Permit terms that are not strictly required by federal law.[80] Federal guidelines that explain U.S. EPA's suggestions on how to address certain federal regulatory terms, are simply that, guidelines, and not themselves "specific requirements" under federal law. Moreover, on their face these Guidelines offer permit writers a range of "discretionary" choices or recommendations regarding programs to include in NPDES

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75 *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-94 [emphasis added].

76 See Cal. Const. Art. XIII B sec 6(c).

77 Cal. Const. Art. XIII B sec 6; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-94.

78 *Hayes v. Commission on State Mandates, supra,* at p. 1594.

79 *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595.

80 *See Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165 [federal law does not require the US EPA or the states to impose any specific requirements other than those expressly set forth in the Federal Regulations or the text of the CWA.]

permits, and expressly leave the ultimate decision regarding what is appropriate up to the State.[81] As a result, the State exercised "true choice" in deciding which BMPs to include in the 2009 Permit, including many that go beyond the requirements of federal law. Pursuant to Government Code section 17556 and Article XIII B § 6 of the California Constitution, those requirements are State mandates for which the Cities are entitled to a subvention of funds.

V. MS4 PERMITS ARE UNIQUE TO CITIES AND OTHER LOCAL GOVERNMENT ENTITIES

In response to the Permittees' Test Claim, the State alleges that the 2009 Permit imposes requirements that are not unique to government, and thus, that such requirements do not represent reimbursable state mandates. In general, laws that apply equally to government and private industry are not entitled to subvention.[82] Where local agencies are required to perform the same functions as private industry, no subvention is required.[83] The State contends that because private industry, the State, and the federal government are required to obtain NPDES permits for their activities, the CWA's NPDES program governing MS4 permittees is a law of general application, and the Permittees are therefore not entitled to reimbursement. As discussed below, the State's argument is frivolous.

An MS4 permit is unique to government and subject to unique regulations that are expressly recognized by the CWA and its implementing regulations. An MS4 is defined as:

> . . . a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) . . . **owned or operated by a State, city, town, borough, county, parish, district, association, or other public body** (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district.[84]

As the Boards themselves admit, federal law imposes far different requirements on industrial dischargers than it does on local government stormwater dischargers. "While both industrial dischargers and MS4s must obtain permits, the requirements in the industrial permits ***must be more stringent than in MS4 Permits***." (Board Response, p. 8.) "***In fact, the requirements for industrial and construction entities are more stringent than for government dischargers***." (Board Response, p. 17.) "The Permit's BMP-based iterative approach for

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81 See e.g. US EPA Office of Wastewater Management, MS4 Program Evaluation GUIDANCE, January, 2007, p.3.

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

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

84 40 C.F.R. § 122.26(b)(8) [emphasis added].

complying with numeric effluent limits ***is generally not allowed in non-MS4 NPDES permits***." (Board Response, p. 21.)[85]

An MS4 system serves two purposes: (1) to remove floodwaters from roads, parks, parking lots, and other public spaces; and (2) to provide a means of removing trash, debris, and other pollutants from urban run-off before it enters local water bodies. In so doing, the MS4 gathers stormwater from the entire jurisdiction, stormwater that fell as precipitation on public and privately owned spaces. Consequently, the nature of the MS4 is to channel all of the non-point source discharges in a community away from inhabited areas and into the nearest water body to avoid flooding in our communities. This is a uniquely government function that provides for the health, safety, and welfare of the citizens in a community.

Because of the nature of MS4 systems, municipal dischargers are held responsible for all discharges from their MS4, regardless of where such discharge originated. For that reason, when amending the CWA to include stormwater discharges, Congress intentionally imposed the different, less stringent MEP standard on MS4s. Congress further provided that MS4 permits "may be issued on a system- or jurisdiction-wide basis."[86]

In contrast, as acknowledged by the State itself in its Responses (discussed above), NPDES permits for industrial activities, including those issued to large industrial facilities and large construction sites, have different requirements and different standards. Rather than imposing the "Maximum Extent Practicable" standard on industrial dischargers, the CWA holds them to the Best Available Technology standard.[87] The difference in these requirements is further spelled out in the US EPA regulations governing stormwater discharges. Requirements for industrial dischargers are set forth at 40 C.F.R. section 122.26(c). Requirements for MS4 permits are set forth at 40 C.F.R. § 122.26(d).

The CWA very clearly differentiates between the responsibilities of MS4 operators, and those of other dischargers subject to the NPDES program. The State repeatedly admits these differences. (Board Response, pgs. 8, 17 and 21.) MS4s provide a service that is unique to government. The 2009 Permit imposes State mandated programs on the Cities related to operation and management of their MS4s, and the California Constitution requires reimbursement for these programs.

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[85] Where the City's and County are required to get these permits they do. They represent an entirely different regulatory scheme. The Permittees are not asserting that these requirements are unfunded mandates. Given the definition of MS4 in federal regulations, it does not appear that US EPA could issue an MS4 permit to a non-public entity.

[86] 33 USC § 1342(p)(3)(B)(iii).

[87] See 33 U.S.C. §§ 1311, 1342(p)(3)(A).

VI. THE CHALLENGED PERMIT PROVISIONS ARE ALL UNFUNDED STATE MANDATES

A. The Permit's TMDL Provisions Are More Stringent Than Required By Federal Law

1. Contrary To The Board's Assertion, The 2009 Permit Does Not Allow For Compliance With The TMDL-Derived Numeric Limit Requirements Through A Safe Harbor-Iterative-BMP Process.

The first specific argument made by the Board on the various TMDL related requirements in the 2009 Permit is that the numeric limits in the 2009 Permit are not really required to be met. Instead, the Board claims, "the Permit actually requires an iterative-BMP based approach for compliance with these effluent limitations."[88] In support of this contention, the Board cites Section XVIII.E.2 of the Permit, claiming that the Permit "***explicitly*** allows for an iterative-BMP approach for complying with the numeric effluent limitations" and that "a cooperative, iterative approach to identify violations of water quality standards ***does not exceed the MEP standard***."

The Permittees wish this were an accurate representation of the language of the Permit, and indeed, would welcome Board action to amend the Permit to make it operate as the Board suggests it already does. Unfortunately, however, as the 2009 Permit is currently written, the Permittees will be in violation of its terms if they do not meet the numeric effluent limits set forth under Section XVIII of the Permit, even if engaged in the "iterative-BMP" process. In fact, the plain language of the 2009 Permit requires clearly and repeatedly that the Permittees "***shall comply***" with the various waste load allocations/numeric effluent limits set forth in Section XVIII.B, Section XVIII.C and Section XVIII.D.[89]

The above mandatory program requirements in the Permit, including the related monitoring and other program terms, unambiguously require compliance with the stated numeric requirements, without exception. Moreover, contrary to the Board's assertions, there is no language anywhere in the Permit that indicates that a failure to comply with these numeric effluent limits would not be considered a violation of the Permit even if the Permittees are engaged in an "iterative process."[90]

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[88] Board Response, p. 21.

[89] 2009 Permit, p. 68 ["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***."], p. 71 ["Accordingly, upon approval of the Regional Board-adopted organochlorine compound TMDLs by the State Board and the Office of Administrative Law, ***Permittee shall comply with both the EPA and Regional Board waste load allocations specified in Tables 2 A/B/C/D and Table 4, respectively***."], p. 75 ["***The Permittees shall comply with the waste load allocations for urban runoff in Tables 8A and 8B in accordance with the deadlines in Tables 8A and 8B***."]; and p. 76 ["The Permittees in the Newport Bay Watershed ***shall comply*** with the allocations in Tables 9 A and B."].

[90] Board Response, p. 21.

To the contrary, rather than providing a safe harbor or other comfort that the numeric effluent limits need not be strictly complied with, Section XVIII.E to the Permit provides the opposite. Under Section XVIII.E.2, the Permit states: "Based on the TMDLs, ***effluent numeric limits have been specified*** to ensure consistency with the waste load allocation."[91] Further, if monitoring shows an exceedence of a numeric effluent limit, the Permittees are then required to "reevaluate the current control measures and impose additional BMPs/control measures." Once these additional measures are approved by the Board, "the Permittees shall immediately start implementation of the revised plan."[92] The language within Section XVIIIE.2 of the Permit thus makes clear that the TMDL derived numeric limits are required effluent limits that must be strictly complied with, and if these limits are exceeded, that further action will be necessary on the part of the Permittees to meet the numeric limits.[93] Thus, not only does Section XVIII.E.2 fail to provide any form of safe harbor to the Permittees, it specifically imposes more requirements on the Permittees in the event of an exceedence. As such, if there is an exceedence that is detected as a result of the mandated monitoring under the Permit, the Permittees not only required to take further actions to achieve the numeric limits, but are subject to third-party citizen suits and enforcement action by the Board itself.

Finally, everyone recognizes that the Permittees will be using BMPs as the means of complying with whatever numeric limits have been imposed. However, the use of BMPs, whether through an iterative process or otherwise, does not change the fact that the numeric limits set forth in the Permit must be strictly complied with, and as such, are State imposed requirements that go beyond what is required under federal law.[94]

2. <u>The Permit's TMDL Related Provisions Requiring Permittees To Strictly Comply With Numeric Effluent Limits And Related Programs Are Beyond What Is Required By The CWA.</u>

In *Divers' Environmental, supra,* 145 Cal.App.4th 246, an environmental organization alleged that a permit issued to the United States Navy by the San Diego Regional Board was defective because it did not "set numeric 'water quality based effluent limitations' (WQBEL's) on the Navy's stormwater discharges."[95] After discussing the relevant requirements of the Clean Water Act, as well as governing case authority, the Court of Appeal found that ***"[i]n regulating stormwater permits EPA has repeatedly expressed a preference for doing so by way of BMP's, rather than by way of imposing either technology-based or water quality-based numerical***

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91 2009 Permit, p. 79.

92 2009 Permit, p. 79.

93 2009 Permit, p. 79.

94 See Board Response, p. 24 ["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."]; *see also* p. 17 ["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. . . . ***The vast majority of claimants permit requirements are based on the less stringent MEP standard.***"].

95 *Divers' Environmental, supra,* at p. 251.

limitations."[96] The Court went on to find that "***it is now clear that in implementing numeric water quality standards, such as those set forth in the CTR, permitting agencies are not required to do so solely by means of corresponding numeric WQBEL's."***[97] Accordingly, the Court held that the use of numeric limits was not required even for ***industrial*** stormwater discharges, noting "Congress intended to permit the EPA and permitting authorities ***wide discretion*** in regulating stormwater runoff."[98]

Similarly, in *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159 ("*Defenders*"), the Ninth Circuit Court of Appeal found that Congress intentionally elected to treat stormwater discharges differently than industrial discharges, holding that "***industrial discharges must comply strictly with state water-quality standards," while Congress chose "not to include a similar provision for municipal storm-sewer discharges.***"[99] Instead, Congress replaced the requirements applicable to industrial discharges "with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable. . .'"; "the statute unambiguously demonstrates that ***Congress did not require municipal storm-sewer discharges to comply strictly"*** with water quality standards.[100]

Likewise, in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874 ("BIA"), the California Court of Appeal found that Congress intentionally gave the EPA "the authority to fashion NPDES permit requirements to meet water quality standards ***without specific numeric effluent limits and instead to impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'"***[101] As indicated by the Board, the Court rejected the claim that the MEP standard "sets the upper limit on the type of control that can be used in an NPDES permit," instead holding that the permitting agency "***retains the discretion*** to impose 'appropriate' water pollution controls in addition to those that come within the definition of 'maximum extent practicable.'"[102] Significantly, however, the Court did not find that federal law required the Board to go beyond MEP, but only that federal law did not prevent the Board from doing so.[103]

In 2008, ***in a letter to this very Commission*** (opposing a test claim concerning the Los Angeles MS4 Permit) the State Water Board's Chief Counsel recognized that: (1) federal law does not require MS4 permits to go beyond the MEP Standard; and (2) federal law does not

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96 *Divers' Environmental, supra,* at p. 256.

97 *Divers' Environmental, supra,* at pp. 261-262, emph. added.

98 *Divers' Environmental, supra,* at p. 261.

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

100 *Defenders,* at 1165, emphasis added.

101 *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874, emphasis in original, citing 33 U.S.C. § 1342(p)(3)(B)(iii) and *Defenders, supra* at 1163.

102 *Building Industry Association of San Diego County v. State Water Resources Control Board, supra,* 882, 883, emph. added.

103 *Building Industry Association of San Diego County v. State Water Resources Control Board, supra,* 882, 883, emph. added.

require stormwater permits to include numeric limitations.[104] The State Board's Chief Counsel explained as follows:

> 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 must require controls to reduce the discharge of pollutants to the maximum extent practicable ("MEP")**. . . . Thus, the federal law mandates that permits issued to MS4s must require management practices that will result in reducing pollutants to the MEP.
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> * * *
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> **Most NPDES permits are largely comprised of numeric limitations for pollutants**. … **Storm water permits, on the other hand, usually require dischargers to implement BMPs that will result in lessening the pollutants in runoff**, since without a treatment plant the pollutants can flow directly into surface waters. **Storm water permits apply to several types of entities—industries, construction, and municipalities—and all usually mandate BMPs**. 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.[105]

And in its Response to this Test Claim, even the Board acknowledged that, in *Tualatin River Keepers, et al. v. Oregon Department of Environmental Quality* (2010) 235 Ore. App. 132 ("*Tualatin*"), an Oregon decision issued just last year, the Court "***held that the CWA does not require WLAs to be included in NPDES permits as numeric effluent limits.***" (Response, p. 24, emphasis added; *see also Tualatin* at 148 [rejecting challenge to stormwater permits that did "not themselves include numeric waste load allocations like those set forth in the TMDLs" and finding that "best management practices are a type of effluent limitation that is used in municipal storm water permits"].) Strangely, as if to ignore the very holding in *Tualatin* it cites, the Board goes on to argue in its Response that "this is not the same as concluding that including WLAs as numeric limits is beyond federal law."[106]

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104 Exhibit 22, April 18, 2008 Letter from Elizabeth Miller Jennings, pp. 5-6.

105 Exhibit 22, April 18, 2008 Letter from Elizabeth Miller Jennings, p. 6, italics in original, bolding added. [The Commission ultimately ruled that, contrary to the arguments of the State and Regional Boards, certain provisions of the Los Angeles MS4 Permit did constitute an unfunded state mandate. (In Re Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182, pp.1-2.]

106 Board Response, p. 24.

Of course, the Board's admission that "the CWA does not require WLAs to be included in NPDES permits as numeric effluent limits,"[107] should mean precisely that, *i.e.*, ***that "the CWA does not require WLA to be included in NPDES permits as numeric effluent limits***." Including WLAs as numeric effluent limits in an NPDES permit may be "allowed" under federal law, but that does not change the fact that federal law does not "require" the imposition of "numeric limits" in a municipal NPDES permit.[108]

The Board's discussion of the Permit's various TMDL-derived numeric limits further reinforces the fact that such provisions are not federal requirements.[109] Specifically, the Board makes a point of distinguishing between MS4 and non-MS4 permits, asserting that "***non-MS4*** NPDES Permits" "require strict compliance with numeric limits," and noting that "violations [of such numeric limits] trigger enforcement under both State and federal law, as well as third-party citizens suits under CWA Section 505."[110] This discussion thus reinforces the conclusion that for "MS4 Permits," numeric limits are ***not required*** under federal law, and highlights an important reason for that distinction, i.e. including such provisions in MS4 permits exposes municipalities to enforcement actions and third party lawsuits. The Board's admission that numeric limits are not required under the CWA should end the discussion on the critical issue of whether the CWA requires "WLAs to be included in NPDES permits as numeric effluent limits."

As discussed above, nothing in federal law requires that numeric effluent limits be included in municipal NPDES permits. Accordingly, all of the 2009 Permit requirements associated with such limits, including the monitoring and program development requirements described in the Narrative Statement, are not federally mandated and thus constitute unfunded State Mandates.

3. The Board's Reliance On The 2010 EPA Memorandum Is Misplaced

In its Response, the Board relies heavily on a 2010 EPA Memorandum to argue "that numeric effluent limits ***for CTR constituents*** . . . are consistent with federal requirements."[111]

The Board asserts that such Memorandum "represents U.S. EPA's most recent ***guidance*** on the subject," and claims it "is important for several reasons," specifically, it purportedly: 1) "directly addresses Claimants' argument that numeric effluent limits in MS4 permits are beyond what federal law requires; and 2) "exemplifies the evolving nature of CWA's legal standard for MS4 permits."[112] In reality, however, ***the 2010 EPA Memorandum supports neither of these propositions, nor, in fact, is EPA's 2010 Memorandum even final guidance***.

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107 Board Response, p. 24.

108 Board Response, p. 24.

109 See Board Response, p. 21.

110 Board Response, pp. 21-22.

111 See e.g., Board Response, p. 26 ["the most recent federal guidance on this specific subject . . . confirms "that numeric effluent limits ***for CTR constituents*** . . . are consistent with federal requirements."].

112 Board Response, p. 22.

EPA's November 2010 Memorandum was issued after the Test Claim was submitted in this case, however, its issuance does nothing to change federal law, which plainly does not "require" the use of numeric limits in municipal stormwater permits. The 2010 Memorandum revises portions of the 2002 EPA Memorandum (cited in the Narrative Statement), but only provides "guidance" or "recommendations" on using numeric limits. It does not and cannot change federal laws or regulations.

Moreover, on March 17, 2011, EPA issued a formal comment solicitation notice, announcing that it is reconsidering the guidance provided in the Memorandum, and inviting interested parties to submit comments, questions, and objections regarding the substance of the 2010 Memorandum.[113] Importantly, the EPA Notice provides as follows:

> A number of stakeholders expressed concern that they did not have the opportunity to provide input before the memorandum was issued and have asked questions about the substance of the memorandum. EPA is soliciting comments on the 2010 memorandum and will accept comments until May 16, 2011. **EPA plans to make a decision by August 15, 2011 to either retain the memorandum without change, to reissue it with revisions, or to withdraw it.**[114]

Consequently, the 2010 EPA Memorandum is not final, and the Board's reliance on EPA's Guidance in the 2010 Memorandum is both premature and unpersuasive.

Significantly, the Notice emphasized the non-binding nature of the 2010 Memorandum:

> **EPA emphasizes that the discussion in the November 12, 2010 memorandum is intended solely as guidance to regulatory authorities as they implement CWA Programs**. The statutory provision and EPA regulations described in this document contain legally binding requirements. This memorandum is not a regulation itself, nor does it change or substitute for those provisions and regulations. **Thus, it does not impose legally binding requirements on EPA, States, or the regulated community**, nor does it confer legal rights or impose legal obligations upon any member of the public. In the event of a conflict between the discussion in this document and any statute or regulation, **this document would not be controlling**.[115]

113 Exhibit 23, March 17, 2011 Notice of Comment Period ("EPA Notice"), p. 1.
114 Exhibit 23, EPA Notice, p. 1, emph. added.
115 Exhibit 23, EPA Notice, p. 2, emphasis added.

Thus, even if the 2010 EPA Memorandum is not ultimately "revised or withdrawn," it is merely a non-binding Guidance Memorandum, and does not change the Clean Water Act or the regulations thereunder.[116]

Accordingly, all of the statutory, regulatory and case authority cited above and in the Narrative Statement for the proposition that numeric limits are not required in municipal NPDES permits remain valid and binding.[117]

Finally, there is the practical problem of requiring municipalities to strictly comply with numeric limits. Unlike requiring a particular "BMP" that the Board has found is necessary to "control pollutants"[118], demanding that Permittees meet a particular "numeric effluent limitation" will not "control pollutants." A numeric limit is not a treatment mechanism and will not "control pollutants." Consequently, imposing numeric effluent limitations in stormwater permits will not change the "technical," "practical" or "economic" viability of meeting water quality standards, and thus, does not qualify as a viable "BMP" subject to the MEP analysis as described in the Board's Response (at page 8) and in the MEP Memo.[119]

Further, unlike industrial dischargers who have the option of not discharging at all (*i.e.*, by ceasing their operations where they cannot feasibly meet effluent limitations), MS4 operators do not have that luxury. Notwithstanding the Board's assertion that "neither federal nor state law requires that parties discharge to waters of the United States"[120], the Permittees cannot stop the rain from falling. As the Court found in *BIA, supra,* 124 Cal.App.4th 866, 884, Congress "added the NPDES storm-sewer requirements to strengthen the [Clean Water Act] by making its mandate correspond to the practical realities of municipal storm-sewer regulations . . . reacting to the physical differences between municipal stormwater runoff and other pollutant discharges." Consequently, a finding the Clean Water Act required the Board to include numeric effluent limits in the 2009 Permit, as a means of implementing a TMDL or otherwise, would ignore the spirit and intent of Congress under the Clean Water Act as well as the "physical differences between municipal stormwater runoff and other pollutant discharges."

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116 See also Board Response, p. 22 ["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 limits] in the applicable stormwater permits."].

117 See, e.g., *Drivers' Environmental, supra,* 145 Cal.App.4th 246, 261-62 ["It is now clear that in implementing numeric water quality standards, such as those set forth in the CTR, permitting agencies are not required to do so solely by means of corresponding ***numeric*** WQBELs."]; *Defenders, supra,* 191 F.3d. 1159, 1165 [holding that "industrial discharges must strictly comply with State water-quality standards," while "Congress chose not to include a similar provisions for municipal storm-sewer discharges."]; and *BIA, supra,* 124 Cal.App.4th 866, 874 [holding that Congress intentionally gave the Board "the authority to fashion NPDES permit requirements to meet water-quality standards without specific numeric effluent limits and instead to impose 'controls to reduce the discharge of pollutants to the maximum extent practical.'"].

118 Board Response, p. 9.

119 Exhibit 21, MEP Memo at pp. 4-5.

120 Board Response, p. 12.

The Permittees respectfully request that the Commission adhere to the Clean Water Act and established case precedent, and find that the numeric limits in the 2009 Permit are not required under federal law, and thus, that the numeric effluent limit and related requirements set forth in the 2009 Permit (as described above and in the Test Claim) are unfunded State mandates.

4. EPA's California Toxics Rule (CTR), Upon Which Many Of The TMDL-Derived Numeric Limits In The 2009 Permit Are Based, Confirms That The State Had "Discretion" To Impose These Permit Provisions.

The Board attempts to discount the clear pronouncements made by EPA when it adopted the California Toxics Rule ("CTR")[121] (*i.e.*, that the State has wide discretion in imposing permit requirements to comply with the requirements of CTR), by claiming that "the Permit's numeric effluent limits for CTR constituents were derived from WLAs established in TMDLs, not from the CTR numeric objectives themselves."[122] The Board also argues that the Permittees' discussion of the State of California's Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (the "SIP") is inapplicable because, according to the Board, "the footnote in the SIP in no way precludes TMDL-derived numeric effluent limitations for CTR constituents in stormwater permits."[123] The Board entirely misses the point of the significance of CTR and the discussion in the Narrative Statement of the relevant portions of the SIP.

Starting with the SIP, the Board takes issue with the contention that the SIP excludes "stormwater discharges" from its application, asserting that the footnote only means that the "permitting agency should not use the SIP to translate CTR numeric objectives into numeric effluent limits in an MS4 Permit."[124] This statement, in and of itself, proves the Permittees' point, *i.e.*, that federal law does not require the use of numeric limits "an MS4 Permit," even for "toxic pollutants."

The point of the discussion of the SIP in the Narrative Statement was to show, as explained therein, that the State of California has itself recognized that the CTR-derived TMDLs are not to be strictly applied to stormwater through numeric limits. The Board's response seems to accept this point, but then ignores its significance. The SIP specifically provides that the SIP "does not apply to the regulation of stormwater dischargers."[125] Thus, the State of California has confirmed that its primary policy for implementing CTR, which includes using numeric limits in non-MS4 Permits, specifically exempted "stormwater" permits from using these numeric limits. This conclusion, combined with the various EPA pronouncements in CTR itself (which confirm that CTR was not developed with the intention of imposing numeric effluent limits upon municipalities), shows that the CTR-related TMDL requirements in the Permit (the "toxics TMDLs") are not compelled by federal law. EPA's comments in the preamble to CTR and in its Responses to Comments (as discussed in the Narrative Statement and further discussed briefly

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121 See Exhibit 13, California Toxics Rule ("CTR"), 65 Fed. Reg. 31682.

122 Board Response, p. 25.

123 Board Response, p. 25.

124 Board Response, p. 26.

125 SIP, p. 1, n. 1.

below), all confirm that, even for "toxic" pollutants, when it comes to municipal stormwater permits, the State has significant discretion in developing permit terms to meet CTR-derived TMDLs.

As discussed in more detail in the Narrative Statement, when adopting CTR, EPA made very clear that CTR did not impose and would not result in any specific federal mandates to impose numeric limits on municipal Permittees.[126] Indeed, CTR plainly states that it "***contains no Federal mandates … for local, or tribal governments or the private sector***" and "***imposes no enforceable duty*** on any State, local or Tribal governments or the private sector."[127] The preamble to CTR also repeatedly makes clear that the State of California "will have considerable discretion" in implementing CTR.[128]

Likewise, EPA confirmed in its Responses to Comments that it did not envision (let alone require) that CTR would be used to set strict numeric effluent limits for municipal stormwater discharges. For example, in responding to comments submitted by the County of Los Angeles, EPA stated as follows:

> EPA did not ascribe benefits or costs of controlling storm water discharges in the proposed or final Economic Analysis. EPA believes that many storm water dischargers can avoid violation of water quality standards through application of best management practices that are already required by the current storm water permits.
>
> The commenter claims that even with the application of current BMPs, its storm water dischargers would still violate water quality standards due to the CTR criteria. **The commenter appears to assume that storm water discharge would be subject to numeric water quality based effluent limits which would be equivalent to the criteria values and applied as effluent limits never to be exceeded**, or calculated in the same manner that effluent limits are calculated for other point sources, such as POTWs. The comment then appears to assume that such WQBELs would then require the construction of very costly end-of-pipe controls.
>
> **EPA contends that neither scenario is valid with regards to developing WQBELs for storm water discharges or establishing compliance with WQBELs**. . . **EPA will continue to advocate the use of BMPs, as discussed in the CTR**

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126 See, e.g., Exhibit 13, 65 Fed. Reg. 31682, 31703, 31708-709.

127 65 Fed. Reg. 31682, 31708.

128 Exhibit 13, 65 Fed. 31682, 31708-709 [In implementing CTR, "***the State will have considerable discretion***;" "***the state has considerable discretion*** in deciding how to meet the water quality standards and in developing discharge limits as needed to meet the standards;" and "the state will have ***a number of discretionary choices*** associated with permit writing."].

> **preamble**. . . . EPA will continue to work with the State to implement storm water permits that comply with water quality standards with an emphasis on pollution prevention and best management practices rather than costly end-of-pipe controls.[129]

Despite the Board's insistence that "TMDL-derived effluent limitations for CTR constituents" are "not the same thing" as "effluent limitations derived from CTR numeric objectives themselves"[130], the truth of the matter is that ***the numeric effluent limitations set forth in the TMDLs at issue flow directly from the numeric effluent limitations set forth in CTR***. For example, the TMDL for Toxic Pollutants in San Diego Creek and Newport Bay plainly states ***"[f]or most metals addressed in these TMDLs, the numeric targets are equal to the numeric objectives in the CTR."***[131]

Thus, the Board's claim that the "TMDL-derived effluent limitations" set forth in the Permit are independent of the effluent limitations included in CTR is simply not accurate. The mere fact that there is an extra step between CTR and the Permit—*i.e.,* numeric limitations from CTR are utilized to develop toxic TMDLs, which are ***then*** incorporated into the Permit—does not affect the relevance of the authorities cited in the Test Claim Narrative Statement, nor change the fact that the Board is imposing numeric limits even though they are not required to do so under the Clean Water Act.

Indeed, while the Board goes to great lengths to argue that EPA's assurances that CTR would not be used to establish numeric effluent limits, involved the scenario "when CTR objectives are applied directly as end-of-pipe numeric effluent limitations"[132], the Board fails to point to any requirement in CTR or federal law that mandates that the State impose "TMDL-derived effluent limitations for CTR constituents" on municipal stormwater.

Finally, on the very next page of the Board's Response (after claiming EPA's statements regarding the Board's discretion in implementing CTR are not relevant), the Board unwittingly concedes the relevance of EPA's statements concerning CTR by attempting to rely upon EPA's 2010 Guidance Memo (discussed above) to support its claim that the CTR-derived TMDL numeric limits in the 2009 Permit are required by federal law.[133] But EPA's recognition within CTR itself and in EPA's Responses to Comments that CTR "***contains no federal mandates***… for local or tribal governments," "***imposes no enforceable duty*** on any state, local or tribal

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129 Exhibit 14, EPA Response to Comment CTR-001-007, emphasis added; *see also* EPA Responses to Comments CTR-031-005b, CTR-035-044c, CTR-040-004, CTR-040-014b; CTR-H-001-001b, and CTR H-002-017.

130 Board Response, p. 25.

131 Exhibit 24, p. 14, *see also* p. 15 [acknowledging the final Selenium TMDLs were "***based on the promulgated CTR standards***"], pp. 41-42 [indicating CTR was used to calculate metals numeric targets]; and p. 52 ["Numeric targets for water column concentrations [for organochlorine compounds] are . . . based on CTR criteria"].

132 Board Response, p. 25.

133 Board Response, p. 26["the numeric effluent limits ***for CTR constituents*** … are consistent with federal requirements".].

governments," and that in implementing CTR, "***the state will have considerable discretion***"[134], all refute the Board's assertions and confirm that numeric limits are not required for storm water permits, even where the numeric limits are derived from CTR. The Board's argument to the contrary is without merit.

5. The Organochlorine TMDL-Derived Numeric Limits Set Forth In Tables 2 A/B/C/D, And 4 And 5 A/B, And Related Requirements Are Unfunded State Mandates

The Board completely misses the argument on the organochlorine TMDL-derived requirements being unfunded mandates when it incorrectly assumes that the Permittees are arguing that the mandate is limited to the "early implementation" of the Board's organochlorine TMDL for a "brief window," until the Board's organochlorine TMDL is finally approved.[135] In fact, the mandate created by the organochlorine TMDL-derived requirements in the Permit is far broader than recognized by the Board. Specifically, Section XVIII.B.4 of the 2009 Permit requires that:

> "**Permittees . . . shall comply** with the waste load allocations specified with established TMDLs and shown in **Tables** . . . **2 A/B/C/D [Urban Runoff Waste load allocations for Organochlorine Compounds (TMDLs promulgated by U.S. EPA)**]."

Section XVIII.B.5 then requires that the Permittees "***shall comply with both*** the EPA and Regional Board waste load allocations specified in Tables 2 A/B/C/D, Table 4 and Table 5 A/B, respectively," once the Board's TMDL is approved by Office of Administrative Law ("OAL"), stating:

> 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 waste load allocations specified in Tables 2 A/B/C/O and Table 4 respectively.**
>
> **In accordance with the Regional Board's TMDL, 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 waste load allocations shall be those specified in Table 4."[136]**

Thus, as further discussed in the Narrative Statement in support of the Test Claim, the 2009 Permit currently requires compliance with numeric effluent limits based on waste load

134 Exhibit 13, 65 Fed. Reg. 31682, 31708-09.
135 Board Response, p. 29.
136 2009 Permit, p. 71.

allocations (set forth in EPA's organochlorine TMDL), as listed in Table 2 A/B/C, and in the future will require compliance with ***both*** EPA and the Board's organochlorine TMDLs, until the Board's TMDLs are approved by EPA, at which point only the numeric limits in Table 4 of the Board's TMDL limit must be complied with. The Board's "brief window" argument only concerns the time period when both the EPA and the Board-developed TMDLs must be met. It ignores the requirement to comply with the EPA organochlorine TMDL at the outset, as well as to comply with the Board organochlorine TMDL for the long term. Accordingly, the assertion that the Permittees need only comply with the Board TMDL in the "early implementation" period for a "brief window" is plainly incorrect.

In sum, the Organochlorine TMDL-derived mandates require immediate compliance with numeric limits from EPA's TMDLs in Tables 2 A/B/C/D, interim compliance with both sets of numeric limits from EPA's and the Board's TMDLs in Table 2 A/B/C/D and 4, and thereafter permanent compliance with the Board's numeric limits in Table 4. In all instances, the Permit is imposing numeric effluent limits that are not required by federal law. As such, these new requirements must be funded under the California Constitution.

Likewise, the related monitoring requirements set forth in Section XVIII.B.6 and Tables 4 and 5 A/B are not required by federal law, and thus constitute additional unfunded State mandates.

6. The Selenium TMDL-Derived Numeric Limits In Table 3 And The Related Requirements Are Unfunded State Mandates

The selenium TMDL provisions in the 2009 Permit also currently require the Permittees to meet strict numeric limits. Specifically, the selenium TMDL adopted by USEPA was incorporated into the Permit by the Board through various strict numeric effluent limits as shown on Table 3 on page 70.[137] As indicated in the Response, the Regional Board is in the process of developing a selenium TMDL intended to replace the EPA TMDL.[138] The Board's reason for doing so is their recognition that the current EPA TMDL is unachievable; as the Permit expressly concedes, ***"there are no economically and technically feasible treatment techniques to remove selenium from the water column."*** [139]

Nonetheless, the 2009 Permit incorporates the numeric limits from the existing EPA selenium TMDL as strict numeric limits. Section XVIII.B.4 provides that the ***"Permittees. . . . shall comply with the wasteload allocations specified in the established TMDLs and shown in Tables . . . 3."*** Acknowledging that that EPA's selenium limits are unachievable, the Permit envisions the development of a Board-developed selenium TMDL, which is to be complied with through the subsequent development and Board approval of a "Cooperative Watershed Program." However, under the present language of the 2009 Permit, a Cooperative Watershed Program can only be developed to comply with the Board's yet-to-be-developed selenium TMDL, not EPA's selenium TMDL. In this regard, the 2009 Permit provides as follows:

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137 2009 Permit, pp. 68-70.

138 Board Response, p. 30; Permit, p. 72.

139 2009 Permit, p. 72, emph. added.

7. Regional Board staff, in collaboration with stakeholders, is developing TMDLs for metals and selenium that will include implementation plans and monitoring programs and that are intended to replace the EPA TMDLs. … This 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 [OAL]. As for the organochlorine compounds, the EPA promulgated allocations for these constituents will also remain in effect unless and until the 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 a result of extensive drainage modifications. Selenium-laden shallow and rising groundwater enters the stormwater conveyance systems and flows into San Diego Creek and distributaries. 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 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 water within twenty-four (24) months of adoption of this order, **or one month after approval of the selenium TMDLs by OAL, whichever is later.** The program must be implemented upon Regional Board's approval. 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.[140]

[140] 2009 Permit, Subsection XVIII.B.8, pp. 70, 73, emphasis added.

Based on the underlined language cited above, the Board argues that the Permit "expressly [does] not require compliance with the existing WLAs for selenium as numeric effluent limitations as long as the Claimants [are] 'participating in and implementing the approved Cooperative Watershed Program.'"[141] The principle problem with such argument is that it takes the underlined language completely out of context. Because neither the Regional Board, the State Board, nor the Office of Administrative Law (OAL) have yet approved a Regional Board-developed selenium TMDL, let alone a Board-developed selenium Implementation Plan, ***there is presently no Cooperative Watershed Program*** that can even be prepared, let alone be submitted by the Permittees for Board approval.

In short, the Permittees are unable to submit a Cooperative Watershed Program to the Board for approval, because ***the Board has not yet adopted its proposed selenium TMDL*** which, once adopted, will still need to be approved by the State Board and Office of Administrative Law. Nor has a selenium TMDL Implementation Plan yet been developed and adopted. Under the Permit, it is only after OAL has approved the selenium TMDL ("***approval of the selenium TMDLs by OAL***"[142]), and only after the Board has approved a selenium Implementation Plan that a Cooperative Watershed Program may even be prepared. Thus, the Board's reliance on the language in the 2009 Permit involving the Cooperative Watershed Program is without basis.

Accordingly, contrary to the Board's contention, there is no mechanism for the Permittees to comply with the EPA selenium TMDL-derived numeric limits (set forth in Table 3 on page 70 of the Permit), other than to strictly comply with said numeric limits, a task that the Permit itself recognizes is not "***economically and technically feasible***."[143]

Further, the requirement of developing and implementing a new "Cooperative Watershed Program," once the Regional and State Board and OAL have approved new selenium TMDLs, is yet another "new program" which the Permittees will need to implement to comply with the numeric selenium effluent limitations under the Permit. As no such program is required by federal law, said program constitutes another unfunded State mandate.

7. <u>The Coyote Creek TMDL-Derived Numeric Limits In Tables 6 And 7, And Related Requirements Are Unfunded State Mandates</u>

The Board claims that the Coyote Creek TMDL-related unfunded mandates do not go beyond what is required under federal law because these "specific provisions were supported by U.S. EPA as consistent with federal requirements under the CWA."[144] According to EPA's Comment Letter, EPA stated that it "***support[s]*** the approach provided by incorporating the Coyote Creek WLAs by establishing a date certain for source control plan and a monitoring

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141 Board Response, p. 31.

142 2009 Permit, p. 73.

143 2009 Permit, p. 72. If the Board truly intended the EPA selenium TMDL-based numeric limits included in the Permit to be unenforceable, so long as Permittees have developed and are implementing a Board-approved Cooperative Watershed Program, the Permittees would welcome formal Board action revising the Permit to address that issue, *i.e.*, the adoption of a formal amendment to the Permit consistent with the Board's stated position in this matter.

144 Board Response, p. 32.

plan." The Board argues the CWA "allows the Santa Ana Water Board ***discretion*** to include appropriate provisions to control pollutants" and that this discretion, combined with EPA's support of these provisions, makes these TMDL-related requirements "appropriate requirements" and not an "unfunded State mandate."[145]

But whether EPA "supports" the Permit terms incorporating the Coyote Creek TMDL-derived requirements into the 2009 Permit as numeric limits is the wrong question. The real issue is whether federal law ***"required"*** their inclusion as numeric effluent limits into the 2009 Permit. It did not.

The 2009 Permit requires that Permittees who discharged 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 2009 Permit further requires that:

> "[T]he source control plan **shall include a monitoring program** and shall be completed within twelve months from the date of adoption of this Order. **The source control plan shall be designed to ensure compliance with the following waste load allocations**: [Table 6 – Municipal Storm Waste Load Allocations – Coyote Creek]."[146]

The 2009 Permit thus clearly imposes various mandates involving the Coyote Creek TMDL, including a requirement to develop a "***source control plan***" which must "***ensure compliance with***" the specified numeric limits in Table 6 until a formal Implementation Plan is developed. In addition, the "source control plan shall include" a ***monitoring plan*** which must be completed within twelve months from the date of the adoption of the Order. As discussed above and in the Narrative Statement, nothing in federal law requires that the Permittees develop or implement a "constituent-specific source control plan," nor a "monitoring plan," or otherwise comply with numeric effluent limits in municipal NPDES Permit. All such requirements are unfunded mandates as they are not required anywhere under the Clean Water Act or the federal regulations.

8. <u>The Fecal Coliform TMDL-Derived Numeric Limits In Tables 8a And 8b And Related Requirements Are Unfunded State Mandates</u>

Although the Board correctly pointed out that U.S. EPA has "approved" the Board-developed fecal coliform/bacteria TMDL for Newport Bay (*see* section XVIII.C.1 of the 2009 Permit), the Board has no argument, beyond the arguments that have been discussed and refuted above, to support its claim that federal law requires the incorporation of numeric effluent limits from these fecal coliform TMDLs. As such, the fecal coliform TMDL-related requirements are State mandates that are required to be funded under the California Constitution.

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145 Board Response, p. 32.

146 2009 Permit, pp. 73-74.

9. The Diazanon And Chloropyrifos TMDL-Derived Numeric Limits In Tables 9A And 9B And Related Requirements Are Unfunded State Mandates

Under Section XVIII.D.1 of the 2009 Permit, "the Permittees in the Newport Bay watershed ***shall comply*** with the allocations in Tables 9A [Table 9A Diazanon and Chloropyrifos Allocations for San Diego Creek] and B [Table 9B Chloropyrifos Allocations for Upper Newport Bay]."[147] The Board raises no new arguments in connection with these specific provisions. For the reasons set forth above and in the Narrative Statement, these 2009 Permit terms are requirements that are not mandated by federal law, and as such are State mandates that must be funded under the California Constitution.

B. The Challenged Low Impact Development And Hydromodification Requirements Are Reimbursable State Mandates

The Regional Board makes several arguments alleging that the 2009 Permit's Low Impact Development ("LID") and hydromodification requirements are not state mandates subject to reimbursement under Article XIII B § 6 of the California Constitution. For the reasons set forth below, the Regional Board's arguments are without merit.

1. Federal Regulations Only Require A General Program To Regulate Discharges From Areas Of New Construction, While The 2009 Permit Includes Highly Specific Requirements That The Regional Board Chose To Impose On The Cities

As described in the Test Claim Narrative, no federal statute, regulation, or policy specifically requires municipal stormwater permits to include the LID and hydromodification requirements present in the 2009 Permit. Code of Federal Regulations, Title 40, section 122.26(d)(2)(iv)(A) provides a general requirement that large municipal stormwater permits include programs to reduce the discharge of pollutants from the MS4 that originate in areas of new development.

Pursuant to federal regulations, the 2009 Permit must include: "a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment" and "controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment."[148]

Consequently, federal regulations do not require the highly specific design elements included in the LID, or the hydromodification requirements in the 2009 Permit. Pursuant to *Hayes v. Commission on State Mandates, supra,* 11 Cal.App.4th 1564, "[i]f the state freely chooses to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were

147 2009 Permit, p. 76.

148 40 CFR § 122.26(d)(2)(iv)(A).

imposed upon the state by the federal government."[149] Federal law does not require the 2009 Permit to include low impact development and hydromodification programs, yet the state has exercised its discretion to include them in the permit. For that reason, those aspects of the 2009 Permit exceed the requirements of federal law and represent a state mandated program for which the Permittees are entitled to reimbursement.

The Regional Board nonetheless contends that US EPA guidance requires the highly specific LID and hydromodification requirements in 2009 Permit. As described in detail above, US EPA Guidance is not mandatory. Moreover, US EPA staff's comments of support for the 2009 Permit, cited by the Regional Board, do not constitute a federal mandate. Notably, even those comments cited by the Regional Board do not state that the LID and hydromodification requirements in the 2009 Permit are strictly required. And they are not.

The same rationale applies to the Regional Board's claim that the authority to impose hydromodification and LID requirements under section 401 of the CWA equates to a mandate to include specific requirements in the 2009 Permit. Citing the United States Supreme Court decision in *PUD No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700 and policy statements in US EPA regulations not applicable to the 2009 Permit, the Regional Board claims there is no question that it can regulate volume-based discharges from areas of new development. Regardless of the truth of that statement, as stated above, the authority to exceed federal requirements does not equate to a federal mandate to impose the condition.[150]

Lastly, the Regional Board's reliance on decisions from state agencies in other states is equally misplaced. A state agency decision from another state is neither binding on the Commission nor any court in the State. Moreover, the cited case explicitly recognized that LID requirements are not federally mandated. Indeed, the Washington State Pollution Control Board specifically stated:

> The 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 thorough numerous publications.[151]

EPA's increasing support for LID does not represent a federal mandate. EPA frequently encourages the states to include provisions in NPDES permits that exceed the scope of federal law. This is precisely why the EPA encourages, rather than mandates such requirements. Thus, while the State may have the authority under the Porter-Cologne Act to include LID and hydromodification requirements in State-issued permits, that authority does not mean that such requirements are federally mandated, even when encouraged by EPA.

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

150 *Long Beach Unified School Dist. v. State of California, supra,* at p. 173.

151 Washington State Pollution Control Board, Final Order, *Puget Soundkeeper Alliance, et al. v. State of Washington Department of Ecology* (2008), Finding of Fact No. 45, page 32.

2. The 2009 Permit's LID And Hydromodification Requirements Are A New Program Or Higher Level Of Services Within The Meaning Of Section XII B Of The California Constitution

The 2009 Permit unquestionably imposes new requirements on the cities. The specific requirements are detailed on pages 29 through 32 of the Test Claim Narrative. These requirements greatly exceed those in the 2002 Permit. Indeed, the 2002 Permit's requirements were minimal in comparison. The relevant portions of the 2002 Permit are as follows:

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

The requirements from the 2002 Permit were very general. The Regional Board nonetheless claims that the 2009 Permit does not impose a new program or higher level of service because it merely clarifies the requirements in the 2002 Permit. This is far from the case; the 2009 Permit includes several new substantive aspects to the Permittees' LID and hydromodification programs. These include (but are not limited to) requiring the Permittees to analyze and mitigate downstream impacts related to the volume of water leaving completed priority development projects under sections XII.D.1. through XII.D.4.:

> Each priority development project shall be required to ascertain the impact of the development on the site's hydrologic regime and include the findings in the WQMP, including the following for a two-year frequency storm event impacts downstream hydrology.
>
> * * *
>
> If a hydrologic condition of concern exists, then the WQMP shall include an evaluation of whether the project will adversely impact downstream erosion, sedimentation or stream habitat. If the evaluation determines adverse impacts are likely to occur, the project proponent shall implement additional site design controls, on-site management controls, structural treatment controls and/or in-stream controls to mitigate the impacts. The project proponent should first consider site design controls and on-site controls prior to proposing in-stream controls; in-stream controls must not adversely impact beneficial uses or result in sustained degradation of water quality of the receiving waters.
>
> The project proponent may also address hydrologic conditions of concern by mimicking the pre-development hydrograph with the post-development hydrograph, for a two year return frequency storm. Generally, the hydrologic conditions of concern are not

> significant, if the post-development hydrograph is no more than 10% greater than pre-development hydrograph. In cases where excess volume cannot be infiltrated or captured and reused, discharge from the site must be limited to a flow rate no greater than 110% of the pre-development 2-year peak flow.

When a state law or order mandates a change that does more than just increase the cost of providing services, and instead requires an increase in the actual level or quality of governmental services provided, that increase will represent a "higher level of service" within the meaning of Article XIII B § 6 of the California Constitution.[152] Such is the case here. The 2002 Permit included very general hydromodification and LID requirements. The 2009 Permit, however, significantly increases the burden imposed on the Cities. By requiring the Cities to implement these requirements, the Regional Board has imposed a higher level of service for which the Permittees are entitled to reimbursement.

3. The ROWD Does Not Constitute A Request For Regulation

The Regional Board additionally argues that the Permittees committed to include provisions "consistent with LID and hydromodification principles" in their Report of Waste Discharge ("ROWD"). California Government Code section 17556(a) provides that costs associated with a program or legislative mandate requested by the local agency or school district challenging the measure as an unfunded mandate are not eligible for reimbursement.

Presumably the Regional Board included these comments from the ROWD to imply that the Permittees had requested the challenged programs. That is not the case. As stated by the Commission in its decision on the San Diego County municipal NPDES permit in Test Claim 07-TC-09:

> The ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …" Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.[153]

The Permittees never requested that the Regional Board impose the LID requirements included in the 2009 Permit. Moreover, although the Permittees did acknowledge that LID and hydromodification design principles may help improve water quality, they never recommended or otherwise requested the range and depth of the requirements that were adopted in the 2009 Permit.

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152 *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Ca1.4th 859, 877.

153 Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 35.

4. Municipal Development Projects Are Not Discretionary Within The Meaning Of California Constitution Article XIII B § 6

Lastly, the Regional Board contends that municipal projects are discretionary and, as such, are not subject to reimbursement under Article XIII B § 6 of the California Constitution. The Regional Board cites previous Commission decisions holding that municipal projects are discretionary, and requests that the Commission continue this interpretation of California law. As described at length in the Test Claim Narrative, because of the California Supreme Court's decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, the rationale for determining that municipal projects are discretionary and therefore not eligible for reimbursement is not applicable to the 2009 Permit.

The 2009 Permit is not a voluntary program. The 2009 Permit requires the Permittees to take immediate actions related to low impact development and hydromodification. These steps include updating the model WQMP to incorporate low impact development and hydromodification principles, and developing feasibility criteria for project evaluation to determine the feasibility of implementing low impact development BMPs. Both must be complete within 12 months of the Permit's effective date, and both include elements that are specific to municipal projects.

As described more fully in the Permittees' Test Claim, these requirements are not triggered by any voluntary action on the part of the Permittees. Thus the rationale for determining that municipal projects are discretionary is not applicable to the 2009 Permit, which imposes requirements on the Permittees that are either wholly unrelated to voluntary action on the part of the Permittees, or are triggered by municipal projects that the Permittees implement with little to no discretion because they are integral to the Permittees' function as municipal entities.

C. Public Education Requirements

1. The State's Rebuttal Mischaracterizes The Nature And The Extent Of The New Public Education Requirements Contained In The 2009 Permit.

Section XIII of the 2009 Permit requires the Permittees to develop a public education program that must contain a number of very specific elements. These permit requirements are referred to hereinafter as "Public Education Requirements."

The State argues in its rebuttal that the public education requirements of the 2009 Permit are not unfunded mandates in that the requirements of the 2009 Permit are not significantly different that the requirements contained in the previous 2002 Permit. In their rebuttal the State characterizes the new requirements as follows, "…comparing the public education requirements in the 2002 Permit 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."[154]

[154] Regional Board Rebuttal p. 38

The State's rebuttal mischaracterizes the nature and the extent of the new requirements contained in the 2009 Permit. A comparison of the requirements in the 2002 Permit related to a public education program with the Public Education Requirements in the 2009 Permit show that the Public Education Requirements in the 2009 Permit are in fact significantly greater both in terms of the nature of the additional requirements and the potential cost to the Permittees of the new requirements.

2. The Public Education Requirements in the 2002 Permit

The 2002 Permit contains provisions requiring the development of a public education program and requiring the Permittees to establish a Public Education Committee to provide oversight and guidance for the implementation of that public education program.[155] The 2002 Permit requirements as far as the content of that education program, however, were fairly general. The materials were to be designed to encourage public reporting of unauthorized non-stormwater discharges into the MS4.[156] and also required the development and distribution of BMP guidance documents aimed at certain sources of pollution that are not otherwise regulated by another governmental agency , namely "guidelines for the household use of fertilizers, pesticides, herbicides and other chemicals, and guidance for mobile vehicle maintenance, carpet cleaners, commercial landscape maintenance, and pavement cutting."[157]

3. The 2009 Permit Adds Significant New Requirements for The Permittees' Public Education Program

These public education requirements from 2002 Permit are carried forward in the 2009 Permit but the 2009 Permit adds new and very specific requirements for a series of workshops and public meetings that were not in the 2002 Permit and go beyond any requirement in federal law. Section XIII.3 of the 2009 Permit requires individual workshops to be conducted at least once per year with each of the following industries, "manufacturing facilities; mobile service industry; commercial, distribution and retail sales industry; residential/commercial landscape construction and services industry; residential and commercial construction industry; and residential and community activities."[158]

Section XIII.7 of the 2009 Permit also adds very detailed and prescriptive requirements to conduct a number of public workshops related to numerous documents that the 2009 Permit requires the Permittees to develop as part of stormwater program. Permittees are required to develop Drainage Area Management Plans, monitoring plans, Water Quality Management Plan Guidance and Fact Sheets for various activities by various provisions of the 2009 Permit. The Public Education requirements contained in section XIII.7 of the 2009 Permit now require the following:

> The principal Permittee, in collaboration with the Co-Permittees, shall develop and implement a mechanism for public participation in the updating and

[155] 2002 Permit, Sections XIII.1 and XIII.3
[156] 2002 Permit, section XIII.4
[157] 2002 Permit, section XIII.5
[158] 2009 Permit, Section XIII.3, p

implementation of the Drainage Area Management Plans, monitoring plans, Water Quality Management Plan guidance and Fact Sheets for various activities. The public shall be informed of the availability of these documents through public notices in local newspapers, County and/or city websites, local libraries, city halls and/or courthouses." [159]

4. Federal Regulations Do Not Require Any of the New Public Education Requirements Contained in the 2009 Permit

The federal regulations concerning the Public Education Requirement of an MS4 Permit do not contain any requirements for these workshops. As mentioned in our Narrative Statement, Title 40, sections 122.26(d)(2)(iv)(A)(6), (B)(6), and (D)(4) of the Code of Federal Regulations provide general public education requirements for large municipal stormwater permits. These Federal Regulations require MS4 Permits to require a public education program. [160] The elements that federal regulations require be part of a public education program are very limited, namely educational activities to facilitate the proper management and disposal of used oil and toxic materials[161], and appropriate educational and training measures for construction site operators.[162] The regulations do not specifically require workshops for the development of each of the documents required by the 2009 Permit, nor do they require the industry workshop mandated by the 2009 Permit. Because of the lack of specific requirements related to the public education program in the federal regulations, federal law grants Permittees latitude to determine the most efficient and effective way to solicit that public participation. The prescriptive requirements contained in the 2009 Permit go well beyond what federal law requires.

5. The New Public Education Requirements in the 2009 Permit are Not Necessary to Meet the Federal MEP Standard.

The State argues that these new requirements of the 2009 Permit are "… new and more specific controls that reflect increased understanding of pollution problems and associated control measures" and constitute "… additional or better-tailored requirements … necessary to achieve the federal MEP standard"

At the time the 2009 Permit was adopted the Regional Board adopted findings setting forth the factual basis for the provisions in the MS4 Permit. (Findings, Order No. R8-2009-0030, pp 1-29, hereinafter referred at as "Findings") The Findings acknowledges that Permittees have expended significant efforts and resources in developing a public education program in response to the requirements of the 2002 Permit[163]. The Findings do not set forth any facts to suggest that the additional Public Education Requirement of the 2009 Permit were necessary to address any deficiencies of the existing program. There is no indication in the Regional Board's Findings that these workshops are necessary to address specific pollutants of concern or are likely to have a water quality benefit commensurate with their cost nor is there any factual basis

[159] Section XIII.7 of the 2009 Permit, p 63 of 93
[160] 40 C.F.R. § 122.26(d)(2)(iv)(A)(6)
[161] 40 C.F.R. § 122.26(d)(2)(iv)(B)(6)
[162] 40 C.F.R. § 122.26(d)(2)(iv)(D)(4)
[163] Findings Section P.81, p 27 of 93

set forth in the Findings to support a conclusion that the Regional Board considered the significant cost of these workshops. The sole justification for these requirements in the Findings that served as the justification for the Public Education Component of the 2009 Permit is one sentence, namely "The stormwater regulations require public participation in the development and implementation of the storm water management program."[164]

The MEP Memo sets forth the Regional Board's own criteria for determining whether a requirement is required by the federal MEP standard. The MEP Memo indicates that a number of factors need to be considered to determine if a requirement is required by federal MEP. Among the factors laid out in the MEP Memo is the cost of the requirement and whether the requirement is designed to meet a pollutant of concern. There is nothing in the Findings or other evidence presented by the State in its Rebuttal to indicate that Regional Board made any attempt follow its own criteria as set forth in the MEP Memo for determining if the new requirements of the Public Education program were required to meet the federal MEP standard. The record, therefore, does not support the State's assertion that the numerous public workshops required by the 2009 Permit, are necessary to achieve the federal MEP.

6. The New Public Education Requirements in The 2009 Permits Are Reimbursable Unfunded Mandates

The 2009 Permit mandates changes in the Permittee's Public Education Program that does more than just increase the cost of providing services, but rather requires a significant increase in the actual level and quality of the Public Education Program and therefore constitutes a requirement for a "higher level of service" within the meaning of Article XIII B § 6 of the California Constitution.[165] This higher level of service is not mandated by federal regulations and cannot be characterized as necessary to meet federal MEP standard. The additional Public Education Requirements, therefore constitute unfunded mandates. Permittees are entitled to be reimbursed for the cost of implementing these mandates.

D. Residential Facilities Requirements

1. Federal Regulations Require Only Limited Program To Be Developed By The Permittees

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

> [S]tructural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the

[164] Findings Section P.82, p 27 of 93

[165] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Ca1.4th 859, 877.

expected reduction of pollutant loads and a proposed schedule for implementing such controls.

Federal regulations do not, however, require anywhere near the level of specificity that the Regional Board has included in the 2009 Permit. As stated above, where the state freely chooses to impose costs associated with a new program or higher level of service upon a local agency as a means of implementing a federal program, then the costs represent a reimbursable state mandate.[166] Federal law does not require the 2009 Permit to include the highly specific residential program in the 2009 Permit, yet the state has exercised its discretion to impose that program on the Permittees. For that reason, the residential program requirements in the 2009 Permit exceed federal law and represent a state mandated program.

2. The 2009 Permit Imposes Highly Specific Requirements

The 2002 Permit does not require the Permittees to develop and implement a Residential program. The closest the 2002 Permit comes to requiring the Permittees to implement such a program is to require the Permittees to include a residential reporting component in paragraph 4 of its Public Education section (Section XIII). This stands in stark contrast to the extensive requirements in the 2009 Permit. These requirements are discussed at length on pages 41 through 43 of the Test Claim Narrative.

Whenever a state law or order mandates a change that does more than just increase the cost of providing services, and instead requires an increase in the actual level or quality of governmental services provided, that increase will represent a "higher level of service" within the meaning of Article XIII B § 6 of the California Constitution.[167] Such is the case here. The 2002 Permit included no residential program requirements. The 2009 Permit, however, significantly increases the burden imposed on the Cities. By requiring the Cities to develop and implement a residential program, the Regional Board has imposed a higher level of service for which the Permittees are entitled to reimbursement.

E. Geographical Information System (GIS) For Industrial Facilities And Newly Specified Commercial Facilities

1. The Mandated Activity Or Program

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

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

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

167 *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Ca1.4th 859, 877.

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

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

2. State's Response

In response to Permittees' claim that the above requirements constitute unfunded state mandates, the State argues that the fact that the Permit includes additional or better-tailored" requirements does not mean that the 2009 Permit is going beyond federal law or imposing a new program or higher level of service. The State claims the following are examples of additional and "better tailored" requirements that do not impose new programs or higher levels of service:

- Because the 2002 Permit required prioritization of industrial and commercial facilities, the inclusion of GIS would aid in determining the proximity of a facility to its receiving waterbody.

- Permittees provided the proposed 2007 DAMP on how they envisioned their storm water program moving forward during the next permit term. This 2007 DAMP included several uses of GIS, including mapping of HOA common areas, mapping of sensitive environmental areas, and the "optional" inclusion of GIS for industrial and commercial facilities in the inspection database.

- Permittees proposed the prioritization methodology for industrial and commercial inspections, which identifies the distance between the facility and a sensitive waterbody as one of the major factors in prioritization ranking, and GIS would be needed to calculate this distance.

In addition, the State argues that because the inclusion of GIS was first introduced as a recommendation in the 2002 permit, the new 2009 requirement for inclusion of GIS is simply a necessary addition to achieve the federal MEP standard.

3. Permittees' Rebuttal

The State's arguments fail for the following reasons:

(a) By Adding Additional Requirements and Increasing the Specificity of Existing Requirements, the Permit Imposes a Higher Level of Service

Neither the 2009 Permit, nor any of its supporting documents, specifically identifies any federal regulations as specific authority for imposition of the GIS requirement set forth in Section IX.1 of the 2009 Permit. Moreover, the Clean Water Act does not specifically require the use of a Geographical Information System as a part of a municipal inventory of industrial or commercial facilities.[168] Thus, the 2009 Permit's requirement for the inclusion of a GIS as part of a municipal inventory of industrial facilities is an unfunded state mandate because it imposes a higher level of service.

The State implies the new GIS requirement is not a higher level of service because GIS was recommended in the 2002 permit and would aid in meeting a 2002 Permit requirement for

[168] See 40 C.F.R. 122.26(d)(2)(ii).

prioritizing facilities for inspection frequency. However, the fact that something may aid in meeting a 2002 Permit requirement does not compel the inclusion of GIS as an additional requirement in the 2009 Permit. The Permittees certainly could have determined and are able to determine how to prioritize facilities for inspection frequency without including the latitude and longitude information for industrial and commercial facilities. The fact remains that the GIS requirement is a higher level of service beyond the 2002 requirement of developing an inventory of industrial and commercial facilities within each Permittee's jurisdiction. A Permittee can develop an inventory of such facilities without the use and inclusion of an expensive GIS system.

The State also argues that the new GIS requirement does not impose a higher level of service because the GIS requirement "flow[s] directly from the [Permittees'] proposal" because the 2007 DAMP included the use of GIS in other program areas. This argument is misleading, however, because regardless of commitments made by the Permittees to use GIS in ***other*** specified program areas (*e.g.*, mapping HOA common areas), the Permittees never made any commitment to use GIS as part of their industrial or commercial programs in either the 2007 DAMP or the 2006 ROWD. Moreover, the 2007 DAMP only suggested the "optional" inclusion of GIS for industrial and commercial facilities in the inspection database; in no way was it suggested that GIS should be required for industrial and commercial facilities.

Moreover, even if a Permittee already had a GIS system in place prior to the 2009 Permit, such a Permittee would be required to expend significant staff time and financial resources (*e.g.*, hiring consultants and purchasing computer equipment, software and databases) to expand its system to include all commercial and industrial facilities in its jurisdiction. As such, the GIS requirement for commercial and industrial facilities absolutely imposes a higher level of service that substantially expands upon the 2002 permit and requires the Permittees to undertake defined actions that were merely advisory under the 2002 Permit and the 2007 DAMP.

To further support its argument that the GIS requirement does not represent a higher level of service, the State argues that GIS should be used to determine distance from a facility to a sensitive water body because identifying this distance was a prioritization methodology proposed by the Permittees in the 2007 DAMP. First, the State implies that this prioritization methodology was newly introduced in the 2007 DAMP. This prioritization methodology was not first introduced in the 2007 DAMP. This prioritization methodology is the same methodology set forth in the 2002 DAMP, but the information was conveyed in a different manner – using a table format as opposed to a graphic representation.

Furthermore, it is not necessary to use GIS to determine distances from a facility to a sensitive water body. During the third term, the Permittees successfully determined distance information by using a map provided by the County, as well as other resources provided by each individual Permittee. Inclusion of GIS was not required or necessary during the third term, and therefore there is no technical basis for its requirement in the 2009 Permit.

Lastly, in their test claim, Permittees stated that the Regional Board indefensibly added 11 new categories[169] of commercial facilities subject to municipal inspections that were not in the 2002 Permit. The Clean Water Act does not require these 11 new categories of commercial facilities, and the Regional Board provided no legal authority for adding these 11 new categories. The State Board did not respond to this fact, which tends to indicate that there exists no legal justification for adding these 11 new categories of commercial facilities in the 2009 Permit. There simply is no legal authority warranting the inclusion of these 11 new categories of commercial facilities and no evidence that these 11 categories are significant non-point source polluters.

(b) GIS Is Not a Necessary Addition to Achieve Federal MEP

Because the 2009 Permit requires the same ends to be met as the 2002 permit (*i.e.*, to inventory and prioritize industrial and commercial facilities, and as part of the prioritization process, determine the proximity of those facilities to sensitive waterbodies), there is no basis for requiring new means (*i.e.*, the mandatory inclusion of GIS) to reach those same ends. These inventory and prioritization requirements for commercial and industrial facilities were met throughout the third term permit without the use of GIS, and therefore GIS is not necessary to meet those same requirements in the 2009 Permit. In light of this, the inclusion of GIS as a requirement in the 2009 Permit is not necessary to achieve the federal MEP, but instead imposes a higher level of service that is unwarranted and constitutes an unfunded mandate.

VII. THERE IS NO REQUIREMENT THAT PERMITTEES BRING AN UNFUNDED MANDATE CLAIM TO THE STATE WATER BOARD, PRIOR TO THE COMMISSION

The Board argues that the Commission should abstain from hearing the Test Claim, asserting that Permittees have not yet exhausted their remedies before the State Water Board.[170] Interestingly, this argument is essentially the exact opposite of the argument made by the State Water Board and the Los Angeles Regional Board in 2003, in a superior court action challenging the 2001 Los Angeles MS4 NPDES Permit ("LA Permit"). In that action, the Boards successfully opposed a claim that various provisions of the LA Permit constituted unfunded mandates, on the basis that the petitioners in the case had not exhausted their administrative remedies before the Commission.[171] Specifically, the Boards argued "Petitioners cannot seek a judicial declaration that the Permit constitutes an unfunded mandate ***until [they] file[] an administrative claim with the Commission on State Mandates*** and have had the claim

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

170 Board Response, pp. 18-19.

171 See Exhibit 25, Demurrer, p. 4.

denied."[172] The Superior Court agreed, ruling that the exclusive procedure for challenging an unfunded mandate is to file a test claim with the Commission, followed by a test case, were necessary.[173]

Here, the Permittees have done exactly what the Water Boards in the LA Permit case argued (and the Superior Court ruled) should have been done in that case, *i.e.*, they have presented their unfunded mandate claims to the Commission first for a determination on whether or not the requirement in question is an unfunded State mandate. Yet the Board now argues that this Commission cannot yet hear the test claim because whether or not it is an unfunded State mandate has not first been ruled on by the State Water Board. That position is not only inconsistent with the position taken by the Water Boards in 2003 concerning the LA Permit, but is also inconsistent with the clear language of the statutory schemes related both to unfunded mandate claims and to State Water Board review of regional board actions.

The law is clear that the ***"sole and exclusive procedure*** by which a local agency" may bring an unfunded mandate claim is that set forth in Government Code section 17550 *et seq.*[174] The procedure authorized thereby requires the filing of a test claim with the Commission, to be followed by a review of the Commission's decision through a petition for administrative mandate in a California Superior Court.[175] In fact, the Commission is given the express authority to determine whether an executive order that imposes a requirement "is mandated by a federal law or regulation and results in costs mandated by the federal government."[176] Thus, the Board's claim that Permittees are required to seek the State Board's opinion of whether or not the Permit goes beyond federal mandates, before bringing a test claim, is directly refuted by the express process set forth in the Government Code.

In addition, under Water Code section 13320, the State Water Board is to review "any action or failure to act by a regional board under subdivision (c) of Section 13225, Article 4 (commencing with Section 13260) of Chapter 4, Chapter 5 (commencing with Section 13300), Chapter 5.9 (commencing with Section 13399.25), or Chapter 7 (commencing with Section 13500)."[177] Nowhere in this list of decisions that are to be subject to State Board review is there any authority provided to the State Water Board to review the failure of a regional board to comply with the specific funding requirements under the California Constitution, or with the review process required under Government Code section 17550 *et seq*.

Likewise, the statutory scheme governing State Water Board review of regional board actions shows the Boards' exhaustion argument to be frivolous. The Boards appear to suggest that Permittees must exhaust their alleged administrative remedies with the State Water Board, and thereafter then the Commission, before the complaining party may seek judicial relief. But under Water Code section 13330(a), any petitioner filing suit and seeking review of a decision of

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172 See Exhibit 25, Demurrer, p. 4, emph. added.
173 Exhibit 26, Ruling on Demurrer, pp. 2-3.
174 Gov. Code § 17552, emph. added.
175 Gov. Code §§ 17551, 17559.
176 Gov. Code § 17556(c).
177 Water Code § 13320(a).

the State Board must file the suit shortly thereafter, *i.e.,* within 30 days of service of such decision, and thus would not have time, under the Board's interpretation of the statute, to ever timely file a suit in State Court challenging the State Board's determination. Accordingly, the petition process under Water Code sections 13320 and 13330 does not allow for another layer of administrative review, *i.e.,* by the Commission, of an issue appealed to the State Board.

The review requirements under Water Code section 13320 for a petition to the State Water Board are very specific and on their face plainly have no application to reviewing a Water Board's failure to comply with Article XIIIB Section 6 of the California Constitution or Government Code section 17500. In addition, nothing under Government Code section 17500 *et seq*. in any way provides the State Board with jurisdiction over determining whether a permit requirement is an unfunded State mandate.

As this Commission has exclusive jurisdiction to determine whether the permit provisions at issue constitute unfunded state mandates, there is no basis for the Board's claim that Permittees were required to exhaust their "remedies" before the State Board before bringing this Test Claim.

VIII. THE PERMITTEES DO NOT HAVE THE AUTHORITY TO RECOVER THE COST OF THE CONTESTED PROGRAMS THROUGH FEES

Any attempt to charge a fee to recover the cost involved in stormwater regulation presents a particular challenge in light of the limitations set forth in the California Constitution on local government's power to raise tax or charge fees. Various provisions within the California Constitution require voter approval in all but a few very limited circumstances, before taxes or fees can be imposed.

Under the 2009 Permit, the Permittees are required to develop complex programs to deal with non-point source discharges to reduce pollutants that are carried by stormwater into the MS4 system and discharged into receiving waters. Most of the programs developed by local governments to comply with their obligations under the 2009 Permit are not directed at individual dischargers but rather are designed to deal with multiple sources of pollutants being transported by stormwater from multiple properties being put to a wide range of uses.

In an urban area that is largely built out, such as Orange County, effectively implementing the requirements of the 2009 Permit means developing programs directed at the use of property that is already developed and is being used in accordance with existing lawfully authorized uses. Yet local governments typically have a very limited ability to regulate existing lawful uses of property. The limitations in Articles XIII A, XIII C, and XIII D of the California Constitution severely constrain the local government's ability to impose taxes and fees in a situation where the payor of the fee is using its property for a use that are is directly regulated by the local government or where the individual property owner, occupant or user of that property is not directly availing itself of governmental services.

The provisions of the MS4 Permit that are the subject of the unfunded mandate claim are the following:

- Watershed Action Plans and TMDL Implementation (Section XVIII)
- Public Education Requirements (Section XIII)
- Reduction of Pollutant Discharges From Residential Facilities (Section IX)
- Municipal Inspections of Industrial Facilities (Section IX)
- Municipal Inspections of Commercial Facilities (Section X)
- Provisions Requiring Public Projects to comply with Low impact development and Hydromodification Requirements (Section XII)

As more fully explained below, The Permittees do not have the ability to fund any of these programs by a fee that could be imposed without a vote of the electorate.

A. California Constitution Article XIII C Limits Local Governments' Power To Impose Fees

Proposition 26, enacted by the voters this year to amend Article XIII C of the California Constitution, defined virtually any revenue device enacted by a local government as a tax requiring voter approval, unless it fell within certain enumerated exceptions.

Article XIII C § 2(d)[178] now provides that:

> No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

Article XIII C § 1(d) defines special tax as

> … any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund

Article XIII C § 1(e) defines a tax as

> … any levy, charge, or exaction of any kind imposed by a local government, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those

[178] All future references are to the California Constitution unless otherwise noted.

> not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.
>
> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

In order not to be characterized as a tax subject to a voter approval, a fee must fall within the express exemptions it authorized by Article XIII C § 1(e). The fee must be such that it recovers no more than the amount necessary to recover costs of the governmental program being funded by the fee. Further the person or business being charged the fee, the payor, may only be charged a fee based on the portion of the total government costs attributable to burdens being placed on the government by that payor or an amount based on the direct benefits the payor receives from the program or facility being funded by the fee.

A fee or charge that does not fall within the seven exceptions listed in Article XIIIC § 1(e) is automatically deemed a tax, which must be approved by the voters.

Any fee that does not fall within one of the one of the exceptions listed in Article XIII C § 1(e) that is imposed for a specific purpose, such as funding all or portion of a program designed to comply with a local government's obligation under the MS4 Permit, would constitute a "special tax." Article XIII A § 4 and Article XIII C § 2(d) would thus require it to be approved by 2/3 of the voters of the portion of the jurisdiction subject to the fee.

B. Permittees Cannot Charge Fees to Cover the Costs of Complying with the Watershed Action Plans and TMDL Implementation Requirements of the 2009 Permit(Section XVIII)

The programs that the Permittees need to develop to comply with the requirements of Section XVIII of the Permit, concerning Watershed Action Plans and TMDL Implementation, are required to address a wide range of sources of certain pollutants within an entire watershed, an area measured in square miles, and involving a large number of individual property owners and occupants and a myriad of uses. Because of the large number of potential sources of pollutants within a given watershed, the Permittees are unable to develop a methodology to precisely allocate the cost of any such programs to individual sources of the pollutants within that watershed in accordance with the California Constitution. It would be impossible, therefore, to impose a fee without voter approval that meets the threshold requirement of Article XIII C § 1(e) so that the fee charged to an individual "… bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the [program designed to comply with these MS4 Permit requirement]"[179]

C. Permittees Cannot Charge Fees to Cover the Costs of Complying with the Public Education Requirements of the 2009 Permit (Section XIII)

The Public Education program developed by the Permittees, as required by Section XIII of the 2009 Permit, is a County-wide program and is not directed to individual residents or property owners within the county. In order to be effective the education program must be designed to reach the maximum number of persons. Further, any attempt to charge for educational materials or services or otherwise to directly charge the persons utilizing those educational materials would necessarily undercut the effectiveness of the program, and is thus infeasible.

D. Permittees Cannot Charge Fees to Cover the Costs of Complying with the Provisions of the 2009 Permit Requiring Reduction Of Pollutant Discharges From Residential Facilities (Section XI)

The provisions of the Section XI of the 2009 Permit include a number of very specific requirements that require the Permittees to develop fact sheets and BMPs dealing with certain enumerated activities typically conducted on residential property, as well as to develop a pilot program to deal with pollutants being discharged from property under the control of homeowners associations Given the wide range of properties and activities affected by these requirements, it would be legally impossible for the local government to develop a fee that allocates to the individual fee payor the portion of the program costs attributable to the burdens that the payor places on the MS4. That burden allocation would need to take into consideration the activity taking place on the individual property and the pollutants being generated and discharged from that property. Also, because most residential uses are existing lawful uses that do not require any permits, the local government does not have an ability to compel the payment of fees without imposing a tax.

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179 Article XIII C § 1(e).

E. Permittees Cannot Charge Fees to Cover the Costs of Complying with the Provisions of the 2009 Permit Requiring Municipal Inspections Of Industrial And Commercial Facilities (Section IX And X)

The Permittees are challenging provisions in section IX and section X of the 2009 Permit that require the Permittees to develop certain databases as part of their inspection programs.

Section IX of the MS4 Permit requires:

> Each permittee shall continue to maintain an inventory of industrial facilities within its jurisdiction. All sites that have the potential to discharge pollutants to the MS4 should be included in this inventory regardless of whether the facility is subject to business permits, licensing, the State's General Industrial Permit or other individual NPDES permit. This database must be updated on an annual basis. This inventory must be maintained in a computer-based database system and must include relevant information on ownership, SIC code(s), General Industrial Permit WDID # (if any), size, location, etc. Inclusion of a Geographical Information System (GIS) is required, with latitude/longitude (in decimals) or NAD83/WGS84103 compatible formatting.

Section X of the MS4 Permit requires:

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

Although Article XIIIC § 1(e)(3) authorizes the local government to charge certain fees for "the reasonable regulatory costs to a local government for … performing … inspections …", the amount charged to the individual payor must be related to the portion of the governmental cost reasonably related to the burden being placed on the governmental service by that individual payor.

The databases required to be developed by the 2009 Permit would cover all commercial and industrial activates within the jurisdiction of the individual Permittees. The type of activities and the potential for discharging pollutants that impact stormwater varies widely from each individual industrial and commercial operation. It would be impossible to develop a "fee"

structure that meets the constitutional requirement to allocate the cost of developing the required databases over all of those industrial and commercial operations, based on the burden that an individual operation places on the MS4.

Further the commercial and industrial inspection program is largely voluntary. Most industrial and commercial operations that are permitted by the zoning code do not require any discretionary approval by the local government. The local government cannot compel the operator to permit such an inspection nor can the local government require users who do not require permits to pay inspection fees.

A limited number of industrial and commercial uses may require a conditional use permit or other permit to operate. Even though the local government may have an ability to require that such uses allow inspections of their operation and pay a fee related to those inspections as a condition of their permit, any such fee is constitutionally required to be in an amount that bears a reasonable relation to the burden attributable to that fee payor. A local government could not allocate the cost of developing databases intended to support the entire industrial and commercial inspection program only on those industrial and commercial operations requiring a conditional use permit. Any such attempted fee would be invalid as violating the requirement of Article XIII C §1(e) that inspections fees be limited to an amount proportional to the burden being placed on the governmental entity by the payor of the fee.

F. Permittees Cannot Charge Fees to Cover the Costs of Complying with the Provisions of the 2009 Permit Requiring Public Projects To Comply With Low Impact Development And Hydromodification Requirements (Section XII)

Section XII of the 2009 Permit requires the Permittees to develop and implement on municipal projects certain low impact development and hydromodification prevention design principles. Projects that are subject to these requirements include municipal yards, recreation centers, civic centers, and road improvements. Many of the requirements of this section of the Permit, such as the need to follow EPA Guidance documents known as the Green Street, are unique to public projects.

Although Permittees may be permitted to charge a fee for the use of certain governmental facilities under the exception set forth in Article XIIIC § 1(e)(4), most governmental facilities subject to these requirements, including municipal yards, civic centers, and road improvements, are necessary public facilities, which local government cannot charge the public to use for both legal and practical reasons.

For example, the cost of compliance with the permit requirements cannot be passed on to others through fees for facilities such as municipal yards that are used only by the Permittees' staff and contractors. Likewise, facilities in which public meetings subject to the Brown Act are held[180] must be open to the public, with any member of the public freely permitted to attend.[181]

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180 Gov. Code §§ 5490-54962.

181 Gov. Code §54953.

Similarly, streets within the street system of the Permittee must be open to the general public and there is no statutory authority to charge fees for the use of these public facilities.

G. Any Fee Charged To Property Owners To Fund A Local Government's Stormwater Program Must Comply With Article XIII D Requirement That Property Related Fees Be Approved By A Vote Of The Electorate

The State contends that some jurisdictions have enacted stormwater fees as authority for the State's contentions that the Permittees may impose fees to fund their stormwater programs. The State, however, does not discuss the procedure used by the local jurisdiction for enacting those stormwater fees.

Any jurisdiction-wide fee charged to owners and occupants of real property must comply with the requirements of Article XIII D, which governs any such property related fees. Although property related fees are expressly exempted from the requirements of Article XIII C by § 1(e)(7), Article XIII D also requires voter approval of most property related fees. The courts have expressly held that stormwater fees charged to owners and occupants of property by a local government require voter approval before they may be imposed.

Article XIII D § 3(a) provides that:

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

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

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

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

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

The case of *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 dealt with a stormwater fee that the City of Salinas attempted to enact without

voter approval. The court held the stormwater fee was invalid and that that such a fee could not be imposed unless it was approved by the voters.

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

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

The City asserted that the fee did not require voter approval requirements of Article XIII D § 6(c) on two grounds. The first ground was that the fee was not a "property related" fee but rather a "user fee" which the property owner could avoid simply by maintaining a storm water management facility on the property. The City argued that because it was possible to own property without being subject to the fee that it was not a fee imposed "as an incident of property ownership."[182] The second ground asserted by the City was that, even if the fee could be characterized as a property related fee, it was exempted from the voter approval requirements by provisions of Article XIIID § 6(c) that allow local governments to enact fees for sewer and water services without prior voter approval.[183] The court rejected both arguments.

The *Salinas* Court found that because the fee was not directly based on or measured by use, comparable to the metered use of water or the operation of a business, it could not be characterized as a use fee. Rather the fee was based on ownership or occupancy of a parcel and was based on the size of the parcel and therefore must be viewed as a property related fee.[184]

The Court also found that the "Proportional Reduction" provision of the City's fee did not alter the nature of the fee as a property related fee. A property owner's operation of a private storm drain system reduced the amount owed to the City to the extent that runoff into the City's system is reduced but did not eliminate the need to pay a fee. The reduction was not proportional to the amount of services requested or used by the occupant, but rather was based on the physical properties of the parcel. Thus, the court determined that the fee was ultimately a fee for a public service having a direct relationship to the ownership of developed property. The court concluded that the storm drainage fee "burden[s] landowners *as landowners*," and thus it

182 *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* at p. 1354.
183 *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* at p. 1354.
184 *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* at p. 1355.

was in reality a property related fee subject to the requirements of Article XIII D and not a user fee. The fee was therefore subject to the voter-approval requirements of article XIII D unless one of the exceptions in section 6(c) of that section applied.[185]

The Court then went on to reject that the City's contention that the fee fell within exemption from the voter-approval requirement applicable to fees for sewer or water services. The court concluded that that the term "sewer services" was ambiguous in the context of both § 6(c) and Article XIII D as a whole. The court found that because Article XIII D was enacted through the initiative process the rule of judicial construction that an enactment must be strictly construed required the court to take a narrow reading of the sewer exemption. The court found that the sewer services exception in Article XIIID § 6(c) was applicable only to sanitary sewerage and not to services related to stormwater.[186]

The Court observed:

> The City itself treats storm drainage differently from its other sewer systems. The stated purpose of [the City storm drainage fee ordinance] was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways … the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water..[187]

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

> …[W]e cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." *Government Code section 53750,* enacted to explain some of the terms used in articles XIII C and XIII D, defines " '[w]ater' " as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.[188]

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185 *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* at p. 1355.

186 *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* at pp. 1357-1358.

187 *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* at p. 1358.

188 *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* at p. 1358.

In summary, Articles XIII A, XIII C, and XIII D of the California Constitution severely limit the Permittees' power to impose fees. Any fees developed by the Permittees to fund the portions of the MS4 Permit that are the subject of this unfunded mandate claim could only be imposed by some form of special tax or property related fee that would require either a 2/3 vote of the electorate affected by the tax or a majority vote of the property owners subject to the property related fee.

IX. CONCLUSION

The 2009 Permit imposes a series of new State mandated activities and programs on the Permittees. The Permittees' Test Claim detailed the nature and substantial cost to develop and implement these new programs and activities, and satisfied all of the criteria to establish their claims for subvention. While the State's Responses to the Test Claim raises several recurring themes against subvention as demonstrated hereinabove, none of the arguments raised have merit, and most of the State's contentions can be found to be baseless on their face, (*see*, *e.g.*, the contention that all Permit Terms in issue are federally requires because the Permit was issued in part under the CWA; the contention that any "discretionary" decision was "mandated" by federal law; or the claim that the Permittees must first raise their Test Claim arguments with the State Board before filing a Test Claim with this Commission.)

As a result, the Permittees respectfully request that the Commission find that the Permittees are entitled to reimbursement with respect to each of the programs and activities raised in their Test Claim and that it sustain the Permittees' claims in their entirety in this regard.

Dated: 6/17/2011

NICHOLAS S. CHRISOS, COUNTY COUNSEL
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PROOF OF SERVICE

I, Shalaine A. Aguayo, declare that I am over 18 years of age and not a party to the within action. I am employed in Orange County at 333 W. Santa Ana Blvd., #407, Santa Ana, California, 92701. My mailing address is P.O. Box 1379, Santa Ana, CA, 92702-1379. On June 17, 2011, The following document(s) were transmitted as follows:

NARRATIVE STATEMENT IN REBUTTAL TO SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD'S AND THE DEPARTMENT OF FINANCE'S RESPONSES TO TEST CLAIM 09-TC-03 SANTA ANA REGIONAL WATER PERMIT – ORANGE COUNTY ALONG WITH SUPPORTING DOCUMENTS

	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 uploaded a true copy thereof to the CSM Drop Box at the Commission on State Mandates' website 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)].
	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.

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

EXECUTED on the 17th day of June, 2011, in Santa Ana, California.

Shalaine A. Aguayo