



California Regional Water Quality Control Board

San Francisco Bay Region

Linda S. Adams
Acting Secretary for
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>

Received
May 17, 2011
Commission on
State Mandates

Edmund G. Brown, Jr.
Governor

May 17, 2011

Drew Bohan, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Mr. Bohan:

San Francisco Bay Regional Water Quality Control Board Response to:

- Municipal Regional Stormwater Permit--San Mateo County, 10-TC-01, City of Brisbane, Claimant
- Municipal Regional Stormwater Permit--Alameda County, 10-TC-02, City of Alameda, Claimant
- Municipal Regional Stormwater Permit--Santa Clara County, 10-TC-03, Santa Clara County, Claimant
- Municipal Regional Stormwater Permit--Municipal Operations (C.2), 10-TC-05, City of San Jose, Claimant

I. Introduction

The San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) files this response to Test Claims 10-TC-01, 10-TC-02, 10-TC-03, and 10-TC-05. The Test Claims arise from a single federal permit that was issued by the San Francisco Bay Water Board as Waste Discharge Requirements and a National Pollutant Discharge Elimination System (NPDES) Permit (Permit).¹ The Permit authorized the discharge of stormwater runoff from the municipal separate storm sewer systems (MS4s) of 76 municipalities and local agencies in the San Francisco Bay Area (collectively referred to as Permittees). The Test Claims were filed by the City of Alameda (Alameda), City of Brisbane (Brisbane), County of Santa Clara (Santa Clara County) and City of San Jose (San Jose) (collectively referred to as Claimants). They seek reimbursement of Claimants' costs in implementing multiple permit provisions during 2010 and 2011. The San Francisco Bay Water Board issued the Permit pursuant to the requirements of the Clean Water Act (CWA),² its implementing regulations, and guidance from the United States Environmental Protection Agency (U.S. EPA). U.S. EPA is the federal agency responsible for administering the CWA. Pursuant to federal law, U.S. EPA authorized the San Francisco Bay Water Board to issue NPDES permits including the Permit in lieu of issuance of those permits by U.S. EPA itself. The Permit regulates the discharge of stormwater runoff from the municipal separate storm sewer systems (MS4s) of 76 cities, counties and special districts.

¹ California Regional Water Quality Control Board, San Francisco Bay Region Order R2-2009-0074. (Hereafter "Permit".) It was issued by the San Francisco Bay Water Board on October 14, 2009.

² Federal Water Pollution Control Act (FWPCA; 33 USCA §§ 1251 et seq.). The federal Act is referred to herein by its popular name, the Clean Water Act ("CWA") and the code sections used are for the CWA.

The CWA requires that local agencies that discharge pollutants from their MS4s to waters of the United States must apply for and receive permits regulating those discharges.³ Local agencies generally obtain a single system-wide MS4 permit for each inter-connected municipal storm sewer system.⁴ As required by federal statute and regulations, the Permit contains numerous requirements for the Permittees to take actions, known as Best Management Practices (BMPs), to reduce the flow of pollutants into waters in the San Francisco Bay Region. These Test Claims seek reimbursement by the State of California for expenses they assert have occurred or will incur in implementing numerous requirements of the Permit.

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

The Permit as a whole, including the challenged provisions, is mandated on the local governments by federal law. The federal mandate applies to many dischargers of storm water, both public and private, and is not unique to local governments. The federal mandate requires that the Permit be issued to the local governments; it is not a question of "shifting" the costs from the state to the local governments. The specific requirements challenged are consistent with the minimum requirements of federal law. Even if the Permit were to be interpreted to as going beyond federal law, any additional state requirements for each requirement are *de minimis*. Finally, they are not subject to reimbursement because the Claimants have the ability to comply with these requirements through charges and fees, and are not required to raise taxes.

II. Description of the Test Claims

The Test Claims focus on a number of Permit requirements. The challenged Provisions are listed below together with the names of the Claimants that are challenging those specific Provisions:

1. C.8.b--Regional Monitoring Program: Brisbane, Alameda, Santa Clara County
2. C.8.c--Status monitoring: Brisbane, Alameda, Santa Clara County
3. C.8.d--New monitoring studies and projects: Brisbane, Alameda, Santa Clara County
4. C.8.e.i--Pollutants of concern monitoring: Brisbane, Alameda, Santa Clara County
5. C.8.e.ii--Long term monitoring: Brisbane, Alameda, Santa Clara County
6. C.8.e.vi--Sediment delivery estimate/budget: Brisbane, Alameda, Santa Clara County
7. C.8.f--Citizen monitoring and participation: Brisbane, Alameda, Santa Clara County
8. C.8.g--Reporting: Brisbane, Alameda, Santa Clara County
9. C.8.h--Monitoring protocols and data quality: Brisbane, Alameda, Santa Clara County
10. C.10.a.i--Short term trash reduction plan: Brisbane, Alameda, Santa Clara County

³ CWA, § 402(p); *NRDC v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1295-1296.

⁴ CWA § 402(p)(3)(B)(i).

11. C.10.a.ii--Baseline trash load and trash load reduction tracking method: Brisbane, Alameda, Santa Clara County
12. C.10.a.iii--Minimum full trash capture: Brisbane, Alameda, Santa Clara County
13. C.10.b.i--Trash hot spot cleanup and definition: Brisbane, Alameda, Santa Clara County
14. C.10.b.ii--Trash hot spot selection and cleanup: Brisbane, Alameda, Santa Clara County
15. C.10.b.iii--Trash hot spot assessment: Brisbane, Alameda, Santa Clara County
16. C.10.c--Long term trash reduction plan: Brisbane, Alameda, Santa Clara County
17. C.10.d--Trash reporting: Brisbane, Alameda, Santa Clara County
18. C.11.f & C.12.f--Mercury and PCBs diversion studies: Brisbane, Alameda, Santa Clara County
19. C.2.b--Parking lots, garages, trash areas, etc.--San Jose
20. C.2.c--Bridge and Structure maintenance and graffiti removal--San Jose
21. C.2.e--Rural road and public works maintenance--San Jose
22. C.2.f--SWPPP for corporate yards--San Jose

The Claimants assert that the Provisions listed above are subject to subvention because they are not required by federal law and because they impose new programs or higher levels of service. The Claimants also allege that none of the exceptions in Government Code section 17556 that would bar recovery of costs apply. Finally, they claim that they lack authority to assess a fee to recover the costs of these mandated activities.

III. History of Issuance of the Permit

In response to the CWA amendments of 1987, the San Francisco Bay Water Board issued municipal storm water Phase I permits to the entire county-wide urban areas of Santa Clara, Alameda, and San Mateo counties as described below. The cities within those counties chose to collaborate in countywide groups, to pool resources and expertise, and share information, public outreach and monitoring costs, among other tasks. Alameda's discharge of stormwater was covered by the Alameda County permits described below. Brisbane's discharge was covered by the San Mateo County permits. San Jose's and Santa Clara County's discharges were covered by the Santa Clara County permits.

A. Claimants' Prior Permits

1 Santa Clara County

- On June 20, 1990, the San Francisco Bay Water Board issued the first municipal stormwater permit to the cities in Santa Clara County (including San Jose), the County of Santa Clara, and the Santa Clara Valley Water District (NPDES Permit Number CAS0029718, Order No. 90-094).
 - On February 19, 1992, Water Board amended it (Order No. 92-021).
- On August 23, 1995, the Water Board reissued the permit (Order No. 95-180)
 - On July 21, 1999, Water Board amended it (Order No. 99-050)
- On April 21, 2001, the Water Board reissued the permit (Order No. 01-024).

- On October 17, 2001, the Water Board amended the permit (Order No. 01-119) to require additional treatment controls to limit stormwater pollutant discharges associated with certain new development and significant redevelopment projects.
- On July 20, 2005, the Water Board amended the permit (Order No. R2-2005-0035) to require hydromofication management controls on certain new and redevelopment projects.

2 Alameda County

- On October 16, 1991, the San Francisco Bay Water Board issued the first municipal stormwater permit to the cities in Alameda County, the County of Alameda, the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control and Water Conservation District (NPDES Permit Number CAS0029831, Order No. 91-146).
- On February 19, 1997, the Water Board reissued the permit (Order No. 97-030)
 - On July 21, 1999, the Water Board amended it (Order No. 99-049).
- On February 19, 2003, the Water Board reissued the permit (Order R2-2003-0021)
 - On March 14, 2007, the Water Board amended it (Order R2-2007-0025) to require hydromofication management controls on certain new and redevelopment projects.

3 San Mateo County

- On September 15, 1993, the San Francisco Bay Water Board issued the first municipal stormwater permit to the cities in San Mateo County, the County of San Mateo, and City/County Association of Governments of San Mateo County (NPDES Permit Number CAS0029921, Order No. 93-106).
- On July 21, 1999, the San Francisco Bay Water Board reissued the permit (Order No. 99-059).
 - In August 1999, the San Francisco Baykeeper and Just Economics for Environmental Health filed petitions for review of Order No. 99-059 to the State Water Resources Control Board (the State Board). After careful consideration the State Board dismissed the petitions on April 4, 2001.
 - On November 14, 2003, the San Francisco Superior Court granted a petition for writ of mandate challenging the San Francisco Bay Water Board's 1999 reissuance of the permit.⁵ The Superior Court upheld the permit on most counts; however, the Writ of Mandate required that the Board amend the permit in compliance with the Court's Statement of Decision, which held that:
 - the permit failed to include a monitoring program and must therefore specify required monitoring including type, interval, and frequency sufficient to yield data which are representative of the monitored activity;
 - because the Stormwater Management Plan (Plan) was incorporated into and was deemed an integral part of the permit, modifications to the Plan would be

⁵ *San Francisco Baykeeper v. Regional Water Quality Control Board, San Francisco Bay Region* (2003) San Francisco Superior Court No. 500527, Order Granting Petition for Writ of Mandate and Statement of Decision.

- modifications to the permit and would be required to go through a public notice and comment process; and
- the Board, not the Board's Executive Officer, would be required to approve substantive modifications to the Plan.
- On February 19, 2003, the San Francisco Bay Water Board amended the permit (Order No. R2-2003-0023) to require additional treatment controls to limit stormwater pollutant discharges associated with certain new development and significant redevelopment projects.
- On July 21, 2004, the Board amended the permit (Order Nos. R2-2004-0060 and R2-2004-0062) to comply with the Superior Court's Writ of Mandate.
- On March 14, 2007, the Board amended the permit (Order R2-2007-0027) to require hydromodification management controls on certain new and redevelopment projects.

B. Permit at Issue in Test Claims

On October 14, 2009 the San Francisco Bay Water Board issued the Permit to all Phase I municipal stormwater dischargers (including Alameda County, Santa Clara County and San Mateo County). That Permit is the subject of the test claims filed by Alameda, Brisbane, San Jose and Santa Clara County.

The San Francisco Bay Water Board followed a different approach to writing the Permit than it had used in prior permits that were issued to stormwater dischargers. Those earlier permits included general descriptions of things that permittees had to do to comply with the permit. They further required that permittees develop stormwater management plans and annual plans after permit issuance. The plans that were developed after permit issuance contained detailed implementation measures and were enforceable components of the municipal NPDES stormwater permits.^{6 7 8} Permittees developed and submitted the required plans and over time the plans were enhanced, refined, and improved as stormwater programs were developed and implemented.

An advantage of this approach was that it provided flexibility for permittees to tailor their stormwater management programs to reflect local priorities and needs. Furthermore, stormwater agencies could easily improve their plans over the course of five year permit terms. Nevertheless, San Francisco Bay Water Board staff found it difficult to determine whether permittees were in compliance with their permits because the permits did not include specific requirements and measurable outcomes of some required actions. In addition, although many permit implementation measures developed during a permittee's five year permit cycle were subject to approval by the Board's Executive Officer, those changes became enforceable permit requirements without significant public review and comment or formal action by the Board. The San Francisco Bay Water Board's staff modified its approach to stormwater permitting in light of two court decisions in 2003 (one of which was a trial court decision and thus was not

⁶ California Regional Water Quality Control Board, San Francisco Bay Region Order No. R2-2003-0021, Provisions C.1, C.2.a. (Hereafter "Alameda County 2003 permit".)

⁷ California Regional Water Quality Control Board, San Francisco Bay Region Order No.99-059, Provisions C.1, C.3. (Hereafter referred to as "San Mateo County 1999 permit".)

⁸ California Regional Water Quality Control Board, San Francisco Bay Region Order No. 01-024, Provisions C.1, Provision C.2 (Hereafter referred to as "Santa Clara County 2001 permit".)

precedential).^{9 10} Taken together those cases emphasized the importance of ensuring that there was adequate opportunity for public review and comment prior to approval of implementation specifics and modifications to MS4 permits.

Following those court decisions the San Francisco Bay Water Board staff began discussions with all Phase I Countywide programs (including those representing Claimants) about the next reissuance of MS4 permits. Staff met extensively with Permittees and their representatives to discuss Board staff's plan to propose a single region-wide permit that would include implementation specifics and performance standards in the permit itself (rather than in subsequently developed plans). On-going discussions and input from MS4 permittees and other interested parties led to Board staff's release of a first draft of the permit in December 2007 and culminated with issuance of the permit in October 2009.

In comments on a draft version of the Permit, U.S. EPA staff noted that they supported the inclusion of detailed requirements in the Permit.¹¹ They stated that "[o]ur municipal audits of recent years have identified lack of detailed requirements as a frequent shortcoming in previously issued-permits in our Region."¹²

As noted above, the Permit differs from the prior MS4 permits issued by the San Francisco Bay Water Board in that the Permit was issued on a regional basis to all large stormwater permittees rather than to individual countywide programs. The regional approach to permit issuance standardized Permittees' required actions, specific levels of implementation, and reporting requirements. This approach has provided Permittees with an increased opportunity to combine resources and collaborate. It has also "leveled the playing field" through regionally consistent requirements for all 76 Permittees.

IV. Federal Law Requirements for Municipal Storm Water Permits

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

1. Regulatory Overview of the CWA

In 1972, the CWA was extensively amended to implement a permitting system for all discharges of pollutants from "point sources"¹³ to waters of the United States.¹⁴ These permits, issued pursuant to the National Pollutant Discharge Elimination System, are known as "NPDES

⁹ *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832.

¹⁰ *San Francisco Baykeeper v. Regional Water Quality Control Board, San Francisco Bay Region* (2003) San Francisco Superior Court No. 500527, Order Granting Petition for Writ of Mandate and Statement of Decision.

¹¹ Email from Eugene Bromley, EPA, to MRP, "Comments on December 27 Draft MRP", 2/29/2008

¹² *Id.*

¹³ CWA, § 502(14). The Permittees' MS4s are point sources. (CWA, § 402(p); 40 CFR § 122.26(b)(4).)

¹⁴ CWA, §§ 301 and 402.

permits.” The 1972 amendments specifically allowed U.S. EPA to authorize states to administer the NPDES program in lieu of U.S. EPA, and to issue permits pursuant to this authority.¹⁵ California was the first state in the nation to obtain such authorization. In order to obtain this authorization, the California Legislature amended the California Water Code, finding that the state should implement the federal law in order to avoid direct regulation by the federal government.¹⁶ The California Legislature mandated that California’s permit program must ensure consistency with federal law.¹⁷ Federal law also requires that, when a Regional Water Board issues a NPDES permit, it must meet the same federal requirements as U.S. EPA would have met in issuing a permit.¹⁸

The State Water Resources Control Board and the nine Regional Water Quality Control Boards are the state agencies charged with implementing the federal NPDES program.¹⁹ The State Water Board’s regulations incorporate U.S. EPA regulations for implementing the federal permit program,²⁰ and do not impose any additional state requirements. Therefore, both the CWA and U.S. EPA regulations apply to the permit program in California.²¹ In California, permits to allow discharges into state waters are termed “waste discharge requirements.”²² When issuing permits for discharges to waters of the United States, the term “waste discharge requirements” equates to the term “permit” in the CWA.²³ Waste discharge requirements issued for discharges to waters of the United States are NPDES permits under federal law.

The Clean Water Act prohibits the discharge of pollutants from point sources to waters of the United States, except in compliance with a NPDES permit.²⁴ In 1973, U.S. EPA issued regulations that exempted certain types of discharges it determined were administratively infeasible to regulate, including storm water runoff. Such regulation is difficult because storm water runoff generally is not subjected to any treatment prior to discharge. Instead, it simply runs off urban streets or developed properties into gutters and drainage ways and flows directly into streams, lakes, and the ocean.²⁵ This exemption was overruled in *Natural Resources Defense Council v. Costle*²⁶, which held that the exemption was illegal, and ordered U.S. EPA to require NPDES permits for storm water runoff. In *Costle* the court suggested innovative methods for permitting storm water discharges, including using general permits for numerous sources and issuing permits that “proscribe industry practices that aggravate the problem of

¹⁵ *Id.*, § 402(b).

¹⁶ Wat. Code, § 13370 *et seq.*, adding Chapter 5.5 to the Porter-Cologne Water Quality Control Act.

¹⁷ Wat. Code, § 13372.

¹⁸ CWA, § 402(b).

¹⁹ Wat. Code, § 13370.

²⁰ Cal. Code Regs., tit. 23, § 2235.2.

²¹ The permits *may* also include additional state requirements. (Cal. Code Regs., tit. 23, § 2235.3; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.)

²² *Id.*, § 13263.

²³ Wat. Code, § 13374.

²⁴ CWA, § 301(a). In general, “navigable waters” or “waters of the United States,” includes all surface waters, such as rivers, lakes, bays and the ocean. (CWA, § 502.)

²⁵ The chief traditional categories of discharges subject to NPDES permits are industrial process wastewater and sanitary sewer effluent. Both of these discharges are typically processed in a treatment plant before they are discharges to surface waters.

²⁶ *Natural Resources Defense Council v. Costle* (D.C. Cir. 1977) 568 F.2d 1369.

point source Pollution."²⁷ Where permits require dischargers to implement actions to control discharges or meet performance standards, these requirements are commonly called "best management practices" ("BMPs").²⁸

Despite the *Costle*²⁹ decision, U.S. EPA had not adopted regulations implementing a permitting program for storm water runoff by 1987. That year, the United States Congress amended the CWA to require storm water permits for industrial and municipal storm water runoff.³⁰ The amendments require NPDES permits for "[a] discharge from a municipal separate storm sewer system [MS4] serving a population of 250,000 or more."³¹ As discussed above, the CWA contains three provisions specific to permits for MS4s: (1) permits may be issued on a system- or jurisdiction-wide basis; (2) permits must include a requirement to effectively prohibit non-storm water discharges into storm sewers; and (3) permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the [permit writer] determines appropriate for the control of such pollutants."³²

In 1990, U.S. EPA adopted regulations to implement section 402(p).³³ The regulations specify which entities need to apply for permits and also the information they must include in permit applications. The regulations define "industrial activity" to include numerous categories of manufacturing, construction, and other typically private enterprises.³⁴ The regulations define MS4s as storm sewer systems operated by numerous public agencies, including cities, counties, states, and the federal government.³⁵ While both industrial dischargers and MS4s must obtain permits, the requirements in the industrial permits must be more stringent than in MS4 permits.³⁶ Large and medium MS4s may obtain individual or systemwide MS4 permits.³⁷ As a practical matter, most large and medium MS4s in California have chosen to be regulated as co-permittees under area-wide MS4 permits. Because many MS4 systems are connected, this allows co-permittees to take advantage of economies of scale and achieve cost-savings over individual regulation of each city or county.

²⁷ *NRDC v. Costle*, *supra*, 568 F.2d at p.1380.

²⁸ 40 CFR § 122.2. ("Best management practices ("BMPs") means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.")

²⁹ *NRDC v. Costle*, *supra*, 568 F.2d 1369.

³⁰ CWA, § 402(p).

³¹ *Id.*, § 402(p)(2)(C). U.S. EPA defines municipal separate storm sewer systems (MS4s) that serve a population over 250,000 as "large" MS4s.

³² *Id.*, § 402(p)(3)(B).

³³ Vol. 55, Federal Register (Fed.Reg.) 47990 *et seq.*

³⁴ 40 C.F.R. § 122.26(b)(14).

³⁵ 40 C.F.R. § 122.26(b)(8).

³⁶ *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3rd 1159. The differences between municipal and industrial permits are complicated, but are relevant to the question whether this permit addresses a uniquely governmental program, and are therefore discussed in more detail below.

³⁷ CWA, § 402(p)(3)(B)(i).

In order to obtain a NPDES permit, as required by the CWA, entities seeking coverage file an application with the permitting authority and the permitting authority holds a public hearing on contested permits.³⁸ U.S. EPA regulations specify the information that applicants for MS4 permits must include in their applications.³⁹ For large and medium MS4s, the application requirements are extensive.⁴⁰ Some of the federal application requirements relevant to the Test Claims are: management programs including procedures to control pollution resulting from construction activities⁴¹; legal authority to control the contribution of pollutants associated with industrial activity⁴²; and a description of maintenance activities and a maintenance schedule for structural controls, as well as a description of practices for operating and maintaining public streets, roads and highways to reduce pollutants in discharges from MS4s.⁴³ The management programs must address oversight of discharges into the system from the general population, and from industrial and construction activities within its jurisdiction, and also maintenance and control activities by the permittees. Permit applications must describe programs for education and outreach to the general public, and to certain categories of municipal workers.⁴⁴ The initial requirements for small MS4s were considered to be less stringent than those for Phase I MS4s, such as Permittees.

2. Legal Standards for MS4 Permit Provisions

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

- (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.

CWA section 402(p)(3)(B)(ii) and (iii) thus include three independent requirements: (1) the permit must effectively prohibit non-stormwater discharges into storm sewers, (2) the permit

³⁸ CWA, § 402(b)(3).

³⁹ 40 C.F.R. § 122.26(a)(4). The U.S. EPA regulations have varied requirements depending on the size of the population served by the MS4. A "large" MS4 serves a population of 250,000 or more. (40 C.F.R. § 122.26(b)(4).) Claimants filed for coverage as members of countywide stormwater programs and thus had sufficient population to qualify as "large" MS4s.

⁴⁰ 40 C.F.R. § 122.26(d).

⁴¹ 40 C.F.R. § 122.26(d)(1)(v).

⁴² 40 C.F.R. § 122.26(d)(2)(i)(A).

⁴³ 40 C.F.R. §§ 122.26(d)(2)(iv)(A)(1) and (2).

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

must include controls to reduce the pollutants to the MEP¹ and (3) the permit must include such other provisions as the permit writer deems appropriate for controlling pollutants.

An additional requirement is set forth in 40 C.F.R. section 122.44(d)(1)(vii)(B). It provides that once U.S. EPA approves a Total Maximum Daily Load (TMDL) for a waterbody, any NPDES permit, including an MS4 permit, must include effluent limits "consistent with the assumptions and requirements of any available wasteload allocations."⁴⁵

The word "shall" modifies all the quoted statutory and regulatory requirements thus the CWA and its implementing regulations mandate that the permitting agency comply with all of those mandates.

A. The MEP Standard

The MEP standard is akin to a technology-based standard and was first established in the CWA in 1987. The fundamental requirement that municipalities reduce pollutants in MS4s to the MEP remains a cornerstone of the mandate imposed upon municipalities by the federal CWA and implementing NPDES regulations. MEP is generally a result of emphasizing pollution prevention and source control BMPs as the first lines of defense in combination with appropriate structural and treatment methods serving as additional lines of defense.

The MEP approach is an ever evolving, flexible, and advancing concept, which considers technical and economic feasibility. As technical knowledge about controlling urban runoff continues to advance and change, so do the actions must be taken to comply with the MEP standard. Successive permits issued to the stormwater dischargers thus require greater levels of specificity over time in defining what constitutes MEP. This is consistent with U.S. EPA's guidance that successive permits for the same MS4 must become more refined and detailed:

The EPA also expects stormwater permits to follow an iterative process whereby each successive permit becomes more refined, detailed, and expanded as needed, based on experience under the previous permit. See, 55 Fed. Reg. 47990, 48052 ("EPA anticipates that storm water management programs will evolve and mature over time."); 64 Fed. Reg. 67722, 68754; Dec. 8, 1999 ("EPA envisions application of the MEP standard as an iterative process.") Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits (Sept. 1, 1996) ("The interim permitting approach uses BMPs in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.")⁴⁶ (Emphasis in original.)

In 2001, the Building Industry Association and Building Industry Legal Defense Fund (collectively Building Industry) challenged numerous aspects of an MS4 permit issued by the San Diego Regional Water Quality Control Board (San Diego Water Board) and the process by which it was issued, culminating in a appellate court decision upholding the permit in its entirety.⁴⁷ The San Diego Water Board argued that the Court of Appeal must give special

⁴⁵ 40 C.F.R. § 122.44(d)(1)(vii)(B).

⁴⁶ Letter from Alexis Strauss to Tam Doduc and Dorothy Rice, April 10, 2008, concerning Los Angeles County Copermittee Test Claims Nos. 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21.

⁴⁷ *Building Industry Association of San Diego County v. State Water Board* (2004) 124 Cal.App.4th 866.

deference to its determination that the permit did not exceed the MEP standard. The *Building Industry* court acknowledged the lower court's finding that "Building Industry failed to establish that the permit requirements were 'impracticable under federal law or unreasonable under state law,' and noted that there was evidence showing the Regional Water Board considered many practical aspects of the regulatory controls before issuing the permit."⁴⁸ The lower court found that Building Industry failed to show that it would be impossible to meet the requirements in the challenged permit.⁴⁹

In rejecting Building Industry's challenge, the Court of Appeal recognized that the federal MEP requirement "is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. *This definition conveys that the Permit's maximum extent practicable standard is a term of art. . . .*" (Emphasis added.)⁵⁰ Thus, the Court of Appeal's *Building Industry* decision demonstrates that the San Francisco Bay Water Board is entitled to considerable deference concerning its determination about the actions necessary to meet the federal minimum requirements.

B. *Such Other Provisions as the Administrator or the State Determines Appropriate for the Control of Such Pollutants*

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

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

Second, this provision requires that the San Francisco Bay Water Board, when appropriate, include provisions that go beyond MEP. The permittees in *Building Industry Association of San Diego County v. State Water Board* argued that the Water Boards lacked authority under federal law to impose conditions more stringent than MEP.⁵¹ The court found that the Clean Water Act provided such authority, and that it was not necessary to resort to state law to justify

⁴⁸ *Id.*, at p. 878-879.

⁴⁹ *Id.*, at p. 888.

⁵⁰ *Id.*, at p. 889.

⁵¹ *Building Industry Association, supra*, 124 Cal.App.4th 866,

the disputed permit provisions.⁵² In rejecting the challenge to the Water Boards' authority, the court had no occasion to consider whether, once the permitting agency determines that more stringent controls are necessary to protect water quality, federal law requires or merely allows the agency to include such provisions. As the court noted, however, EPA interprets section 402(p)(3)(B)(iii) to mandate "... 'controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls'"⁵³ (Emphasis in original.) Thus, even if the Commission finds that any Permit provisions go beyond MEP, the San Francisco Bay Water Board was bound by the federal mandate to include appropriate provisions necessary to control pollutants.

C. Implementation of TMDL Requirements

Claimants challenge various Provisions that are in fact required in order to implement requirements in wasteload allocations adopted in Total Maximum Daily Loads (TMDLs). As discussed in greater detail below the San Francisco Bay Water Board is required to implement TMDLs by including effluent limitations in NPDES permits that are "consistent with the assumptions and requirements of any available wasteload allocations."⁵⁴ Thus, the San Francisco Bay Water Board has an independent mandate under federal law to require provisions in MS4 permits that are necessary to implement the wasteload allocations in TMDLs.

i. The TMDL Program

The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁵⁵ The CWA contains two broad strategies for establishing effluent limitations to achieve these goals. The first is a technology-based approach that envisions requirements to maintain a minimum level of pollutant management using the best available technology.⁵⁶ The second, a water-quality based approach, relies on evaluating the condition of surface waters and setting limitations on the amount of pollution that the water can be exposed to without adversely affecting the beneficial uses of those waters.⁵⁷

Fundamentally, the purpose of a TMDL is to determine how much of a specific pollutant a waterbody can tolerate and still meet water quality standards and protect beneficial uses, and then to allocate portions of the pollutant load to various point and nonpoint source dischargers.⁵⁸ Point source dischargers that have been issued NPDES permits, such as

⁵² *Id.* at p. 881.

⁵³ *Id.*, at p. 886, citing 55 Fed.Reg. 47990, 47994 (Nov. 16, 1990), (Italics added in court's decision.); see also, *Defenders of Wildlife, supra*, 191 F.3d at 1166.

⁵⁴ 40 C.F.R. § 122.44(d)(1)(vii)(B).

⁵⁵ CWA § 101.

⁵⁶ CWA § 301.

⁵⁷ CWA §§ 301(b)(1)(C), 302(a).

⁵⁸ *Total Maximum Daily Load (TMDL)*. The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs. (40 C.F.R. § 130.2(i).)

Claimants, receive a wasteload allocation ("WLA").⁵⁹ Nonpoint source dischargers receive a load allocation ("LA").⁶⁰ Thus, the TMDL process leads to a "pollution budget" designed to restore the health of a polluted body of water, and provides a quantitative assessment of water quality problems, contributing sources of pollution, and the pollutant load reductions or control actions needed to restore and protect the beneficial uses of an individual waterbody impaired from loading of a particular pollutant.

In California TMDLs are developed either by a Regional Water Board or U.S. EPA. (U.S. EPA has not developed any TMDLs within the jurisdiction of the San Francisco Bay Water Board.) Regional Water Board-adopted TMDLs are subject to approval by the State Water Board, the State of California Office of Administrative Law, and U.S. EPA. Such TMDLs are adopted with comprehensive implementation plans. TMDLs are not self-executing and are generally incorporated as enforceable provisions in NPDES permits, including MS4 permits. Federal law contains a single provision regarding how this should be accomplished: NPDES permits must contain effluent limits that are "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA."⁶¹

ii. The TMDL-Derived Provisions are Required by Federal Law

As explained above, section 303(d) of the CWA requires the development and adoption of TMDLs for impaired waterbodies on the 303(d) List. Once a TMDL is approved by U.S. EPA, any NPDES permit, including MS4 permits, must include effluent limits "consistent with the assumptions and requirements of any available wasteload allocations."⁶² Therefore, 40 C.F.R. section 122.44(d)(1)(vii)(B) provides an alternative and independent federal authority for TMDL-derived requirements in an NPDES permit.

The Permit implements the WLAs in TMDLs adopted by the San Francisco Bay Water Board to address mercury⁶³, PCBs⁶⁴, and pesticides impairment⁶⁵ in San Francisco Bay. It implements WLAs through an iterative BMP approach that is intended to meet the WLAs in accordance with the schedules set forth in the TMDLs. The Permit includes the numeric WLA as a performance standard⁶⁶ rather than as effluent limitations.

⁵⁹ *Wasteload allocation (WLA)*. The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation. (40 C.F.R. § 130.2(h).)

⁶⁰ *Load allocation (LA)*. The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished. (40 C.F.R. § 130.2(g))

⁶¹ 40 C.F.R. § 122.44(d)(1)(vii)(B).

⁶² 40 C.F.R. § 122.44(d)(1)(vii)(B).

⁶³ San Francisco Bay Regional Water Quality Control Board, Water Quality Control Plan, Chapter 7.2.2.

⁶⁴ *Id.*, Chapter 7.2.3.

⁶⁵ *Id.*, Chapter 7.1.1.

⁶⁶ Permit, Provision C.1.

Such a BMP based approach would generally not be allowed in non-MS4 NPDES Permits.⁶⁷ Most NPDES permits incorporate WLAs as numeric effluent limits that must be met by certain dates. Compliance is measured by sampling the treated effluent, which is discharged from a treatment plant into surface waters. Those permits are written assuming that an engineered treatment plant can be built and operated to obtain a specified effluent. Such provisions require strict compliance with the numeric limits, and dischargers cannot demonstrate compliance through an iterative process of modifying BMPs.⁶⁸ Rather, violations trigger enforcement under both state and federal law, as well as third-party citizen suits under CWA section 505. The less stringent BMP-based iterative approach is consistent with the MEP standard applicable to MS4 permits

The Permit's Fact Sheet explained that various Provisions of the Permit implement TMDLs in a manner that was consistent with U.S. EPA's then current guidance about how MS4 permits should comply with 40 CFR 122.44(d)(b)(1)(vii)(B):

Where a TMDL has been approved, NPDES permits must contain effluent limitations and conditions consistent with the requirements and assumptions in the TMDL. (40 CFR 122.44(d)(1)(vii)(B).) Effluent limitations are generally expressed in numerical form. However, USEPA recommends that for NPDES-regulated municipal ... stormwater discharges, effluent limitations should be expressed as BMPs or other similar recommendations rather than as numeric effluent limitations. [Fn. Omitted.] Consistent with USEPA's recommendation, ... [Provisions C.9-C.14 implement] WQBELs expressed as an iterative BMP approach capable of meeting the WLAs in accordance with the associated compliance schedule. The Permit's WQBELs include the numeric WLA as a performance standard and not as an effluent limitation. The WLA can be used to assess if additional BMPs are needed to achieve the TMDL Numeric Target in the waterbody.⁶⁹

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

CWA section 402(p)(3)(B)(iii) requires that, beyond MEP, permits shall require such other provisions as the permitting agency determines appropriate to control pollutants. As explained above, federal law requires the development of TMDLs for impaired waterbodies and federal regulations require the inclusion of effluent limits in an NPDES permit consistent with the assumptions and requirements of any WLAs. The challenged Provisions in the Permit are not only consistent with the assumptions and requirements of the applicable WLAs, they are consistent with applicable U.S. EPA guidance. Accordingly, even if the Commission finds that the challenged Provisions that implement TMDLs exceed the requirements of the MEP

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

⁶⁸ 40 C.F.R. § 122.44(d).

⁶⁹ Permit, p. App I-68.

standard, the San Francisco Bay Water Board acted pursuant to its mandate to include any such provisions as appropriate to control the discharge of pollutants into impaired waterbodies.

D. Effective Prohibition of Non-Stormwater Discharges

Under CWA section 402(p)(3)(B)(ii) permitting agencies must ensure that permits for MS4 discharges include requirements necessary to “effectively prohibit non-stormwater discharges into the storm sewers”. EPA has defined “storm water”⁷⁰ to mean “storm water runoff, snow melt runoff and surface runoff and drainage.”⁷¹ Thus, MS4 permits must “effectively prohibit” all discharges in to storm drains that are not storm water runoff, snow melt runoff and surface runoff and drainage. In general, the requirement to “effectively prohibit” non-stormwater discharges requires either prohibiting the flows from the MS4’s system or ensuring that operators of such systems obtain NPDES permits for those discharges.⁷² MS4s meet this requirement by implementing a program to detect and remove, or to require the discharger into the system to obtain a separate NPDES permit for, illicit discharges and improper disposal into the storm sewer.⁷³

V. General Responses

Article XIII B, Section 6 of the California Constitution requires subvention of funds to reimburse local governments for state-mandated programs in specified situations. There are several exceptions and limitations to the subvention requirements that provide bases for the Commission to determine that the Test Claims are not subject to subvention. Article XIII B, Section 6 provides that “[w]henver the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service.” Implementing statutes clarify that no subvention of funds is required if: (1) the mandate imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation;⁷⁴ or (2) the local agency proposed the mandate;⁷⁵ or (3) the local agency has the authority to levy service charges, fees, or assessments sufficient to pay.⁷⁶

Claimants contend that all of the activities for which they seek reimbursement exceed federal law requirements and that the Permit imposes many new programs and activities that were not required in their prior permits. Claimants assert that they cannot assess a fee to recover the costs of the mandates activities. The Test Claims challenge the requirements included in multiple Provisions in the Permit. Because many of the responses apply to all of the challenged provisions, the San Francisco Bay Water Board has endeavored to avoid repetition by

⁷⁰ Note: U.S. EPA uses a different spelling of the word than is used by the San Francisco Bay Regional Water Board.

⁷¹ 40 CFR § 122.26(b)(13).

⁷² 55 Federal Register 47990 at 47995 (Nov. 16, 1990))

⁷³ 40 CFR §.122.26(d)(2)(iv)(B).

⁷⁴ Govt. Code, § 17556, subd. c.

⁷⁵ *Id.*, § subd. (a).

⁷⁶ *Id.*, § subd. (d).

responding generally to these assertions. When necessary, individualized responses follow in the next section.

The Permit does not require subvention for five separate reasons. First, as a threshold matter, it does not require a new program or higher level of service. Second, the challenged requirements are federal mandates. Third, the requirements are not unique to local entities. Fourth, the Claimants can avoid the expenditure of tax monies by raising stormwater fees to pay for the requirements. Fifth, any cost increases that result solely from state law requirements are *de minimis*.

The Commission has previously rendered decisions on two test claims involving challenges to MS4 permits.⁷⁷ In both decisions, the Commission found that some of the challenged provisions were unfunded mandates. Both of these decisions have been appealed and are currently subject to judicial review. To the extent that the San Francisco Bay Water Board's positions differ from the prior Commission decisions, the Board respectfully requests that the Commission reconsider its analytical approach in light of the arguments made herein.

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

Claimants seek to distinguish the Permit from their prior permits in an effort to demonstrate that the Permit imposes new programs or requirements to provide higher levels of service. As a general matter, the Claimants have not established that the challenged Provisions impose new programs or higher levels of service. Many of the Provisions are very similar to those in Claimants' prior permits or to those in plans that Claimants' prior permits required that they implement. Other activities, even if not previously required, are already being carried out by some of the Permittees.

As explained above, federal law requires that permitting authorities include controls in MS4 permits to reduce the discharge of pollutants to the MEP and further require that they include other appropriate provisions.⁷⁸ This standard has not changed since first established in the CWA. What has changed is that the Permit contains additional BMPs and other appropriate provisions designed to meet the MEP standard. All challenged permit provisions comply with federal mandate set forth in 402(p)(3)(B)(iii) and, as such, do not constitute new programs or higher levels of service.

In the San Diego MS4 Permit Decision, the Commission found that the "permit activities were not undertaken at the option or discretion of the Claimants."⁷⁹ In reaching this conclusion, the Commission relied on federal and state law requirements that an existing or prospective discharger shall submit a permit application in the form of a ROWD.⁸⁰ For legal support, the Commission relied primarily on the decision in *Department of Finance v. Commission on State Mandates*⁸¹. However, the decision supports the opposite conclusion: that the entire Permit

⁷⁷ In Re Test Claim on Los Angeles Regional [Water] Quality Control Board Order No. 01-182, Adopted July 31, 2009 ("L.A. MS4 Permit Decision"); In Re Test Claim on San Diego Regional Water Quality Control Board Order No. 01-182, Adopted July 31, 2009 ("San Diego MS4 Permit Decision").

⁷⁸ CWA § 402(p)(3)(B)(iii).

⁷⁹ San Diego MS4 Permit Decision, p. 34.

⁸⁰ Wat. Code, § 13260.

⁸¹ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727.

itself is the result of a discretionary act by Claimants—the voluntary decision to discharge pollutants to waters of the United States.

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

[T]he statutes require that districts adopt policies or plans for school site councils—but the statutes do not require that districts adopt councils themselves unless the district first elects to participate in the underlying program.⁸²

Similarly, federal and state law require parties to submit a permit application in the form of a ROWD when there is an existing or threatened discharge to waters of the United States—but neither federal nor state law requires that parties discharge to waters of the United States.⁸³ Thus, by electing to discharge pollutants to the waters of the United States, Claimants have elected to create the condition triggering federal and state requirements to obtain an MS4 permit. Accordingly, because Claimants' discretionary acts led to the issuance of the permit challenged here, none of these provisions are unfunded state mandates subject to reimbursement.

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

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

Federal law requires that a local government must have a permit before it discharges from an MS4 to waters of the United States. Those NPDES permits must reduce the discharge of pollutants to the MEP.⁸⁴ The San Francisco Bay Water Board issued the Permit pursuant to that clear federal mandate. Thus, the Permit is a direct federal mandate on the local governments. Federal law requires that local government dischargers -- not the State of California -- apply for and obtain permits if the local governments discharge storm water to waters of the United States. If U.S. EPA had not approved California's NPDES permitting program, the Clean Water Act would prohibit the MS4 discharges unless U.S. EPA itself issued a similar permit directly to the Claimants.

U.S. EPA has issued regulations and guidance documents that discuss the types of management strategies and other provisions that must be included in storm water permits in order to comply with CWA section 402(p)(3)(B)(iii). Pursuant to the CWA and federal regulations, the Permit contains numerous requirements for the Permittees to take actions (including implementation of BMPs) to reduce the flow of pollutants to waters of the United

⁸² *Department of Finance, supra*, 30 Cal.4th at p. 745.

⁸³ The fact that the discharges in this case result from weather-induced stormwater runoff is immaterial to this conclusion. While the Permittees cannot control the weather, they do have the discretion to require on-site containment of stormwater runoff or to convey their stormwater runoff to a publicly owned treatment works.

⁸⁴ CWA, § 402(p)(3)(B)(iii).

States. Federal law requires that local agencies that operate MS4s must take actions to lessen the incidence of pollutants entering storm drains, and, ultimately, the waters of the United States. Federal law also specifically mandates that the Water Boards prescribe the BMPs that the MS4 must implement.⁸⁵

Therefore, the San Francisco Bay Water Board exercised its duty under federal law and issued the Permit as required by federal law. The fact that the San Francisco Bay Water Board exercised its discretion, as required by federal law, to impose requirements that comply with MEP does not support the conclusion that the provisions are unfunded state mandates. The Ninth Circuit Court of Appeals has expressly noted that "Congress did not mandate a minimum standards approach."⁸⁶ Rather, Congress mandated that permitting agencies including state agencies such as the San Francisco Bay Water Board exercise discretion in determining appropriate provisions designed to control pollutants.⁸⁷ Therefore, the exercise of some discretion in implementing this federal program does not mean that the Permit exceeds federal law or that subvention is required.

In decisions on prior MS4s the Commission relied on decisions in *Hayes v. Commission on State Mandates*⁸⁸ and *Long Beach Unified School Dist. v. State of California*⁸⁹ determining whether specific permit provisions constitute unfunded mandates. In discussing the San Diego MS4 permit's requirement for the development of a hydromodification management plan ("HMP") the Commission described its analytical approach together with its conclusions:

Overall, there is nothing in federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed(s) the mandate in that federal law or regulation." 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 [under *Hayes v. Commission on State Mandates*] to impose these requirements. Thus, the Commission finds that the [HMP requirement] of the permit is not a federal mandate. [Fns. omitted.]⁹⁰

The Commission did not include any analysis of the MEP standard but rather appeared to focus on the fact that neither the CWA nor its implementing regulations specifically mention the word

⁸⁵ The Court of Appeal stated in *Rancho Cucamonga v. Regional Water Quality Control Bd., Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389:

In creating a permit system for dischargers from municipal storm sewers, Congress intended to implement actual programs. [Citation.] The Clean Water Act authorizes the imposition of permit conditions, including: "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." [Citation.] 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. [Citation.]

⁸⁶ *Natural Resources Defense Council v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292,1308.

⁸⁷ *Ibid.*

⁸⁸ *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564.

⁸⁹ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155.

⁹⁰ San Diego MS4 Permit Decision, pp. 44-45.

hydromodification. In citing the *Hayes*⁹¹ and *Long Beach*⁹² decisions, the Commission interpreted these cases to support a finding that a permit provision is an unfunded state mandate unless that exact permit provision is clearly prescribed in federal law or regulations. The San Francisco Bay Water Board respectfully requests that Commission reconsider its approach.

In *Long Beach*⁹³, the Court of Appeal held that an unfunded state mandate resulted from a State of California Executive Order requiring that local school boards expend efforts to alleviate racial and ethnic segregation in schools. The Executive Order was adopted following several federal court decisions that held that school districts had a constitutional obligation to alleviate racial segregation.⁹⁴ The Executive Order responded to this federal constitutional requirement by requiring that all school districts take specific actions to remedy this condition.⁹⁵ In finding that the Executive Order constituted an unfunded state mandate, the Court of Appeal explained:

[A]lthough school districts are required to “take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause” [citations], the courts have been wary of requiring specific steps in advance of a demonstrated need for intervention. [Citations.]⁹⁶

[¶] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. Where courts have *suggested* that certain steps and approaches may be helpful, the Executive Order and guidelines *require* specific actions.... These requirements constitute a higher level of service.⁹⁷ [Emphasis in original.]

Thus, by turning court recommendations for alleviating segregation into mandatory acts the Executive Order created an unfunded state mandate. The San Francisco Bay Water Board suggests that, in applying the narrow holding in *Long Beach*⁹⁸ to the HMP requirements in the San Diego MS4 permit, the Commission should have considered the significant differences between the natures of the respective underlying federal mandates.

In *Long Beach*⁹⁹, the federal requirements at issue stemmed from general constitutional obligations to alleviate racial segregation articulated in several federal court decisions. Those court decisions did not impose any specific requirements on the school districts in California. *Long Beach*¹⁰⁰ included no comprehensive federal program that required specific steps and

⁹¹ *Hayes, supra*, 11 Cal.App.4th 1564.

⁹² *Long Beach, supra*, 225 Cal.App.3d 155.

⁹³ *Long Beach, supra*, 225 Cal.App.3d 155.

⁹⁴ *Id.*, at p. 173.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Long Beach, supra*, 225 Cal.App.3d 155.

⁹⁹ *Long Beach, supra*, 225 Cal.App.3d 155.

¹⁰⁰ *Ibid.*

specific standards to be met by all schools and school districts. There was, in fact, no federal mandate on the school districts at all. Thus, with its Executive Order, the State of California created a state mandate where no federal mandate previously existed. Accordingly, any specific provisions would necessarily be a state mandate because the state took a vague federal constitutional obligation, along with suggestions from federal court decisions, and translated it into very specific requirements.

On the other hand the Test Claims involve two separate and clear federal mandates--one for permittees and one for the permitting agency. First, permittees are subject to the unambiguous federal mandate that they obtain a NPDES permit that imposes requirements to control pollutants to the MEP as well as any other appropriate water quality control measures.¹⁰¹ As opposed to general constitutional obligations at issue in *Long Beach*¹⁰², the CWA as implemented by U.S.EPA's regulations creates a comprehensive regulatory strategy including very specific permit requirements that apply directly to local agencies' storm sewer discharges. Therefore, to the extent that the CWA and the United States Constitution both mandate specific actions by local agencies or school districts, the CWA requires a much more specific set of actions. Second, the CWA contains a separate mandate on the permitting agency, whether federal or state, to issue permits pursuant to the same standards set forth in CWA section 402(p). In *Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal. App. 4th 1377, the Court of Appeal held that a regional water board that issues a stormwater permit under those CWA standards "must comply with federal law requiring detailed conditions for NPDES permits."¹⁰³

The fact that the CWA contains two separate mandates marks the critical difference between *Long Beach*¹⁰⁴ and the Test Claims. Even if the State of California did not administer the NPDES program, Claimants would have been required to obtain an MS4 permit for their discharges. Thus, when the San Francisco Bay Water Board issued the Permit it did so pursuant to the federal mandate that applied to it as the permitting agency rather than the mandate that applied to the Permittees. Importantly, Claimants do not challenge the federal mandate to obtain the Permit. Rather, they challenge the San Francisco Bay Water Board's execution of the federal mandate as the permitting agency.

The San Francisco Bay Water Board contends the Commission erred in its analytical approach in applying *Long Beach*¹⁰⁵ holding to the wrong federal mandate. In *Long Beach*, the federal mandate at issue was from the United States Constitution directly to the school districts. Thus, when the State of California issued the Executive Order in *Long Beach*¹⁰⁶, there was no mandate on the state itself. Put another way, the federal court decisions required no additional state involvement in order to meet constitutional obligations regarding racial segregation.

On the contrary, when the San Diego Water Board (or in this case the San Francisco Bay Water Board) established specific provisions in the MS4 permit, it did so pursuant to the CWA's specific mandate for the permitting agency. As explained above, this federal mandate

¹⁰¹ CWA, §402(p)(3)(B)(iii).

¹⁰² *Long Beach, supra*, 225 Cal.App.3d 155.

¹⁰³ *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1389.

¹⁰⁴ *Long Beach, supra*, 225 Cal.App.3d 155.

¹⁰⁵ *Long Beach, supra*, 225 Cal.App.3d 155.

¹⁰⁶ *Ibid.*

expressly requires the permitting agency to establish permit provisions to control pollutants to the MEP and such other provisions as appropriate to control such pollutants. Thus, as opposed to *Long Beach*¹⁰⁷, where the State of California translated a general constitutional obligation into specific requirements absent any federal mandate to do so, the San Francisco Bay Water Board established permit provisions pursuant to CWA's direct mandate on permitting agencies.

Accordingly, unlike *Long Beach*¹⁰⁸, the mere act of selecting specific permit provisions itself cannot *de facto* create an unfunded mandate. An unfunded mandate can only exist if the permit issued by the San Francisco Bay Water Board includes provisions that go beyond federal requirements. Therefore, in determining whether an unfunded mandate exists, the Commission must analyze whether the challenged provisions go beyond the legal standards set forth in 402(p)(3)(B)(iii).

Furthermore, the San Francisco Bay Water Board contends that the Commission's prior decisions misapplied the holding in *Hayes*¹⁰⁹. The case involved claims by two county school superintendents for reimbursement for special education requirements. After concluding that the special education requirements constituted a federal mandate on the state, the California Supreme Court discussed whether the state had shifted costs associated with complying with the federal mandate to the school districts and whether such a shift required reimbursement:

When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even 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 implementation of the federal mandate. [Citation.]

This reasoning would not hold true where the manner of implementation of the federal program was left to the true discretion of the state. A central purpose of the principle of state subvention is to prevent the state from shifting costs of government from itself to local agencies. [Citation.] Nothing in the statutory or constitutional subvention provisions would suggest that the state is free to shift state costs to local agencies without subvention merely because those costs were imposed upon the state by the federal government. In our view the 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 the federal program then the costs are the result of a reimbursable state mandate regardless if the costs were imposed upon the state by the federal government.¹¹⁰

¹⁰⁷ *Long Beach, supra*, 225 Cal.App.3d 155.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Hayes, supra*, 11 Cal.App.4th 1564.

¹¹⁰ *Id.*, at p. 1593-1594.

Thus, *Hayes*¹¹¹ resolves the issue of when a federal mandate on a state becomes an unfunded mandate on a local agency. If the state had no “true choice” in adopting implementing regulations on a local agency, then no unfunded mandate exists. However, if the state had “true discretion” in determining whether to shift the shift costs from the state to the local agency, then such a shift would create an unfunded mandate.

Unlike *Hayes*¹¹², the Permit did not shift any federal mandate from the state to the Claimants. As explained in the above discussion of *Long Beach*¹¹³, the CWA includes two federal mandates—the requirement on the permittee to obtain the permit and the requirement for the permitting agency to issue the permit. If the San Francisco Bay Water Board had not issued the Permit, Claimants would still have needed to obtain a permit from U.S. EPA.

When applying *Hayes*¹¹⁴ in the San Diego and Los Angeles MS4 Permit Decisions above the Commission mistakenly equated the choice that the state made in *Hayes*¹¹⁵ to the State’s decision to issue NPDES permits in lieu of EPA. It also mistakenly applied the *Hayes*¹¹⁶ decision to the choices that the Los Angeles and San Diego Water Board made in determining appropriate permit provisions in compliance with CWA requirements including compliance with the MEP standard.

The Commission’s decisions cited *Hayes*¹¹⁷ for the proposition that the State has “freely chosen” to effect the stormwater permit program.^{118 119} The Commission’s decisions equated the decision in 1972 by California to administer the NPDES permit program in lieu of U.S. EPA with the State’s decision in *Hayes*¹²⁰ to shift costs associated with complying with the federal mandate to the school districts.

In general, a federal mandate is not subject to reimbursement. In *Hayes*¹²¹, the federal Education of the Handicapped Act imposed requirements on *the state* and the state “freely chose” to shift those costs to local agencies.¹²² The California Supreme Court stated: “A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies.”¹²³ Thus, the court held that if there is a federal

¹¹¹ *Id.*

¹¹² *Hayes, supra*, 11 Cal.App.4th 1564.

¹¹³ *Long Beach, supra*, 225 Cal.App.3d 155.

¹¹⁴ *Hayes, supra*, 11 Cal.App.4th 1564.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Commission on State Mandates, Statement of Decision, Case Nos: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, July 31, 2009, p. 26.

¹¹⁹ Commission on State Mandates, Statement of Decision, Case No.07-TC-09, March 26, 2010, p. 39.

¹²⁰ *Hayes, supra*, 11 Cal.App.4th 1564.

¹²¹ *Ibid.*

¹²² *Hayes, supra*, 11 Cal.App.4th at p. 1587 states: “Since the 1975 amendment, the Education of the Handicapped Act has required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education.”

¹²³ *Id.*, at p. 1593.

mandate on the state, and the state “freely chooses” to shift the mandate to local agencies, the costs constitute a reimbursable state mandate.¹²⁴

In treating the State’s decision to *administer* the NPDES permit program in 1972 as the “choice” referred to in *Hayes*¹²⁵, the Commission’s mandates decisions concerning the Los Angeles and San Diego stormwater permits lead to results that are absurd on their face. It is true that in 1972, California became the first state to administer the NPDES program in lieu of U.S. EPA. But administering the permit program--issuing permits to dischargers who are mandated by law to obtain such permits and enforcing compliance with federal law--is not the same thing as complying with the permits themselves. The federal Clean Water Act requires municipalities to apply for an NPDES permit that must meet various federally mandated requirements, including that it must require pollutant reductions to the maximum extent practicable. The state’s “choice” to administer the program in lieu of the federal government does not alter the federal requirement on municipalities to reduce pollutants in these discharges to the maximum extent practicable.

The federal mandate is imposed specifically upon the municipalities that own and operate MS4s discharging pollutants to the nation’s waters. If the state had not decided, in 1972, to administer the NPDES program, these same municipalities would have received a permit from U.S. EPA with the very same substantive requirements that governed the Permit issued by the San Francisco Bay Water Board.

Clean Water Act section 402(p) requires that permits be issued to “municipal separate storm sewer systems.” In this case, the federal mandate is directly on the local agencies because they own and operate MS4s in the San Francisco Bay area. There has been no shifting of legal or financial responsibility from the state to the local agencies-- the state does not bear the legal or financial responsibility in the first instance so has no responsibility to shift.¹²⁶ There is no mandate on the state to obtain or to comply with the NPDES permit for the claimants’ MS4.

In its role in issuing NPDES permits to dischargers, the San Francisco Bay Water Board must implement the regulatory requirements U.S.EPA’s has established for state permitting agencies.¹²⁷ As explained above, federal law specifically requires that the permitting agency select the BMPs and other appropriate provisions necessary to control the discharge of pollutants--the CWA does not do this for the permitting agency. The state does not have the choice to avoid imposing pollution controls in MS4 permits. The Commission’s Los Angeles and San Diego decisions can be interpreted to reach the untenable result that the State creates unfunded state mandates when it imposes permit provisions to comply with federal mandates in a manner consistent with federal agency guidance.

For the reasons above, the San Francisco Bay Water Board requests that the Commission reject those arguments.

¹²⁴ *Id.*, at p. 1594.

¹²⁵ *Hayes, supra*, 11 Cal.App.4th 1564.

¹²⁶ See, e.g., *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1193 (citing *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1289).

¹²⁷ 40 CFR § 123.25.

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

None of the challenged provisions is subject to reimbursement because the Permit does not involve requirements imposed uniquely upon local government. Reimbursement to local agencies is required only for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not entitled to subvention.¹²⁸ The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required.¹²⁹ Compliance with NPDES permits, and specifically with storm water permits, is required of private industry as well. In fact, the requirements for industrial and construction entities are more stringent than for government dischargers. In addition, the government requirements apply to all governmental entities that operate MS4s, including state, Tribal and federal facilities; local government is not singled out.

The NPDES permit program, and the storm water requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES storm water permits. Those permits are actually more stringent than municipal permits because federal law requires that they meet 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.¹³⁰ Even where construction or industrial permits impose WQBELs in the form of BMP-based requirements, the BMPs must be designed to attain water quality standards, whether attainment is "practicable" or not.¹³¹

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

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

Any "additional" costs that could conceivably be considered additional to the federal mandate would be *de minimis* and would not require payment from tax monies. While the Claimants estimate the costs to implement the challenged provisions to be substantial over the Permit's term, the Permit continues and refines many of the requirements of Claimants' prior permits.

¹²⁸ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

¹²⁹ *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

¹³⁰ *Defenders of Wildlife, supra*, 191 F.3d. 1159.

¹³¹ CWA, §§ 301(b)(1)(C), 402.; 40 C.F.R. § 122.44(k) (providing that BMPs may be allowed for non-MS4 dischargers only if numeric effluent limits are "infeasible.").

Thus the vast majority of the costs to implement the Permit are not new. Indeed, urban runoff management programs have been in place in the San Francisco Bay area for over 20 years, so increased costs are not expected to be substantial.¹³² In addition, previously reported program costs are not all attributable to compliance with MS4 permits. Many program components, and their associated costs, existed before any MS4 permits were ever issued. Therefore, true program cost resulting from MS4 permit requirements is some fraction of reported costs. The California Supreme Court has held that “[f]or ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context de minimis—should be treated as part and parcel of the underlying federal mandate.”¹³³ Those requirements by Claimants are intended to implement a federal law and have costs that are in context, de minimis, thus they should be treated as part of the underlying federal mandate of the CWA.

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

In order to decide Claimants' challenges to the Permit, the Commission must determine whether various Permit provisions exceed the minimum federal requirements established under the CWA that govern the issuance of MS4 permits. The State Water Resources Control Board (State Water Board) is statutorily required to make such determinations.¹³⁴ The Water Code provides an administrative remedy to a party challenging a Regional Water Board decision.¹³⁵ By contrast, the Commission “is the administrative agency which now has jurisdiction over local agency claims for reimbursement for state-mandates costs.”¹³⁶ Therefore, the question of whether permit provisions exceed federal requirements is more properly brought before the State Water Board.

Although Alameda, Brisbane and San Jose petitioned the State Water Board to review the Permit, they placed their petitions in abeyance. Santa Clara County did not submit a petition to the State Water Board. Allowing the Commission to adjudicate a matter properly within the expertise and jurisdiction of the State Water Board offends the basic policies of the doctrine of exhaustion.¹³⁷ Therefore, because Claimants have failed to exhaust their administrative remedy before the State Water Board, the Test Claims constitute an impermissible collateral attack on the Permit.¹³⁸ For the foregoing reasons, the Commission must abstain from hearing the Test Claims until the State Water Board has determined whether the provisions of the permit exceed federal requirements.

VI. Challenged Provisions

¹³² Permit, App I-8 to I-1.

¹³³ *San Diego Unified School District v. Commission on State Mandates* (2004) 22 Cal.4th 859, 890.

¹³⁴ See generally Wat. Code, § 13140 (“The state board shall formulate and adopt state policy for water quality control.”).

¹³⁵ Wat. Code, § 13320(a).

¹³⁶ *Hayes v. Commission on State Mandates* (1992) Cal.App.4th 1564 *citing* Gov. Code, § 17525)

¹³⁷ *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391. (Exhaustion is rooted in concerns favoring administrative autonomy and judicial efficiency.)

¹³⁸ *Hazon-Iny Development, Inc. v. Unkefer* (1980) 116 Cal.App.3d Supp. 1, 5 (“Administrative decisions are not subject to collateral attack”), *citing Nelson v. Oro Loma Sanitary District* (1950) 101 Cal.App.2d 349, 357-358.

Claimants contend that requirements set forth in numerous Provisions in the Permit constitute unfunded mandates. They state as a general matter that each of the requirements they challenge represents obligations they did not have in their prior permits.¹³⁹

In requesting that the Commission find that the Permit imposes numerous state mandates, Claimants' have asserted that the Commission should simply compare the Permit with their prior permits. Claimants have not disclosed that their prior permits incorporated numerous requirements in management plans, monitoring programs and annual reports that were to be developed and revised during the term of the permits.

In the detailed discussion below concerning of the challenged Permit requirements, the San Francisco Bay Water Board has cited numerous mandatory requirements from Claimants' management plans, monitoring programs and work Plans. Claimants' prior permits required that they implement those measures, many of which were developed by the Claimants after the permits were issued. Each of those permits stated that:

The Permittees shall comply with discharge Prohibitions A and Receiving Water Limitations B.1 and B.2 through the timely implementation of control measures and other actions to reduce pollutants in the discharge in accordance with the Management Plan and other requirements of this permit, including any modifications. The Management Plan shall be designed to achieve compliance with Receiving Water Limitations B.1 and B.2....¹⁴⁰

Claimants' prior permits went on to provide that the Management Plan each was to develop was required to "serve as the framework for identification, assignment, *and implementation...*" of BMPs to reduce pollutants in stormwater discharges to the maximum extent practicable".¹⁴¹ (Emphasis added.) Under those prior permits Claimants were also required to implement measures identified in their annual Management Plan revisions and in annual work plans.

Alameda's prior permit required that after permit issuance, permittees were to develop or revise and then implement Performance Standards into annual revisions to the Management Plan required under the permit.¹⁴² Permittees could propose those new or revised Performance Standards either in Annual Reports or Workplans.¹⁴³ Alameda and other permittees were required to comply with those updates, improvements and revisions.¹⁴⁴ Further, Alameda's prior permit provided that the Workplans and Updates to be submitted annually by permittees were deemed to be "final and incorporated into the Management Plan and this Order".¹⁴⁵

¹³⁹ Alameda Test Claim Narrative Statement, p. 2, Brisbane Test Claim Narrative Statement, p. 2, San Jose Test Claim Narrative Statement, p. 2, Santa Clara Test Claim Narrative Statement, p. 2.

¹⁴⁰ Alameda County 2003 permit, Provision C.1; San Mateo County 1999 permit, Provision C.1; Santa Clara County 2001 permit, Provision C.1.

¹⁴¹ Alameda County 2003 permit, Provision C.2.a; San Mateo County 1999 permit, Provision C.3; Santa Clara County 2001 permit, Provision C.2.a.

¹⁴² Alameda County 2003 permit, Provision C.2.a and C.2.b.

¹⁴³ Alameda County 2003 permit, Provision 7.a.

¹⁴⁴ *Id.*

¹⁴⁵ Alameda County 2003 permit, Provision 7.b.

The permit that authorized the MS4 discharges of Brisbane and other San Mateo County permittees provided that the permittees' Management Plan "incorporates Performance Standards developed by the Dischargers... Through a continuous improvement process, the dischargers will modify and improve current performance standards, as needed to achieve reduction of pollutants to the maximum extent practicable."¹⁴⁶ The San Mateo County Permittees' prior permit as amended went on to provide a process that made those modified performance standards an enforceable part of the permit. Permittees were required to include updates, improvements and revisions to their Management Plan in the Annual Reports that they provided following issuance of the permit.¹⁴⁷ Brisbane's prior permit further provided that the Management Plan was an integral and enforceable part of the permit and that any changes to the Management Plan would be made in accordance with legal requirements for permit modifications.¹⁴⁸

As members of the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP), Santa Clara County and San Jose were required under their prior permit to implement a Management Plan and through a "continuous improvement process, subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable".¹⁴⁹ Permittees were required to incorporate those new or updated Performance Standards into annual revisions to the Management Plan.¹⁵⁰ The permit further provided that permittees were to implement those "new/revised Performance Standard(s)".¹⁵¹ Permittees were required to submit annual Workplans that described their proposed implementation of the Management Plan.¹⁵² SCVURPPP's prior permit additionally provided that the annual Workplans became "final and incorporated into this Order" unless disapproved by the Executive Officer.¹⁵³

As discussed below, Claimants' challenges to the Permit involves comparison between the challenged Permit requirements and the requirements to which Claimants were previously subject through their management plans, monitoring programs and annual reports that became enforceable through their prior permits.

1. C.8--Monitoring

A. Introduction

Provision C.8 of the Permit sets forth various requirements concerning water quality monitoring. Monitoring programs are an essential element in the permitting of stormwater discharges. A

¹⁴⁶ San Mateo County 1999 permit, Provision C.4.

¹⁴⁷ California Regional Water Quality Control Board, San Francisco Bay Region Order R2-2004-0060, Provision C.6. (Hereafter "San Mateo County 2004 amendment 0060".) (Note: San Mateo County 2004 amendment 0060 amended San Mateo County 1999 permit.)

¹⁴⁸ *Id.*, at Provisions C.7 and C.14.

¹⁴⁹ Santa Clara County 2001 permit, Provision C.a.

¹⁵⁰ Santa Clara County 2001 permit, Provision C.b.

¹⁵¹ *Id.*

¹⁵² Santa Clara County 2001 County permit, Provision 6.b.

¹⁵³ *Id.*

recent Ninth Circuit decision emphasized the importance on monitoring requirements in a case involving a permit issued by the Los Angeles Regional Water Quality Control Board.¹⁵⁴ The Court noted that "all NPDES permits must include monitoring provisions ensuring that permit conditions are satisfied"¹⁵⁵. The decision also emphasized the importance of monitoring in the NPDES permitting process in citing its decision in *Sierra Club v. Union Oil Company* which stated that "...Congress structured the CWA to function by self-monitoring and self-reporting of violations..."¹⁵⁶.

Monitoring accomplishes a number of important objectives. First, it identifies whether there are existing or potential adverse impacts in receiving waters (water bodies to which MS4s discharge). Second, monitoring results are used to identify whether MS4 discharges are causing or may cause or contribute to exceedances of water quality standards in receiving waters. Third, monitoring identifies sources of pollutants in MS4s. Fourth, it provides means to evaluate whether controls (BMPs) are effective. Next, monitoring provides data necessary to determine whether pollutants are controlled to the maximum extent practicable. Last, it provides the means to track attainment of TMDL wasteload allocations.

Alameda, Brisbane and Santa Clara County ("C.8 Claimants") contend that numerous requirements in Provision C.8 constitute unfunded state mandates. They organize their argument into two sections. First, C.8 Claimants assert that various requirements in Provision C.8 were not required by the prior permits issued to each claimant. Next, they argue that Provision C.8 includes state mandates with respect to four broad categories of requirements. The San Francisco Bay Water Board offers the response below following the same format.

C.8 Claimants have argued that the Commission should compare the requirements in the Permit with those in the permits that were previously issued to each of them. That comparison does not include all applicable monitoring requirements to which the C.8 Claimants were subject. As discussed above Claimants were subject to mandatory requirements through their stormwater management plans, and annual workplans, and monitoring programs and plans. Those documents contained many requirements concerning monitoring, which although developed after their permits were adopted were nevertheless prospectively incorporated into their permits.

C.8 Claimants assert that numerous requirements in Provision C.8 require new programs or higher levels of service. The challenged Provisions C.8 requirements are not new programs but may in some instances require higher levels of service. They are consistent with—and in some cases identical to—requirements of the C.8 Claimants' former permits that were set forth in enforceable plans.

To the extent that the monitoring requirements in the Permit are more detailed, the Fact Sheet issued by the Board for the Permit explains the reason for that additional detail:

Water quality monitoring requirements in previous permits were less detailed than the requirements in this Permit. Under previous permits each program

¹⁵⁴ *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2011) 636 F.3d 1235. Note: the Ninth Circuit is considering a request for reconsideration.

¹⁵⁵ *Id.* at p. 1250.

¹⁵⁶ *Id.* at 1250, citing *Sierra Club v. Union Oil Co. of Calif.* (1987) 813 F.2d 1480, 1483, *vacated on other grounds*, 485 U.S. 931, *reinstated*, 853 F.2d 667 (9th Cir. 1988).

could design its own monitoring program, with few permit guidelines. A decision by the California Superior Court stated:

[“]Federal law requires that all NPDES permits specify “[r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity.” 40 CFR §122.48(b). Here there is no monitoring program set forth in the Permit. Instead an annual monitoring program is to be prepared by the dischargers to set forth the monitoring program that will be used to demonstrate the effectiveness of the Stormwater Management Plan. This does not meet the regulatory requirements that a monitoring program set forth including the types, intervals, and frequencies of the monitoring.[”]¹⁵⁷

The San Francisco Bay Water Board acknowledges that the Superior Court decision quoted in the Fact Sheet was not binding precedent. Nevertheless, the Board incorporated applicable monitoring requirements into the Permit itself, instead of having dischargers subsequently develop equivalent monitoring programs to be incorporated by reference as permit requirements. This allowed a full opportunity for public review of the monitoring requirements before adoption of the Permit and is the functional equivalent of including certain permit requirements in stand alone plans.

The San Francisco Bay Water Board’s approach of including all monitoring requirements in the Permit is also consistent with the reasoning of the Ninth Circuit in its decision in *Environmental Defense Center v. United States Environmental Protection Agency*.¹⁵⁸ The Court held that U.S.EPA’s regulations for Phase II stormwater permitting were deficient in part because they did not require that U.S.EPA review stormwater discharger’s notice of intent to ensure that they required controls to reduce the discharge of pollutants to the maximum extent practicable.¹⁵⁹ It noted that “[i]nvolving regulated parties in the development of individualized stormwater pollution control programs is a laudable step....But EPA is still required to ensure that the individual program are consistent with the law.”¹⁶⁰ The Ninth Circuit additionally held that U.S.EPA’s regulations did not comply with public participation requirements in the CWA because the regulations did not for public hearings on dischargers’ notices of intent to discharge stormwater.¹⁶¹ By including monitoring requirements in the Permit itself and providing the public with an opportunity to comment on the proposed Permit, the Board fully complied with the CWA requirements to have sufficient regulatory review and public comment on the Permit.

¹⁵⁷ Permit, Page App I-58-59, quoting *San Francisco Baykeeper, supra*, San Francisco Superior Court Consolidated Case No. 500527, at p. 2.

¹⁵⁸ *Environmental Defense Center, supra.*, 344 F.3d 832.

¹⁵⁹ *Id.* at 854

¹⁶⁰ *Id.* at 856.

¹⁶¹ *Id.* at 854.

B. Provision C.8 does not require new programs or higher levels of service.**1. C.8.b--Regional Monitoring Program**

Section C.8.b requires that Permittees participate in implementing an Estuary receiving water monitoring program at a minimum equivalent to the San Francisco Estuary Regional Monitoring Program for Trace Substances (RMP). The Permit provides that petitioners shall pay their "fair-share" of the costs of the monitoring program.

Claimants Alameda, Brisbane and Santa Clara County contend that Provision C.8.b imposes a higher level of service. C.8 Claimants assert that the provision requires that Permittees participate in the San Francisco Estuary Regional Monitoring Program (RMP) itself (rather than an alternative), perform specified monitoring, and financially support the RMP. Alameda and Santa Clara County claim that the Provision also imposes a higher level of service because they will be required to devote additional staff resources to the RMP.

Alameda and Santa Clara County argue that the Provision will result in a higher level of service because their prior permits required them to participate in the RMP or an acceptable alternative monitoring program, whereas they believe that the Provision requires that they participate in the MRP. Brisbane contends that the Provision would result in a higher level of service because its prior permit "anticipates participation in watershed monitoring efforts, but does not mention let alone require participation in the San Francisco Estuary Regional Monitoring Program".¹⁶²

C.8 Claimants are incorrect in their characterization of Provision C.8.b. The Provision does not require that Permittees participate in the RMP. Instead it requires that Permittees participate in implementing "an estuary receiving water program, at a minimum *equivalent to the San Francisco Estuary Regional Monitoring Program for Trace Substances (RMP)*, by contributing their fair-share annually on an annual basis." (Emphasis added.) The Provision is consistent with the requirement in Alameda's and County of Santa Clara's prior permits that allowed them to conduct monitoring either through the participation in the RMP or an alternative.^{163 164}

The stormwater permit previously issued to Brisbane and other San Mateo County permittees specifically required participation in the RMP.¹⁶⁵ It provided that as part of the monitoring activities required by the Permit, Permittees were required to: "[p]rovide funding to the San Francisco Estuary Institute (SFEI) for the expenditures on the San Francisco Estuary Regional Monitoring Program (RMP)."¹⁶⁶ By contrast, Provisions C.8.b allows Permittees to decide whether or not to provide funding to the RMP for required monitoring.

Second, C.8 Claimants contend that Provision C.8.b requires a higher level of service in part because the Provision requires that Permittees participate in a monitoring program designed to answer specified questions about conditions in the San Francisco Estuary. The San Francisco Bay Water Board disagrees that the Provision imposes a higher level of service with respect to the questions to be addressed through the required monitoring. C.8 Claimants have not

¹⁶² Brisbane Test Claim, Narrative p. 5.

¹⁶³ Alameda County 2003 permit, Provision C.8.b.

¹⁶⁴ Santa Clara County 2001 permit, Provision C.7.b.

¹⁶⁵ San Mateo County 2004 amendment 0060, Provision C.9, Att. A. p. 4.

¹⁶⁶ *Ibid.*

provided any explanation about the monitoring that they believe is required under the Provision that was not required by their past permits. The Provision is intended to maintain the same level of monitoring that Permittees have been addressing through the monitoring they have conducted under their past permits.

C.8 Claimants are incorrect in stating that the Provision requires that Permittees provide financial support to the RMP. In fact Provision C.8 requires that Permittees participate in a receiving water monitoring program equivalent to the RMP "by contributing their fair-share financially on an annual basis". It is clear that Permittees have discretion as to which monitoring program to participate in and support.

The San Francisco Bay Water Board disagrees with the contention advanced by Alameda and the County of Santa Clara that the Provision requires that their respective countywide or regional stormwater programs devote additional resources to the RMP. Those claimants do not explain why they believe it will be necessary to provide additional staff time to working with the RMP. The Board infers that those claimants contend that additional resources will be required because they believe that Provision C.8.b requires additional monitoring in comparison with the monitoring they are currently performing that was required by their prior permits. In fact the monitoring required by the Provision is intended to maintain the status quo of monitoring currently performed by Permittees under their prior permits. Thus, any increase in staff participation is voluntary on the part of Alameda and County of Santa Clara and is not a direct consequence of the requirements in Provision C.8.b.

2. C.8.c—Status Monitoring/Rotating Watersheds

Provision C.8.c requires that Permittees must conduct status monitoring in local receiving waters using sampling sites set forth in the Permit. It requires that most Permittees (including the C.8 Claimants) conduct annual monitoring.

Alameda, Brisbane and the County of Santa Clara argue that provision C.8.c greatly increases the number of monitoring sites and parameters from those included in their past permits. Additionally, Brisbane and the County of Santa Clara assert that the Provision expands the number of creek sites that must be monitored.

Provision C.8.c's requirements are a further refinement of status monitoring requirements reflected in Alameda's and Santa Clara County's prior permits. Those prior permits did not use the term "status monitoring" but included requirements to assess beneficial uses using appropriate physical, chemical and biological parameters in representative receiving waters.¹⁶⁷

All required that Permittees conduct an "[a]ssessment of existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges, including an evaluation of representative receiving waters".¹⁶⁸ Those permits additionally required that the monitoring programs developed under each permit were to include in relevant part:

Provision for conducting and reporting on the results of special studies... which are designed to [assess various things which may include] assess the adverse impacts of a pollutant or pollutants on beneficial uses....

¹⁶⁷ Alameda County 2003 permit, Provision C.8; San Mateo County 1999 permit, Provision C.7; Santa Clara County 2001 permit, Provision C.7.

¹⁶⁸ *Id.*

Provisions for conducting watershed monitoring activities including: identification of major sources of pollutants of concern; evaluation of the effectiveness of control measures and BMPs; and use of physical, chemical and biological parameters and indicators as appropriate....

Identification and justification of representative sampling locations, frequencies and methods, suite of pollutants to be analyzed, analytical methods, and quality assurance procedures....¹⁶⁹

Brisbane (together with the other San Mateo County MS4 dischargers) was subject to the requirement in its prior permit to: “[a]ssess water quality conditions in representative watersheds in San Mateo County, evaluate stormwater impacts and help solve creek drainage basin-specific water quality impairment problems....”¹⁷⁰

Each of the C.8 Claimants was subject to additional requirements through their prior permits concerning monitoring of creeks, streams and watersheds. Those requirements were set forth in plans submitted on behalf of C.8 Claimants by their countywide stormwater programs.

Alameda, as a member of the Alameda Countywide Clean Water Program (ACCWP) was required to “[c]haracterize Functional Attributes of Creeks and Potential for Stormwater Impacts: Continue inventory and assessment of the pilot group of creek segments or lakes, and establish a plan for assessing other creeks.”¹⁷¹ ACCWP submitted plans that documented how its members (including Alameda) would comply with creek, stream and watershed monitoring requirements. The ACCWP Multi-year Plan for Monitoring and Assessment detailed tasks for 2003-2008 that provided that Permittees were required to “[u]se a variety of indicators to assess the condition of streams and watersheds” and “[c]haracterize and track pollutants of concern that are found in urban runoff and have been identified as possible sources of impairment”.¹⁷²

ACCWP then submitted detailed workplans for each fiscal year following that Plan that documented the steps its members were taking to comply with the monitoring requirements. Workplans submitted over several fiscal years indicated that the ACCWP members would do such monitoring tasks as “[u]se a variety of indicators to assess the conditions of streams and watersheds”¹⁷³, conduct sampling of benthic macroinvertebrate communities at selected sites, and monitor for copper during multiple storm events in a specified creeks.¹⁷⁴ The management plan, quoted multi-year plan and workplans clearly indicate that Alameda was already subject to status monitoring requirements under its prior permit through the plans and workplans. The San Francisco Bay Water Board agrees that Provision C.8.c refined those requirements by adding more specificity to the prior permit status monitoring requirements and resulting ACCWP Monitoring Program Plan and Annual MYP updates, but it does not increase those requirements.

¹⁶⁹ *Id.*

¹⁷⁰ San Mateo County 2004 amendment 0060, Att. 1, p. 1.

¹⁷¹ ACCWP Stormwater Quality Management Plan July 2001-June 2008, Feb. 10, 2003, pages 3-6.

¹⁷² ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003, pp. V-1, V-2.

¹⁷³ *Id.*, at pp. V-1.

¹⁷⁴ ACCWP Annual Monitoring Program Plan and Update to the Multi-Year Monitoring and Assessment Plan (February 27, 2004), pp. 7-8; ACCWP Annual Monitoring Program Plan and Update to the Multi-Year Monitoring and Assessment Plan (February 28, 2005), pp. 8-10; ACCWP Annual Monitoring Program Plan and Update to the Multi-Year Monitoring and Assessment Plan (March 1, 2006).

Similarly, Brisbane was subject to status monitoring requirements through the stormwater management plan and annual reports submitted on behalf of San Mateo County MS4 dischargers by SMCWPPP.¹⁷⁵ San Mateo County Permittees were required to "assess urban runoff-related characteristics of representative watersheds in San Mateo County. Assessments will typically focus on using environmental indicators...to characterize the functional attributes of creeks and potential for stormwater impacts...."¹⁷⁶ SMCWPPP submitted annual workplans that indicated that Permittees would "[p]erform chemical, biological and/or physical monitoring in selected San Mateo County watersheds...."¹⁷⁷ The multi-year plan and workplans clearly indicate that Brisbane and other San Mateo County Permittees was already subject to status monitoring requirements under its prior permit. Provision C.8.c refined those requirements by adding more specificity to the prior permit status monitoring requirements and resulting multi-year plan and workplans, but it does not increase those requirements.

Santa Clara County was also subject to status monitoring requirements through monitoring plans and annual reports submitted by SCVURPPP on behalf of its members including Santa Clara County. The plans included schedules for chemical, biological, and physical monitoring in multiple watersheds.¹⁷⁸ Furthermore, the annual workplans submitted by SCVURPPP for FY 2003-04 through FY 2007-08 include requirements to conduct chemical, biological and physical monitoring in multiple watersheds.¹⁷⁹ The cited plans demonstrate that Santa Clara County was subject to requirements that it conduct status monitoring under its prior permit.

Provision C.8.c added more specificity in limited areas to the prior status monitoring requirements and resulting multi-year monitoring plan and workplans but it does not increase those requirements.

3. C.8.d--Monitoring Projects

Provision C.8.d requires that Permittees conduct monitoring projects. It establishes three categories of projects: stressor/source identification actions, BMP effectiveness investigation, and geomorphic projects. Monitoring projects are necessary to meet several monitoring objectives under the Permit. The Fact Sheet indicates that those objectives are to "characterize stormwater discharges; identify sources of pollutants; identify new or emerging pollutants;

¹⁷⁵ The San Mateo County program was known for part of the time covered by Brisbane's former permit as the San Mateo Stormwater Pollution Prevention Program (STOPPP). It changed its name to the San Mateo Countywide Water Pollution Prevention Program (SMCWPPP). Both names refer to the same organization.

¹⁷⁶ STOPPP, Stormwater Management Plan, April 2004-June 2006, p. 6.6.

¹⁷⁷ STOPPP Mid-Fiscal Year Report 2004-2005 (Workplan for FY 2005-2006), March 1, 2005, p. 9, STOPPP Mid-Fiscal Year Report 2005-2006 (Workplan for FY 2006-2007), March 1, 2006, p. 15, SMCWPPP Mid-Fiscal Year Report 2006-2007 (Workplan for FY 2007-2008), February 22, 2007, p. 7.

¹⁷⁸ Santa Clara Valley Urban Runoff Pollution Prevention Program, Multi-Year Receiving Waters Monitoring Plan—March 1, 2002 (Revised August 5, 2002; SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised)—July 1, 2004, Table 3.0. (Santa Clara Valley Urban Runoff Pollution Prevention Program will hereafter be referred to as "SCVURPPP".)

¹⁷⁹ SCVURPPP FY 03-04 Work Plan, Attachment 4-4, Monitoring Plan, pp. 1-5; SCVURPPP FY 04-05 Work Plan, Attachment 4-1, Monitoring Plan, pp. 1-10; SCVURPPP FY 05-06 Work Plan, Attachment 4-1, Monitoring Plan, pp. 1-10; SCVURPPP FY 06-07 Work Plan, Attachment 4-1, Monitoring Plan, pp. 1-5; SCVURPPP FY 07-08 Work Plan, Attachment 4-1, Monitoring Plan, pp. 1-6.

assess stream channel function and condition; and measure and improve the effectiveness of Stormwater Countywide Programs and implemented BMPs...¹⁸⁰

Alameda, Brisbane and County of Santa Clara argue that C.8.d is a new program or higher level of service. Alameda and Brisbane state that there is nothing comparable in their prior permits. Santa Clara County argues that BMP effectiveness and geomorphic projects were not required in its prior permit. It further contends that the Provision requires that source identification projects must be conducted at a much higher level of effort compared to what was required its prior permit.

a. 8.d.i--Status Monitoring

Provision C.8.d.i details the monitoring that Permittees must conduct in the event that status or long-term monitoring results indicate that a Permittee's discharge exceeds a water quality objective, toxicity threshold, or other "trigger". Alameda, Brisbane and the County of Santa Clara contend that there are no comparable requirements in their prior permits.

The San Francisco Bay Water Board disagrees that Provision C.8.d.i imposes a new program or level of service. In fact Provision C.8.d.i sets forth more detail about the requirements which the C.8.d Claimants were already required to follow in Provision C.1 of their prior permits.¹⁸¹

Provision C.8.d.i(1) requires "when status results trigger a follow up action" a Permittee must conduct a site specific study to identify and isolate the cause of a trigger/stressor source. C.8.d.i Claimants' prior permits implicitly (rather than explicitly) required that they conduct an equivalent study. That requirement was outlined in Provision C.1 of their prior permits. Those permits required that Permittees notify the Board when they discovered that their discharge was causing or potentially causing violations of receiving water limitations (water quality standards).

The Stressor/Source Identification monitoring is a refinement of that requirement. The requirements set forth in Provision C.8.d.i(2), (3) and (4) are equivalent to the other requirements in Provisions C.1 of Claimants' prior permits which all provide that the Permittees shall:

[S]ubmit a report to the Regional Board that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of WQSs.... The report shall include an implementation schedule. ... Implement the...Plan and monitoring program in accordance with the approved schedule.¹⁸²

Provision C.8.d.i(5) establishes a maximum number of such studies that must be conducted by a Permittee. This provision was not reflected in C.8 Claimants' prior permits which did not establish a maximum number of studies. It thus renders the challenged sub-provision actually less stringent (and less costly) than was required by the previous permits, which provided that Provision C.1 requirements had to be implemented without any cap.

¹⁸⁰ Permit, Page App I-63.

¹⁸¹ Alameda County 2003 permit, Provision C.1.a; San Mateo County 1999 permit, Provision C.1; Santa Clara County 2001 permit, Provision C.1.a.

¹⁸² *Id.*

b. 8.d.ii--BMP Effectiveness

Provision C.8.d.ii requires that Permittees investigate the effectiveness of one best management practice (BMP) for stormwater treatment or hydrograph modification control. Under C.8.a.iii Permittees have the option of complying with the requirement individually or through a countywide program, collaborative program, or some approved combination.

As noted above Alameda, Brisbane and the County of Santa Clara argue that Provision C.8.d.ii imposes a new program or higher level of service. In fact it is consistent with their previous permits. Each of the C.8 Claimants was previously required to conduct monitoring designed in part to achieve "[e]valuation of effectiveness of representative stormwater pollution prevention or control measures."¹⁸³

Provision C.8.d.ii differs from the requirement set forth in C.8 Claimants' prior permits in that it limits the required investigation to just one BMP whereas the prior requirements did not specify a maximum. Thus provision C.8.d.ii is in fact less stringent than the equivalent provisions in Claimants' prior permits.

c. 8.d.iii--Geomorphic Studies

Provision C.8.d.iii requires that Permittees monitor a waterbody within each county to determine "[h]ow and where creeks can be restored or protected to cost- effectively reduce the impacts of pollutants, increased flow rates, and increased flow durations of urban runoff..." C.8 Claimants' prior permits did not include a monitoring requirement expressly described as a "Geomorphic Project" monitoring requirement. Instead their prior permits were amended to included related requirements to develop and implement hydromodification management plans and to monitor the effectiveness of hydromodification control measures.¹⁸⁴ Provision C.8.d.iii provides added specificity to those requirements but does not result in a new program or higher level of service.

4. C.8.e--Pollutants of Concern and Long-Term Trends Monitoring

C.8 Claimants contend that Provisions C.8.e.i, C.8.e.ii and C.8.e.vi constitute new programs or higher levels of service. The San Francisco Bay Water Board has responded to those contentions below. C.8 Claimants do not expressly contend that Provisions C.8.e.iii, iv and v constitute new programs or higher levels of service thus the Board has not expressly addressed whether those provisions impose new programs or higher levels of service. If the Commission determines that those provisions are challenged in C.8 Claimants' test claims, then the Board

¹⁸³ Alameda County 2003 permit, Provision C.7; San Mateo County 2004 amendment 0060, Provision C.9, Att. A., p. 1; Provision C.8; Santa Clara County 2001 permit, Provision C.7.

¹⁸⁴ California Regional Water Quality Control Board, San Francisco Bay Region Order No. R2-2007-0025, Provision C.3.f. pages 5 -9; California Regional Water Quality Control Board, San Francisco Bay Region Order No. R2-2007-0027, Provision C.3.f., pages 4 - 8; California Regional Water Quality Control Board, San Francisco Bay Region Order No. R2-2005-0038, Provision C.3.f., page 8.

wishes the responses submitted concerning other requirements of Provision C.8.e to be considered in addressing Provisions C.8.e.iii, iv and v.

a. 8.e.i--Pollutants of Concern Monitoring

Provision C.8.e.i requires that Permittees monitor for pollutants of concern at locations specified in the Permit. It provides in the alternative that upon approval by the San Francisco Bay Regional Board's Executive Officer, Permittees may use alternate monitoring locations. As stated in C.8.e.i, the purpose of pollutants of concern monitoring is to meet four priority management information needs: 1) identifying which Bay tributaries (including stormwater conveyances) contribute most to Bay impairment from pollutants of concern; 2) quantifying annual loads or concentrations of pollutants of concern from tributaries to the Bay; 3) quantifying the decadal-scale loading or concentration trends of pollutants of concern from small tributaries to the Bay; and 4) quantifying the projected impacts of management actions (including control measures) on tributaries and identifying where these management actions should be implemented to have the greatest beneficial impact.

Alameda contends that the provision substantially increases the monitoring beyond that which was required in its former permit. Santa Clara County and Brisbane assert that the provision establishes a new program because their prior permits did not include a comparable provision. The C.8 Claimants challenge provisions C.8.e.i, C.8.e.ii, and C.8.e.vi.

C.8.e.i is not a new program or higher level of service. C.8 Claimants' prior permits required monitoring for pollutants of concern. Those permits required that Alameda, Brisbane and Santa Clara County implement monitoring programs that would characterize "representative drainage areas and stormwater discharges, including land use characteristics pollutant concentrations and mass loadings", assess "existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater dischargers, including an evaluation of representative receiving waters", and evaluate "effectiveness of representative stormwater pollution prevention or control measures."¹⁸⁵

Provision C.8.e.i adds more specificity to the prior permit monitoring requirements, but it does not increase those requirements. Also, Provision C.8.e.i provides two levels of flexibility to the Claimants. First, Claimants may use alternative monitoring locations than those specified, and second, Claimants may pursue an alternative approach than that specified as long as the alternative approach addresses the aforementioned management information needs, which are consistent with prior permit requirements.

b. C.8.e.ii--Long-Term Monitoring Locations

Provision C.8.e.ii requires that Permittees conduct Long-Term monitoring at stations listed in the Permit. The Permit authorizes Permittees to conduct monitoring at alternate locations upon approval by the San Francisco Bay Water Board's Executive Officer. Provision 8.e states that Long-Term monitoring is "intended to assess long-term trends in pollutant concentrations and toxicity in receiving waters and sediment, in order to evaluate if stormwater discharges are causing or contributing to toxic impacts on aquatic life."

¹⁸⁵Alameda County 2003 permit, Provision C.8, Findings 22 and 27; San Mateo County 1999 permit, Provision C.7, Findings 2 and 12; Santa Clara County 2001 permit, Provision C.7, Findings 2 and 13.)

The Fact Sheet indicates that Long Term Monitoring serves as a surrogate to monitor the discharge from all major outfalls.¹⁸⁶ It goes on to state:

By sampling the sediment and water column in urban creeks, the Permittees can determine where water quality problems are occurring in the creeks, then work to identify which outfalls and land uses are contributing to the problem... Long-Term Monitoring... [is] needed to identify water quality problems and assess the health of streams...."¹⁸⁷

The Fact Sheet further states that "Long-Term Monitoring is required every second year (biennially), rather than annually, in order to balance data needs and Permittee costs."¹⁸⁸

Alameda, Brisbane and the County of Santa Clara contend that Provision C.8.e.ii is a new program and state that their prior permits did not include a provision that required monitoring to detect long term trends. In fact C.8 Claimants' prior permits required monitoring of long term trends.

Alameda and Santa Clara were required under their permits to submit a multiyear monitoring plan designed to comply with the monitoring program requirements in the permit which required in relevant part that they characterize "representative drainage areas and stormwater discharges including land-use characteristics, pollutant concentrations, and mass loadings" and assess "existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges, including an evaluation of representative receiving waters".¹⁸⁹

San Mateo's prior permit required that it prepare a multi-year monitoring plan that revised and extended the activities included in the monitoring program plan that was adopted as part of its permit.¹⁹⁰

The fact that C.8 Claimants were required to conduct multiyear monitoring means that C.8 Claimants were already subject to long term monitoring requirements that were equivalent to those required in Provision C.8.e.ii. Thus the Provision does not impose a new program or higher level of service.

c. C.8.e.vi--Sediment Delivery Estimate/Budget

Provision C.8.e.vi requires that Permittees develop a design for a sediment delivery estimate/sediment budget in local tributaries and urban drainages. Permittees are required to implement the study by July 1, 2011. Alameda, Brisbane and the County of Santa Clara argue that Provision C.8.e.vi is a new program in that their prior permits did not require them to design or implement sediment deliver studies. The San Francisco Bay Water Board agrees that the C.8 Claimants' prior permits did not require them to design or implement sediment delivery

¹⁸⁶ Permit, page App I-61.

¹⁸⁷ *Id.*

¹⁸⁸ Permit, page App I-62.

¹⁸⁹ Santa Clara County 2001 permit, Provision C.7; Alameda County 2003 permit, Provision 8.

¹⁹⁰ San Mateo County 2004 amendment 0060, App. A, p. 5.

studies. The Provision added further specificity to the monitoring requirements included in C.8 Claimants' prior permits.

5. C.8.f--Citizen Monitoring and Participation

Provision C.8.f requires that Permittees encourage citizen monitoring and make reasonable efforts to seek out citizen and stakeholder information and comment. The provision further provides that Permittees shall demonstrate annually in their annual Urban Creeks Monitoring Reports that they have encouraged citizen and stakeholder observations and reporting of waterbody conditions.

Alameda, Brisbane and Santa Clara County assert that the Provision imposes a new program in that their prior permits did not include similar provisions. Alameda and Brisbane were both subject to similar requirements through the plans prepared to implement their prior permits.¹⁹¹

Alameda was subject to requirements to encourage citizen monitoring and public participation through its stormwater management plan. It was required to "[p]romote consistent, effective indicator application among the Program, its members and other partners including volunteer monitors".¹⁹² It was additionally required to "[i]dentify and support a friends of a watershed group and encourage creek cleanups...or adopt a creek or other volunteer monitoring and resource inventorying activities...."¹⁹³ The City was subsequently required to do tasks over the period of fiscal years 2003-2008 including:

Increase the participation of community stakeholders in watershed stewardship and assessment, and improve coordination of volunteer groups with agencies and other stakeholders....Provide resources and training to citizen monitoring groups that are working with local watershed partners....Continue support of Talks in the Hallway to strengthen community involvement and interest in assessment issues; explore use of community volunteers to supplement macroinvertebrate field sampling and trash assessment.¹⁹⁴

Furthermore, ACCWP Monitoring Program Plans and Annual Multi-Year Plan Updates over a three year period that all contain the following task: "Facilitate communications with community members and groups to work with ACCWP members and other agencies on volunteer monitoring and other watershed-based projects. Includes coordination and referral to regional resources...."¹⁹⁵ Those plan requirements demonstrate that Alameda was already subject to requirements that were the same as or substantially similar to the citizen monitoring and participation requirements in the Permit.

¹⁹¹ Alameda County 2003 permit, San Mateo County 1999 permit.

¹⁹² ACCWP, Stormwater Quality Management Plan, July 2001-June 2008, page 3-6.

¹⁹³ *Id.*, page 5-6.

¹⁹⁴ ACCWP, Multi-Year Plan for Monitoring and Assessment, May 28, 2003, Task WA-2.

¹⁹⁵ ACCWP Monitoring Program Plan and annual MYP Update Updated FY03/04 Workplan, February 27, 2004, p. 7; ACCWP Monitoring Program Plan and annual MYP Update Updated FY04/05 Workplan, February 28, 2005, p. 8; ACCWP Monitoring Program Plan and annual MYP Update Updated FY05/06 Workplan, March 1, 2006, p. 9.

Similarly, Brisbane and other San Mateo County Permittees were required to encourage citizen monitoring through their countywide stormwater program's stormwater management plan.¹⁹⁶ The plan provides that the Permittees shall "[d]evelop and Implement Integrated Outreach Approaches" and that they shall "[i]dentify and support a "Friends of a (a watershed)" group and encourage creek (lagoon or shoreline) cleanups, or adopt-a-creek or other volunteer monitoring and resource inventorying activities."¹⁹⁷ Brisbane's prior permit clearly required it to conduct citizen outreach requirements that were equivalent to those required by the Provision C.8.f.

Santa Clara County was not subject to citizen monitoring requirements in its prior permit.

Provision C.8.f does not impose a new program or higher level of service for any of C.8 Claimants. Instead the Provision provides additional refinement on C.8 Claimants' requirements for compliance with CWA requirements.

6. C.8.g--Reporting

Provision C.8.g includes various requirements concerning reporting of monitoring results. It provides that Permittees must take specified actions in the event that stormwater runoff or dry weather discharges are or may be causing or contributing to exceedances of applicable water quality standards. It further requires that Permittees must submit the following annual reports: Electronic Status Monitoring Data Report, Urban Creek Monitoring Report, and Integrated Monitoring Report. The Fact Sheet indicates that Provision 8.g requires that Permittees submit monitoring reports to:

- (1) determine compliance with monitoring requirements;
- (2) provide information useful in evaluating compliance with all Permit requirements;
- (3) enhance public awareness of the water quality in local streams and the Bay; and
- (4) standardize reporting to better facilitate analysis of data...¹⁹⁸

Claimants Alameda, Brisbane and Santa Clara County acknowledge that their prior permits required that they prepare an annual report which included a description and interpretation of data collected over the previous fiscal year. They note that the format of the report was unspecified. In addition the City of Alameda notes that its prior permit required permittees to submit workplans, annual updates and reports of illicit discharges and industrial discharge controls.

Although C.8 Claimants identify numerous actions required by Provision C.8.g, they each identify just three aspects of the Provision that they claim result in a higher level of service. Those are:

- electronic reporting,
- maintenance of data in a database accessible to the public, and

¹⁹⁶ SMCWPPP, Stormwater Management Plan for April 2004-June 2010, pp. 1-2 and B-36.

¹⁹⁷ *Id.*

¹⁹⁸ Permit, page App I-65.

- submission of an Urban Creeks Monitoring Report that has increased number of data parameters and programs compared with reports required by their existing permits.

a. Electronic reporting

The San Francisco Bay Water Board agrees that C.8 Claimants' prior permits did not require that they submit reports electronically. The San Francisco Bay Water Board included the requirement to report data electronically because Permittees have submitted all previous monitoring reports with data in tables created with computer software. In light of the fact that Permittees already compile their data in electronic form, the Provision merely requires that they submit that data via email rather than print it out and submit it in hard copy. It is arguably less costly to submit a report electronically than by using mail delivery.

b. Maintenance of data in database accessible to the public

Although C.8 Claimants' prior permits did not require that they make reporting data accessible to the public, they were already required to do so under the Public Records Act. Government Code section 6253.9 requires that public agencies make data available upon request to the public in electronic format when that data is in electronic format. The requirement to post the data in a database accessible to the public adds further specificity to the C.8 Claimants' prior permits.

c. Urban Creeks Monitoring Program

C.8 Claimants contend that they must comply with increased reporting requirements concerning urban creeks monitoring. They acknowledge that their prior permits required reporting of similar monitoring results, but state that they were not required to submit the data in a separate report. C.8 Claimants previously submitted urban creeks monitoring data in their annual reports rather than in a separate monitoring report. There would be at most *de minimis* costs associated with submission of urban creeks monitoring data in a separate annual report versus C.8 Claimants' prior requirement to submit the data as part of a larger annual report that covers other all aspects of the prior permits.

C.8 Claimants contend that Provision C.8.g will result in increased reporting efforts because there are an increased number of data parameters and programs in comparison with their prior permits. They do not identify the requirements that they believe have increased thus it is not possible to reply with specificity. The San Francisco Bay Water Board infers that C.8 Claimants are claiming that their reporting requirements concerning urban creeks monitoring have increased due to some of the other monitoring provisions they challenge. Any increase in reporting burden associated with these other monitoring provisions is minimal. The requirement at issue adds further specificity to the requirements applicable to Permittees as required under federal law.

7. C.8.h—Monitoring Protocols and Data Quality

Provision C.8.h provides that where applicable monitoring data must be "SWAMP comparable". SWAMP is the State Water Board's Surface Water Ambient Monitoring Program (SWAMP) which was created to assess the conditions of surface waters throughout California and coordinate all water quality monitoring conducted by the State and Regional Water Boards. The Provision requires that "[m]inimum data quality shall be consistent with the latest version of

the SWAMP Quality Assurance Project Plan (QAPP).” This statement is a clarification of what must be done to ensure that monitoring data are “SWAMP comparable”.

Claimants Alameda, Brisbane and County of San Mateo argue that Provision C.8.h imposes a higher level of service. They note that their prior permits did not mention the SWAMP program. C.8 Claimants assert that the provision requires that they develop significant updates or additions to existing field standard operating procedures and train field staff regarding collection of data using methods that are compatible with the SWAMP program. They further contend that new data management systems must be developed and managed. C.8 Claimants argue that monitoring data quality assurance procedures will have to be developed, documented and then they will have to adhere to them.

The San Francisco Bay Water Board agrees that the C.8 Claimants' prior permits did not expressly require that monitoring data had to be SWAMP comparable. Nevertheless, Alameda and Santa Clara County were subject to equivalent requirements concerning data quality. Those permits required quality assurance procedures for all monitoring which had the practical effect of requiring the data to be SWAMP comparable. Each of C.8 Claimants' prior permits required that:

*The Monitoring Program shall include... Identification and justification of representative sampling locations, frequencies and methods, suite of pollutants to be analyzed, analytical methods, and quality assurance procedures. Alternative monitoring methods in place of these (special projects, financial participation in regional, state, or national special projects or research, literature review, visual observations, use of indicator parameters, recognition and reliance on special studies conducted by other programs, etc.) may be proposed with justification....*¹⁹⁹ (Emphasis added.)

The underlined language in C.8 Claimants' prior permits above shows that C.8 Claimants' prior permits required identification and justification of quality assurance procedures. Quality assurance procedures are a standard component of any monitoring program with the obvious purpose to assure monitoring data are of adequate quality for their intended use. The State Water Board's Surface Water Ambient Monitoring Program's Quality Assurance Program Plan²⁰⁰ is designed to ensure that monitoring data are adequate to assess the conditions in surface waters. As discussed above, the C.8 Claimants' prior permits required that they conduct an “[a]ssessment of existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges, including an evaluation of representative receiving waters”, which is equivalent to assessment of conditions in surface waters. In other words, the prior permits had requirements to assure the quality of monitoring data used to assess conditions in surface water, and the new Permit requirement that where applicable monitoring data must be “SWAMP comparable” is equivalent to the prior permits' quality assurance requirements.

¹⁹⁹ Alameda County 2003 permit, Provision 8.a; Santa Clara County 2001 permit, Provision 7.a.

²⁰⁰ State Water Resources Control Board, Surface Water Ambient Monitoring Program - Quality Assurance Program Plan (version 1.0), September 1, 2008.

Because Alameda and Santa Clara County were already required to product monitoring data that met the quality assurance standards included in SWAMP, the Provision does not impose new requirements with respect to them.

C. Provision C.8 is required by federal law.

As discussed in detail above, the central issue before the Commission is whether the Permit, including challenged monitoring requirements, exceeds the federal mandate for MS4 permits. C.8 Claimants assert that the monitoring provisions at issue in this claim are state mandates because they exceed federal requirements. They have identified four general reasons that they contend that Provision C.8 exceeds federal requirements. The San Francisco Bay Water Board disagrees.

The Permit's monitoring provisions are required by the Clean Water Act and its implementing regulations. As discussed in detail above Clean Water Act section 402(p)(3)(B)(ii-iii) governs issuance of MS4 permits. It is cited in the Permit's Fact Sheet as providing as broad legal authority for the requirements in Provision C.8. That law provides three separate but related requirements for discharge permits issued to the local governments that operate MS4s.

First, CWA section 403(p)(3)(B) mandates that stormwater permits must effectively prohibit non-stormwater discharges into storm sewers.²⁰¹ Provision C.8 monitoring requirements are necessary to provide data to evaluate whether or not the Permit is effectively prohibiting non-stormwater discharges into Permittees'.

Second, MS4 permits must require controls that will result in reducing the pollutants that discharge from the MS4 to waters of the United States to the MEP.²⁰² The challenged monitoring Provisions are necessary to ensure that the Permit includes controls to reduce the discharge of pollutants to the MEP.

CWA section 403(p)(3)(B) additionally requires that stormwater permits must include such other provisions as the permitting agency determines to be appropriate for the control of pollutants.²⁰³

It requires that a permitting agency must, when appropriate, include provisions that go beyond MEP.²⁰⁴ Thus, even if the Commission finds that the Permit, including any Provision C.8 requirement, goes beyond MEP, the San Francisco Bay Water Board was bound by the federal mandate to include appropriate provisions necessary to control pollutants.

As discussed above, the CWA provides a further statutory mandate that is independent from CWA section 402(p) requirements. Under CWA section 303, a stormwater permit must include provisions in MS4 permits that are required to implement the wasteload allocations of TMDLs. Some of the challenged C.8 Provisions are required to implement the TMDLs for mercury²⁰⁵, PCBs²⁰⁶ and pesticides²⁰⁷ in San Francisco Bay.

²⁰¹ CWA § 402(p)(3)(B)(ii).

²⁰² CWA § 402(p)(3)(B)(iii).

²⁰³ *Id.*

²⁰⁴ *Building Industry Association, supra*, 124 Cal.App.4th at 881.

²⁰⁵ Basin Plan, Chapter 7.2.2

²⁰⁶ *Id.*, Chapter 7.2.3.

²⁰⁷ *Id.*, Chapter 7.1.1.

In complying with those CWA mandates the San Francisco Bay Water also complied with the federal regulations that implement the CWA when it established the Permit's monitoring requirements. The Fact sheet lists numerous federal regulations that support the inclusion of the challenged monitoring requirements. The regulations provide in relevant part that a stormwater permit must establish the "type, intervals, and frequency [of monitoring] sufficient to yield data which are representative of the monitored activity."²⁰⁸ A permit must also establish additional monitoring requirements that are intended to assure compliance with permit limitations.²⁰⁹ (Those limitations include the prohibition on discharge of non-stormwater, reduction of the discharge of pollutants to the MEP, and water quality based provisions).

As noted above C.8 Claimants have identified four general types of Provision C.8 requirements that they contend exceed federal requirements. Those requirements relate to:

- collaborative or watershed monitoring
- characterization of MS4 discharges
- citizen monitoring, and
- electronic reporting.

1. Collaborative and watershed monitoring is required by federal law.

Claimants Alameda, Brisbane and Santa Clara County contend that Provision C.8 requirements concerning collaborative and watershed monitoring are not mandated by federal law or regulations. They argue that federal regulations require that a permit must contain provisions aimed at characterizing and controlling pollutants in a Permittee's own discharge. They assert that federal law and regulations do not require participation in or contributions toward the collaborative monitoring program they believe to be mandated by the Permit. C.8.Claimants assert that the Water Board freely chose to impose the requirements on the Permittees and that the Commission should therefore find them to be state mandates under *Hayes*²¹⁰.

The San Francisco Bay Water Board disagrees with Claimants' assertion that the Permit requires collaborative monitoring. While it is true that Provision C.8.c refers to watershed monitoring, it does not require "watershed-wide" monitoring. When Provision C.8.c is read together with Provision C.8.a it is clear that Permittees can choose whether they wish to conduct the monitoring on a collaborative basis through countywide or regional efforts--or on an individual basis.

Provision C.8.a.iii clearly indicates that a Permittee may choose to do collaborative monitoring but is not required to do so. It provides:

A Permittee may comply with the requirements in Provision C.8 by performing the following:

- (1) Contributing to its stormwater countywide program, as determined appropriate by the Permittee members, so that the stormwater countywide Program conducts monitoring on behalf of its members;

²⁰⁸ 40 CFR 122.48

²⁰⁹ 40 CFR 122.44(i)

²¹⁰ *Hayes, supra*, 11 Cal.App.4th 1564.

- (2) Contributing to a regional collaborative effort;
 - (3) *Fulfilling monitoring requirements within its own jurisdictional boundaries; or*
 - (4) A combination of the previous options, so that all requirements are fulfilled.
- (Emphasis added.)

Provision C.8.a.iv goes on to provide that Permittees have the additional option of fulfilling the requirements of C.8 by using data collected by third parties provided that data quality objectives are met. Because Provision C.8 allows but does not require collaborative monitoring, C.8 Claimants have not supported their claim that the Provision C.8 mandates collaborative monitoring or that the Provision somehow imposes a state mandate as a result.

2. Characterization of MS4 discharges is required by federal law.

C.8 Claimants contend that the Permit imposes new requirements to characterize MS4 discharges and that such requirements are impermissible state mandates. They assert that the requirements in Provision C.8 to characterize specific constituents of stormwater exceed the general requirements concerning monitoring that are set forth in federal law. Provision C.8 monitoring requirements are required pursuant to federal law as discussed extensively above.

C.8 Claimants point to Provisions C.8.c and C.8.h as examples of the requirements to monitor specific constituents in stormwater that they believe constitute state mandates. They do not clarify which other Provisions relating to monitoring of specific constituents that they contend are also state mandates. It may be inferred that C.8 Claimants also intend to refer to Provisions C.8.e because it includes requirements concerning monitoring of specific constituents in stormwater. To the extent that the Commission determines that Claimants' argument applies to other requirements in Provision C.8, the legal analysis set forth generally above and specifically below applies to those Provisions as well.

Provision C.8.c provides that Permittees must conduct status monitoring in local receiving water using sampling sites set forth in the permit. Provision C.8.e also requires monitoring of receiving water but includes specific requirements to monitor for pollutants of concern and to conduct long-term monitoring studies. Both Provisions are required in order to implement requirements in federal law and regulations.

Provisions C.8.c and C.8.e are necessary to ensure that the Permit meets CWA requirements to effectively prohibit non-stormwater discharges into storm drains as required under the CWA²¹¹ and includes controls to reduce the discharge of pollutants to the MEP²¹². Provisions C.8.c and C.8.e are additionally required because the San Francisco Bay Water Board determined that they were "appropriate for the control of... pollutants" in stormwater. The challenged monitoring Provisions are necessary to determine whether Permittees are in compliance with other permit requirements. Those provisions include Receiving Water Limitation B.2²¹³ as well as the Permit's pollutant specific provisions. The latter include Provisions C.9, C.11, C.12, C.13 and C.14.

²¹¹ CWA § 402(p)(3)(B)(ii).

²¹² CWA § 402(p)(3)(B)(iii).

²¹³ Provision B.2 provides that a Permittee's discharge "shall not cause or contribute to a violation of any applicable water quality standard for receiving waters...."

Provisions C.8.c and C.8.e are also required under 40 CFR 122.44(d)(1)(vii)(B) to ensure that the permit includes effluent limits consistent with the assumptions and requirements of WLAs in TMDLs adopted by the San Francisco Bay Water Board. The TMDLs address mercury²¹⁴ and PCBs²¹⁵ in all San Francisco Bay segments and Diazinon and pesticide-related toxicity²¹⁶ in urban creeks throughout the San Francisco Bay Region. These TMDLs provide that the Board will include the monitoring requirements at issue in Provisions C.8.c and C.8.e when the Board issues stormwater permits. Thus, the mercury TMDL provides that when the Board issues a MS4 permit it shall incorporate requirements to "[d]evelop and implement a monitoring system to quantify either mercury loads or loads reduced through treatment, source control, and other management efforts ..."²¹⁷ The PCBs TMDL provides that will include requirements that stormwater permittees "develop and implement a monitoring system to quantify PCBs urban stormwater runoff loads and the load reductions achieved through treatment, source control and other actions...."²¹⁸ The Diazinon and pesticide related toxicity TMDL provides that the Board will require that stormwater permittees Monitor diazinon and other pesticides discharged in urban runoff that pose potential water quality threats to urban creeks; monitor toxicity in both water and sediment; and implement alternative monitoring mechanisms, if appropriate, to indirectly evaluate water quality²¹⁹

Provisions C.8.c and C.8.e are further necessary to meet the requirements 40 CFR section 122.48(b) to specify monitoring requirements, including type, intervals, and frequency sufficient to yield representative data.

As noted above C.8 Claimants point to Provision C.8.h as an example of a provision that requires measurement of the specific constituents in stormwater. In fact the Provision does not require monitoring of any specific constituents but instead sets forth requirements concerning monitoring protocols and data quality. C.8 Claimants argue that the Provision imposes a state mandate because there is no federal requirement to provide SWAMP comparable data. They make the same claim about the Provision in their argument below concerning Electronic Reporting. The San Francisco Bay Water Board has responded to C.8 Claimants' concern below that C.8.h is not federally required. That response is intended to address C.8 Claimants' assertion here as well.

The challenged monitoring requirements implement the requirements in the CWA and federal regulations discussed above. Although the specific requirements in the Provisions contested by C.8 Claimants are not expressly set forth in federal law or regulations, the San Francisco Bay Water Board was nevertheless required under those laws to specify the requirements at issue in order to meet those CWA and regulatory standards. The San Francisco Bay Water Board thus properly exercised its discretion under federal law to implement federal mandates by including the challenged Provisions in the Permit.

²¹⁴ Basin Plan, Chapter 7.2.2.

²¹⁵ *Id.*, Chapter 7.2.3.

²¹⁶ *Id.*, Chapter 7.1.1.

²¹⁷ Basin Plan, Chapter 7.2.2.6.

²¹⁸ Basin Plan, Chapter 7.2.3.6.

²¹⁹ Basin Plan, Chapter 7.1.1.6.

3. Citizen monitoring is required by federal law.

C.8 Claimants contend that the Clean Water Act and its implementing regulations authorize but do not require the specific requirements in Provision C.8.f thus the provision constitutes a state mandate. Provision C.8.f requires that Permittees shall:

- encourage citizen monitoring,
- make reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality when Permittees develop monitoring projects and evaluate specified data, and
- demonstrate annually that they have encouraged citizen and stakeholder observation and reporting of waterbody conditions.

Provision C.8.f does not require that Permittees actually get citizens or stakeholders to monitor or comment. It merely provides that the Permittees encourage such monitoring and "make reasonable efforts" to seek out comment—and then demonstrate annually that they took those actions.

CWA section 101(e) and 40 CFR Part 25 broadly require participation in all programs established pursuant to the Act. In addition 40 C.F.R. §122.26(d)(2)(iv) requires that stormwater management programs shall:

...include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.... Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable.

Furthermore, 40 CFR 122.26(d)(2)(iv)(B)(5) requires that an application include:

A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers....

When translating these application requirements into permit terms, the San Francisco Bay Regional Board must comply with the MEP standard. As explained above, MEP is an iterative evolving standard. The Permit's citizen monitoring requirements are necessary to encourage citizen participation and to ensure that the Permit includes controls to reduce the discharge of pollutants to the MEP as required under CWA section 402(p)(3)(B)(iii). As further required under that section of the CWA, the citizen monitoring requirements are additionally required because the San Francisco Bay Water Board as the permitting authority determined them to be "appropriate for the control of such pollutants".²²⁰ Citizen reporting and comment are essential to ensure that the San Francisco Bay Water Board has the most complete information possible on Permittees' compliance with Permit requirements including those concerning discharge of pollutants. The fact that the Permit contains additional or better tailored requirements than contained in previous permits is due to the fact that it is necessary to achieve the federal standards referenced above. This does not mean that the Permit goes beyond federal law or imposes a new program or higher level of service under state law.

²²⁰ CWA § 402(p)(3)(B)(iii).

4. Electronic reporting is required by federal law.

C.8 Claimants contend that the requirement in Provision C.8 that Permittees submit their data electronically imposes a state mandate. C.8 Claimants have raised a related concern about SWAMP comparability. If the Commission determines that the requirement to submit data electronically and to provide SWAMP comparable data requires a higher level of service, they are nevertheless mandated by federal law. Federal regulations require that monitoring must meet various requirements including that it must be sufficient to yield data which are representative of the monitoring activity.²²¹

Provision C.8.h is also required to comply with 40 CFR 122.48. It requires that:

All permits shall specify: (a) Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate); (b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring; (c) Applicable reporting requirements based upon the impact of the regulated activity and as specified in 122.44. Reporting shall be no less frequent than specified in the above regulation.

The purpose of these regulations is to ensure monitoring data are of adequate quality for their intended use. So as discussed above, where the intended use of monitoring data is to assess the condition of surface waters, the SWAMP QAPP compiles minimum data quality requirements and quality assurance procedures for that purpose. As such, SWAMP comparability is consistent with these federal regulations.

D. Electronic Reporting is Required for Private Stormwater Dischargers

Even if the Commission were to find that there is no federal mandate for C.8 Claimants to report their monitoring data electronically, C.8 Claimants would not prevail on their claim that the requirement imposes a state mandate. As discussed above private entities are subject to NPDES permit requirements in order to discharge to waters of the United States. Private parties are expressly required to report stormwater data electronically. The NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities requires that all dischargers covered under the permit must submit electronic reports that include monitoring data.²²² Public as well as private dischargers are covered under that permit and must comply with the general permit electronic reporting requirements.

²²¹ 40 CFR 122.41(j).

²²² State Water Resources Control Board, Order No. 2009-0009, National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Section XVI A-E, pp. 39-40.

2. C.10 Trash

A. Introduction

Trash is a pervasive problem near and in creeks and in San Francisco Bay. It has significant effects on aquatic life and habitat, persists in the environment, concentrates organic toxins and affects people's enjoyment of creeks and the Bay.

Provision C.10 addresses the problem of trash. It requires that Permittees demonstrate compliance with Discharge Prohibition A.2 and trash related receiving water limitations through implementation of control measures and other action. The provision sets deadlines for phased reductions in trash loads from municipal separate storm sewer systems.

The Permit's Fact Sheet explains that "[t]rash and litter are a pervasive problem near and in San Francisco Bay."²²³ It notes that the Board adopted a prohibition in 1975 that "prohibits the discharge of rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plain areas."²²⁴

The requirements to control the release of trash into MS4s and surface waters are at the heart of a storm water program. The Ninth Circuit noted in its decision in *Environmental Defense Center v. United States Environmental Protection Agency* that "[s]torm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States."²²⁵ (Emphasis added.)

Since the Basin Plan prohibition on the discharge of rubbish and litter was adopted in 1975 there have been two or more MS4 permits issued to Bay Area Phase I stormwater dischargers including Claimants. The fact that trash has remained a significant problem in San Francisco Bay and its tributaries despite those earlier rounds of stormwater permits indicates that those prior permits did not achieve effective control of the discharge of trash in stormwater under CWA section 402(p)(3)(B)(ii). The San Francisco Bay Water Board addressed the discharge of trash in the Permit through Provision C.10.

Claimants Alameda, Brisbane and County of Santa Clara (C.10 Claimants) assert that Provision C.10 constitutes a new program and that each of its provisions require higher level of service. They state that their prior permits contained no comparable provisions. The San Francisco Bay Water Board agrees that Provision C.10 requires a higher level of service from Claimants Alameda, Brisbane and County of Santa Clara. The Board does not agree that Provision C.10 is a new program. As discussed below C.10 Claimants were required through plans developed to implement their prior permits to remove trash from the urban landscape and from the stormdrain system.

²²³ Permit, page App-I-71.

²²⁴ *Id.*

²²⁵ *Environmental Defense Center, supra*, 344 F.3d at p. 841.

B. Provision C.10 does not require new programs or higher level of service.**1. Provision C.10.a.i**

Provision C.10.a.i requires that each Permittee submit a Short-Term Trash Load Reduction Plan, including an implementation schedule. The Plan must describe the control measures and best management practices (BMPs) that will be implemented to achieve a reduction of trash loading from that Permittee's MS4 by July 1, 2014.

The San Francisco Bay Water Board agrees that Provision C.10.a.i includes more specificity than was required in the prior permits that permitted the stormwater discharges of Alameda, Brisbane and Santa Clara County. The Board does not agree that it imposes a new program or higher level of service. C.10 Claimants were required to implement plans under their prior permits that provided for removal of trash from the urban landscape and from the stormdrain system. Those actions included street sweeping, storm drain inlet cleaning and storm drain system maintenance and cleaning.

Alameda was subject to the requirements of the Alameda Countywide Clean Water Program's Stormwater Quality Management Plan.²²⁶ It provided that Permittees in Alameda County would comply with the Permit by taking various actions to remove trash. Permittees in Alameda County were required to perform street sweeping and clean storm drain facilities, remove the "maximum amount of materials" from storm drainage facilities, etc.²²⁷ As part of that effort, agencies were required to develop a storm drainage facility inspection and maintenance plan.²²⁸

This plan, like the Short Term Trash Reduction Plan, includes a set of actions to reduce the presence of pollutants, including trash and debris, in the storm drain system. These actions are similar to the enhanced maintenance actions that Permittees will implement to achieve reduced trash loading under the Short-Term Trash Load Reduction Plan required in Provision C.10.a.i.

Similarly, each Permittee in Alameda County was required to develop monthly records concerning the areas targeted for trash removal.²²⁹

As part of SMCWPPP Brisbane was subject to the requirements of two management plans under its previous permit that included street sweeping and storm drain maintenance, both of which are important activities to remove trash.²³⁰ Additionally, the Program prepared a work plan for trash control.²³¹ The Trash Control Work Plan states that SMCWPPP developed the Work Plan "to begin developing and implementing a strategy to address trash problem areas in urban water bodies in San Mateo County".²³² It is clear that Brisbane was required to develop a plan for trash control under its prior permit.²³³

²²⁶ Alameda County Clean Water Program, Stormwater Quality Management Plan, July 2001-June 2008. (Alameda County Clean Water Program will hereafter be referred to as "ACCWP".)

²²⁷ *Id.* pages 3-15, 3-16, 5-9, 5-11.

²²⁸ *Id.*

²²⁹ *Id.*, at 5-15.

²³⁰ STOPPP Stormwater Management Plan July 1998 – June 2003, p.2-2; SMCWPPP Stormwater Management Plan for April 2004-June 2010, 2-2.

²³¹ SMCWPPP, FY 2003-2004 Trash Control Work Plan, June 2003.

²³² *Id.* at p. 1.

²³³ SMCWPPP, Stormwater Management Plan, April 2004-June 2010, P. D-1, D-5.

Santa Clara County was subject to requirements in its management plan²³⁴ and in a trash work plan²³⁵ which each Permittee implemented through its own adopted performance standards for street sweeping and cleaning,²³⁶ litter control,²³⁷ and storm drain inlet/catch basin cleaning.²³⁸ The Management Plan included requirements for Public Agency Activities, including model Performance Standards²³⁹. In addition, the Trash Work Plan documented existing trash management practices²⁴⁰, developed a strategy for trash assessments in creeks, which included clean up of numerous trash accumulation areas in creeks (which were similar to hot spots under Provision C.10)²⁴¹, and required more substantial counting and characterization of trash items removed than are required under Provision C.10²⁴². It also helped Permittees identify priority trash problem areas²⁴³, provided guidance on trash control measures²⁴⁴, and developed standardized reporting²⁴⁵.

2. Provision C.10.a.ii

Provision C.10.a.ii requires in relevant part that each Permittee document the amount of trash currently being discharged, develop a mechanism to track trash load reductions, and report to the Board on its progress by February 2011. C.10 Claimants reported on their trash reduction efforts under their prior permits.

As part of the ACWWP, Alameda was required to develop monthly records concerning the areas targeted for litter removal and the total amount of material removed.²⁴⁶ Thus, Alameda was already subject to the requirement to document its trash load reduction results.

Brisbane was required to report perform street sweeping, and storm drain inlet cleaning results and volume of material removed under the management plans developed to implement its prior permit.²⁴⁷

²³⁴ SCVURPPP Urban Runoff Management Plan (URMP), September 1, 2004.

²³⁵ SCVURPPP Trash Work Plan, March 1, 2003.

²³⁶ SCVURPPP URMP, *supra*, at p. 64.

²³⁷ SCVURPPP URMP, *supra*, at p. 65.

²³⁸ SCVURPPP URMP, *supra* at p. 66.

²³⁹ SCVURPPP URMP, *supra* in Appendix A, p. A-1, Public Streets, Roads and Highways Operation and Maintenance, pp. 11,12,24, Storm Drain System Operation and Maintenance, pp. 2, 4.

²⁴⁰ SCVURPPP Trash Work Plan, March 1, 2003, pp.1,6.

²⁴¹ SCVURPPP Trash Work Plan, March 1, 2003, p.9,

²⁴² SCVURPPP, Trash Problem Area Evaluation Results- FY 05-06, Aug. 24, 2006, pp. 1-3, and SCVURPPP, Development of the Urban Rapid Trash Assessment Protocol, March 13, 2006, pp. 3-5.

²⁴³ SCVURPPP Trash Work Plan, March 1, 2003, p.1.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ ACCWP, Stormwater Quality Management Plan, July 2001-June 2008, page 5-15.

²⁴⁷ SMCWPPP, Stormwater Quality Management Plan, July 1998 – June 2003, p. 2.1; SMCWPPP, Stormwater Management Plan, April 2004-June 2006, Appendix D, p. D-1.

Santa Clara County was required to collect street sweeping data, identify trash management practices and identify trash "hot spots".²⁴⁸

Although C.10 Claimants were required to report on trash reduction efforts in compliance with their prior permits, Provision C.a.ii provides more specificity than was required in C.10 Claimants' prior permits in that Permittees must report in an accountable manner on their focused efforts to reduce their overall trash loading to the storm sewer system by 40% by year 2013.

3. Provision C.10.a.iii

Provision C.10.ai.iii requires that "population-based" Permittees (which include C.10 Claimants) install and maintain specified numbers of trash capture devices. (The Permit establishes an exemption for certain Permittees. That exemption is not applicable to C.10 Claimants.)

Santa Clara County, as part of the Santa Clara Valley Urban Runoff Program, cooperated in implementing a study which provided for pilot installation and assessment of full trash capture inlet based devices.²⁴⁹ This implementation plan was a requirement of Task 2.2 of the Draft Trash Management and Effectiveness Strategy.²⁵⁰ This strategy was required by the Trash Work Plan²⁵¹

The Provision includes more specificity than was required in C.10 Claimants' prior permits but does not impose a new program or higher level of service.

4. Provisions C.10.b.i and C.10.b.ii

Provisions C.10.b.i and C.10.b.ii set forth requirements for Trash Hot Spot cleanups. Provision C.10.b.i provides that Hot Spots must be cleaned up to a level of "no visual impact" at least one time per year. It also specifies the size of Trash Hot Spots.

Provision C.10.b.ii establishes the minimum number of Hot Spots that must be cleaned up. It further requires that Permittees submit specified information about those Hot Spots to the San Francisco Bay Water Board.

As discussed below the three countywide stormwater programs to which Claimants belong completed required cleanup and assessment of stream locations under their prior permits that would qualify as trash hot spots under the Permit.

As part of the ACCWP Alameda was required through a monitoring and assessment plan to clean up and perform assessment activities in trash hot spots.²⁵² The trash assessment method described in the plan includes complete cleanup of the assessed stream reach.²⁵³ Brisbane, as a member of the SMCWPPP participated in required creek cleanups as part of

²⁴⁸ SCVURPPP, FY 06-07 Workplan, 3/1/2006, p. 9.

²⁴⁹ SCVURPPP, Pilot Trash Structural Treatment Control Study: Implementation Plan, 3/27/08, Att. A, pp. 10,11.

²⁵⁰ SCVURPPP Pilot Trash Structural Treatment Control Study: Implementation Plan, 3/27/08, p.4.

²⁵¹ SCVURPPP Trash Work Plan, March 1, 2003, p. 3-7, 10, 12.

²⁵² ACCWP, "Multi-Year Plan for Monitoring and Assessment", May 28, 2003, pp. II-20, II-21, III-2, III-5, III-7.

²⁵³ *Id.*

trash assessments.²⁵⁴ Santa Clara County conducted required cleanups of what were essentially "trash hot spots".²⁵⁵

Because C.10 Claimants were conducting required to conduct trash hot spot cleanups under their prior permits, Provisions C.10.b.i and C.10.b.ii do not impose new programs or higher levels of service. Provisions C.10.b.i and C.10.b.ii provide more specificity than was required under C.10 Claimants' prior permits in that the Provisions at issue establish size requirements for areas to be cleaned of trash and additionally require documentation requirements.

5. Provision C.10.b.iii

Provision C.10.b.iii provides in relevant part that Permittees must quantify material removed from each Trash Hot Spot cleanup, provide photo documentation and identify the dominant types of trash cleaned up.

As discussed above in C.10.b.i and ii above, C.10 Claimants' countywide stormwater programs completed clean-up and assessment of stream locations that would qualify as trash hot spots under their prior permits. Alameda, Brisbane and Santa Clara County were further subject to the requirements to use assessment methods that were similar if not more involved than the trash assessment methods required in Provision C.10.b.iii.

Under their prior permits, C.10 Claimants were required to use the Regional Trash Assessment protocol or the Urban Rapid Trash Assessment Protocol.²⁵⁶ Those methods involved counting and categorizing individual trash items during the stream segment assessments and cleanups.²⁵⁷

Whereas C.10 Claimants' prior permits required that they count individual trash items, Provision C.10.b.iii requires documentation of the total volume and dominant type of trash removed. Thus the assessment measures required in C.10 Claimants' prior permits were actually more labor intensive for some Permittees because those measures involved each piece of trash and recording the trash type of each piece that was removed.

Provision C.10.b.iii does not impose a new program or higher level of service. It establishes more specific requirements than were set forth in C.10 Claimants' prior permits. It requires that Permittees must record volume and dominant types of trash collected from a certain required number of Trash Hot Spots that must be cleaned and addressed each year, even though the nature of the information collected at each site is easier to collect.

²⁵⁴ SMCWPPP, Trash Control Work Plan, June, 2003, p. 1; SMCWPPP, Trash Assessments in Urban Creeks in San Mateo County, August 2008, pp. 1-2; SMCWPPP, Pilot Study to Identify Trash Sources and Management Measures at an In-stream Trash Accumulation Area, August 2005, p. 7.

²⁵⁵ SCVURPPP, Trash Problem Area Evaluation Results - FY 05-06, p. 2.

²⁵⁶ ACCWP, "Multi-Year Plan for Monitoring and Assessment", May 28, 2003, pp. 11-20; San Francisco Bay Regional Water Quality Control Board, Rapid Trash Assessment Protocol, pp. 5,6; SMCWPPP, Trash Assessments in Urban Creeks in San Mateo County, August 2008; SCVURPPP, Development of Urban Rapid Trash Assessment Protocol, pp. 1-2, Attachment A., p.2, Trash Problem Area Evaluation Results - FY 05-06, p. 2.

²⁵⁷ *Id.*

6. Provision C.10.c

Provision C.10.c requires that each Permittee must submit a Long-Term Trash Load Reduction Plan to the San Francisco Bay Water Board. It further provides that the Plan shall demonstrate specified levels of trash reduction have been attained by 2017 and 2022.

Although C.10 Claimants conducted planning efforts for short term trash reduction, they were not previously required to produce long term trash reduction plans. Thus, Provision C.10.c sets forth more specific requirements than were included in C.10 Claimants' prior permits but it does not impose a new program or higher level of service.

7. Provision C.10.d

Provision C.10.d establishes reporting requirements. It requires that each Permittee must include a report concerning its trash load reduction in the annual report that it provides to the San Francisco Bay Water Board. It further provides that each Permittee shall retain records providing supporting documentation relating to trash load reduction.

All of the C.10 Claimants reported on their municipal maintenance activities and stream assessment and cleanup activities in their annual reports and other reports.²⁵⁸

The requirements for reporting in C.10.d. are different than previous reporting requirements and thus provide more specificity. They do not impose a new program or higher level of service.

C. Provision C.10 is required by federal law.

Claimants Alameda, Brisbane and County of Santa Clara argue that Provision C.10 is a state (rather than federal) mandate. They contend that the San Francisco Water Board exercised its discretion twice in "choosing the means and manner that the federal Clean Water Act will be applied to receiving waters within its jurisdiction".^{259 260 261} They imply that the Board imposed a state mandate when it adopted the prohibition in its Basin Plan on the discharge of "[r]ubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would eventually be transported to surface waters...."²⁶²

C.10 Claimants go on to argue that the Trash Load reduction measures in Provision C.10 represent a second and additional level of discretion by the San Francisco Bay Water Board. They claim that the requirements in C.10 are thus two steps removed from and exceed the general provisions of federal law cited in the Fact Sheet. C.10 Claimants cite the California Supreme Court's *Hayes* decision²⁶³ for the proposition that Provision C.10 is a state rather than a federal mandate.

²⁵⁸ ACCWP, Multi-Year Monitoring Plan, May 28, 2003, p.II-20; SMCWPPP, 2007-2008 Annual Report, p. 2-6; SCVURPPP, Trash Problem Area Evaluation Results, FY 05-06, entire document.

²⁵⁹ Alameda Test Claim, Narrative, p. 36.

²⁶⁰ Brisbane Test Claim, Narrative, p. 30.

²⁶¹ Santa Clara County Test Claim, Narrative, p. 32.

²⁶² Basin Plan, Table 4-1, Prohibition 7.

²⁶³ *Hayes, supra*, 11 Cal.App.4th 1564.

C.10 Claimants' argument concerning the Basin Plan prohibition is flawed. The Fact Sheet indicates that the San Francisco Bay Water Board adopted the Prohibition in 1975.²⁶⁴ Under Government Code section 17551(c), test claims must be filed within 12 months of the effective date of a statute or executive order. C.10 Claimants' argument that the Basin Plan prohibition imposes a state mandate is not timely because the time for challenge to it passed more than thirty years ago.

The San Francisco Bay Water Board implemented numerous federal requirements in adopting Provision C.10. The Permit's trash provisions are required by the Clean Water Act and its implementing regulations. As discussed above Clean Water Act section 402(p)(3)(B)(ii-iii) governs issuance of MS4 permits. It is cited in the Permit's Fact Sheet as providing as broad legal authority for the requirements in Provision C.10.²⁶⁵ That law provides three separate but related requirements for discharge permits issued to the local governments that operate MS4s.

First, the CWA requires that stormwater permits must require that permittees effectively prohibit non-stormwater discharges into storm sewers.²⁶⁶ Those prohibited non-stormwater discharges clearly include trash.

Second, MS4 permits must require controls that will result in reducing the pollutants that discharge from the MS4 to waters of the United States to the MEP.²⁶⁷ Provision C.10 requirements are necessary to reduce the discharge of trash to the MEP.

Last, the CWA provides that stormwater permits must include such other provisions as the permitting agency determines to be appropriate for the control of pollutants.²⁶⁸ The San Francisco Bay Water Board determined that Provision C.10 was appropriate and necessary to control the discharge of trash into storm sewers and into waters of the United States. The Permit's Fact Sheet explains that the trash requirements in Provision C.10 implement narrative water quality objectives:

The narrative water quality objectives [in the Basin Plan] applicable to trash are Floating Material (Waters shall not contain floating material, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses), Settleable Material (Waters shall not contain substances in concentrations that result in the deposition of material that cause nuisance or adversely affect beneficial uses), and Suspended Material (Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses).²⁶⁹

Provision C.10 is also required by 40 CFR 122.26(d)(2)(iv)(B). That regulation provides that a MS4 permit shall include "[a] description of a program, including a schedule, to detect and

²⁶⁴ Permit, page. App I-17.

²⁶⁵ Permit, page App. I-71.

²⁶⁶ CWA § 402(p)(3)(B)(ii).

²⁶⁷ CWA § 402(p)(3)(B)(iii).

²⁶⁸ *Id.*

²⁶⁹ Permit, p. App. I-73, I-74.

remove (or require the discharger to the municipal separate storm sewer system to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer”.

The Provision's requirements, including those concerning trash hot spot identification and assessment, are also required by 40 CFR 122.26(d)(2)(iv)(B)(2). That regulation requires “[a] description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens”.

The requirements in Provision C.10 are further mandated by 40 CFR 122.26(d)(2)(iv)(B)(3) which requires in relevant part “[a] description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges of other sources of non-storm water”.

Provision C.10's requirements, including those concerning trash hot spot clean up and reporting are mandated by 40 CFR 122.26(d)(2)(iv)(B)(4) which requires “[a] description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer.” Additional federal legal authority is found at 40 CFR 122.26(d)(2)(iv)(A) and 40 CFR 122.26(d)(2)(iv)(A)(3).

The San Francisco Bay Water Board disagrees with C.10 Claimants' characterization of the requirements in Provision C.10 as imposing state mandates. The federal authorities cited above support C.10 controls to address the discharge of trash. The Provision provides specificity consistent with the San Francisco Bay Water Board's duty to define what constitutes MEP in the context of a particular permit. The San Francisco Bay Water Board complied with the MEP standard by providing further specificity in an iterative fashion when it refined the trash requirements in the Permit. The Board also properly implemented the other cited federal laws and regulations cited above.

3. Provisions C.11.f and C.12.f-- Mercury and PCB Diversion Studies

A. Introduction

Alameda, Brisbane and Santa Clara County (C.11/C.12 Claimants) challenge Provisions C.11.f and C.12.f. Those Provisions require that Permittees evaluate the reduced loads of mercury and PCBs from pilot projects to divert dry weather and first-flush stormwater flows to sanitary sewers. Provisions C.11.f and C.12.f further provide that Permittees shall work together to implement one pilot project in each of five counties to evaluate those load reductions.

B. Provisions C.11.f and C.12.f do not require new programs or higher levels of service.

Alameda, Brisbane and Santa Clara County argue that Provisions C.11.f and C.12.f are new programs. In fact C.11/C.12 Claimants' prior permits required that they develop and implement control programs for mercury and PCBs.

The prior permit that authorized Alameda's stormwater discharge required that it implement a Mercury Plan to reduce "mercury from controllable sources in urban runoff to the maximum

extent practicable".²⁷⁰ Similarly, that permit required that Alameda implement a PCBs/Dioxin Plan to "[i]mplement actions to eliminate or reduce discharges of PCBs or dioxin-like compounds from urban runoff conveyance systems from controllable sources....and [d]evelop a long-term management plan for eliminating and reducing PCB discharges."²⁷¹

Brisbane's prior permit required that it prepare a report that included an "[e]valuation of...[the] effectiveness of BMPS that are currently being implemented and additional BMPs that will be implemented to prevent or reduce [pollutants including mercury and PCBs] pollutants that may be causing or contributing to the exceedance of [water quality standards]..."²⁷² The report was also required to include a plan to implement pollution reduction and control measures and further required that permittees implement pollutant reduction and control measures...."²⁷³

Santa Clara was required to implement a mercury reduction plan which included in relevant part "[d]evelopment and adoption of policies, procedures and/or ordinances calling for ...[t]he virtual elimination of mercury from controllable sources in urban runoff...."²⁷⁴ The permit further required that Permittees implement a plan to "identify, assess, and manage controllable sources of PCBs and dioxin-like compounds found in urban runoff, if any..."²⁷⁵

When the San Francisco Bay Water Board issued the Permit it determined that more detailed requirements were necessary to refine Claimants' existing programs to address mercury and PCBs contamination. That approach was consistent with the iterative approach required to meet the MEP standard under federal law. Thus, the Board did not require that Claimants implement a new program but instead provided further detail in implementing the minimum federal MEP standard and added specificity to already existing BMPs.

C. Provisions C.11.f and C.12.f are required by federal law.

Provisions C.11.f and C.12.f are required by the Clean Water Act and its implementing regulations. As discussed above Clean Water Act section 402(p)(3)(B)(ii-iii) governs issuance of MS4 permits. It provides broad legal authority for the requirements in Provision C.11 and C.12. That law provides three separate but related requirements for discharge permits issued to the local governments that operate MS4s.

First, the CWA requires that stormwater permits must require that permittees effectively prohibit non-stormwater discharges into storm sewers.²⁷⁶ The challenged Provisions relate to dry weather flows. EPA has defined "storm water" to mean "storm water runoff, snow melt runoff and surface runoff and drainage."²⁷⁷ Dry weather flows are not included in the definition of "stormwater", thus such flows are prohibited.

²⁷⁰ Alameda County 2003 permit, Provision 10.b

²⁷¹ *Id.*, Provision 10.d.

²⁷² San Mateo County 1999 permit, Provision C.2.

²⁷³ *Id.*, at Provision C.2.d.

²⁷⁴ Santa Clara County 2001 Permit, Provision 9.c.i.

²⁷⁵ *Id.*, Provision 9.e.)

²⁷⁶ CWA § 402(p)(3)(B)(ii).

²⁷⁷ 40 CFR § 122.26(b)(13).

Second, MS4 permits must require controls that will result in reducing the pollutants that discharge from the MS4 to waters of the United States to the MEP.²⁷⁸ The challenged Provisions also relate to stormwater flows, specifically MS4 discharges of first-flush stormwater flows which are flows during the initial or early parts of storms. There is a general analysis of the MEP standard above. The San Francisco Bay Water Board implemented the MEP standard in requiring Provisions C.11.f and C.12.f. Federal law mandates that the Board exercise its discretion in establishing requirements to meet the MEP standard. The Board determined that the challenged provisions were necessary to meet the MEP standard. The MEP standard required that the Board make such a determination thus the Board complied with the standard in adopting Provisions C.11.f and C.12.f, despite the fact that the provisions are more specific than the federal laws and regulations that are cited in the permit. For those reasons the challenged requirements meet but do not exceed the MEP standard.

Last, stormwater permits must include such other provisions as the permitting agency determines to be appropriate for the control of pollutants.²⁷⁹ This federal requirement is the basis for water quality based provisions such as Provisions C.11.f and C.12.f.

As discussed above, the CWA provides a further statutory mandate that is independent from CWA section 402(p) requirements. Under CWA section 303, a stormwater permit must include provisions in MS4 permits that are required to implement the wasteload allocations of TMDLs. Provisions C.11.f and C.12.f are required to implement the TMDLs for mercury²⁸⁰ and PCBs²⁸¹ in San Francisco Bay.

Provisions C.11.f and C.12.f are additionally required under federal law because they are necessary to implement the wasteload allocations assigned to stormwater dischargers in Total Maximum Daily Loads (TMDLs) for mercury²⁸² and PCBs. As discussed above once a TMDL is approved by EPA under CWA section 303(d), a permitting agency must issue permits that include effluent limits that are "consistent with the assumptions and requirements of any applicable wasteload allocations..."²⁸³ The San Francisco Bay Water Board and State Water Board adopted TMDLs for mercury²⁸⁴ and PCBs²⁸⁵ that include wasteload allocations for the stormwater agencies. The San Francisco Bay Water Board implemented the TMDLs in part by adopting Provisions C.11.f and C.12.f. The San Francisco Bay Water Board's action in adopting those provisions was consistent with the assumptions and requirements of the wasteload allocations for the stormwater agencies.

The TMDLs were adopted by the San Francisco Bay Water Board and State Water Board in the form of amendments to the Basin Plan for the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan). The amendments were subsequently approved by EPA.

²⁷⁸ CWA § 402(p)(3)(B)(iii).

²⁷⁹ *Id.*

²⁸⁰ Basin Plan, Chapter 7.2.2

²⁸¹ *Id.*, Chapter 7.2.3.

²⁸² *Id.*, Chapter 7.2.2

²⁸³ 40 CFR 122.44(d)(1)(vii)(B).

²⁸⁴ Basin Plan, Chapter 7.2.2.

²⁸⁵ *Id.*, Chapter 7.2.3.

The mercury TMDL provides that the wasteload allocations for stormwater dischargers will be attained by issuing MS4 permits that include narrative requirements instead of numeric permit limits. The Basin Plan provision that sets forth the mercury TMDL provides that:

The NPDES permits for urban runoff management agencies shall require implementation of best management practices and control measures designed to achieve the [wasteload] allocations [for stormwater agencies] or accomplish the load reductions derived from the allocations.²⁸⁶

The Basin Plan further provides in relevant part that the San Francisco Bay Water Board shall incorporate various requirements to implement the mercury TMDL into NPDES permits issued to MS4s.²⁸⁷ Under the Basin Plan, the Board must issue permits that require in relevant part that Permittees develop and implement a mercury source control program.²⁸⁸ Permits must also require that Permittees demonstrate progress toward meeting mercury loading requirements or attainment of wasteload allocation by various methods.²⁸⁹

In the PCBs TMDL the San Francisco Bay Water Board followed the same approach as described above with respect to mercury. The TMDL provides that MS4 permits will implement the applicable PCBs wasteload allocations through narrative requirements rather than through numeric effluent limits. The Basin Plan provision that sets forth the PCBs TMDL provides that the San Francisco Bay Water Board will issue NPDES permits to stormwater agencies that include requirements:

...based on an updated assessment of best management practices and control measures intended to reduce PCBs in urban stormwater runoff. Control measures implemented by stormwater runoff management agencies...shall reduce PCBs in stormwater runoff to the maximum extent practicable...In the first five-year permit term, stormwater Permittees will be required to implement control measures on a pilot scale to determine their effectiveness and technical feasibility....²⁹⁰

The Staff Report that accompanied the PCBs TMDL provides a basis for conducting an updated assessment of best management practices for control measures for PCBs. It notes that the permits issued to MS4s must include requirements to "[c]onduct pilot studies to develop and implement best management practices (BMPs) and control measures where areas where elevated PCBs are detected in storm drain sediments".²⁹¹ The report provides examples of BMPs which include diversion of stormwater for treatment.²⁹²

The San Francisco Bay Water Board complied with the requirement in 40 CFR 122.44(d)(1)(vii)(B) in issuing a permit that included effluent limits that were "consistent with the

²⁸⁶ Basin Plan, Section 7.2.2.6, p. 7-29.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ Basin Plan, section 7.2.3.6, pp. 7-47--7-48.

²⁹¹ San Francisco Bay Regional Water Quality Control Board, Total Maximum Daily Load for PCBs in San Francisco Bay, Final Staff Report for Proposed Basin Plan Amendment, February 13, 2008, p. 74.

²⁹² *Id.*

assumptions and allocations of any available wasteload allocation". Instead of requiring numeric effluent limits the Board required BMPs including Provisions C.11.f and C.11.f as allowed by the CWA for MS4 permits.²⁹³

The Board acted properly in requiring the diversion studies in Provisions C.11.f and C.12.f. Those studies are required in order for the Permit to comply with the CWA and its implementing regulations.

4. Provision C.2--Municipal operations

A. Introduction

Provision C.2 requires that Permittees implement various BMPs to control and reduce discharges of non-stormwater and polluted stormwater during operation, inspection, routine repair and maintenance of municipal facilities and infrastructure.

B. Provision C.2 does not require new programs or higher levels of service.

1. Provision C.2.b

Provision C.2.b requires in relevant part that Permittees implement BMPs for pavement washing, mobile cleaning and pressure wash operations in locations including parking lots, garages, trash areas, gas station fueling areas, sidewalk and plaza cleaning. Those BMPs must prevent the discharge of polluted wash water and non-stormwater to storm drains to comply with Permit Discharge Prohibition A-1.

City of San Jose ("San Jose") asserts that Provision C.2.b imposes a higher level of service. San Jose's test claim does not provide any explanation about why it reaches that conclusion. Instead it states that the Provision "removes SAN JOSE's ability to consider alternatives which may or may not be more effective in its community."²⁹⁴ San Jose's statement amounts to an argument about the wisdom of the requirement but is not sufficient to support its contention that the provision imposes a higher level of service.

The Provision at issue is a refinement of requirements in San Jose's previous permit.²⁹⁵ Discharge Prohibition A in that permit prohibited discharge of polluted non-stormwater in accordance with Provisions C.1-8. One of the provisions referenced in that Discharge Prohibition was Provision C.2.a which required that San Jose implement control measures and best management practices to reduce pollutants in stormwater to the maximum extent practicable.²⁹⁶ It required that Permittees implement and improve their Management Plan which contained standards for various program elements including "Public Streets, Road and Highways Operations and Maintenance."²⁹⁷

San Jose complied with that requirement in relevant part by submitting an Urban Runoff Management Plan and Annual Work Plans to the San Francisco Bay Water Board that detailed

²⁹³ *Defenders of Wildlife, supra*, 191 F.3d at 1166.

²⁹⁴ San Jose Test Claim, Narrative, page 15.

²⁹⁵ Santa Clara County 2001 permit.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

the activities that it was doing to comply with the permit. San Jose's 2004 Urban Runoff Management Plan noted that San Jose was implementing model BMPs and SOPs [Standard Operating Procedures] for public streets, roads, and highways "as part of ongoing permit compliance efforts" in connection with its prior permit issued by the Board.²⁹⁸ San Jose's work plan updates to the URMP describe the permit compliance measures it took with respect to cleaning of sidewalks and plazas.²⁹⁹ San Jose was required to do pavement washing (which can include mobile cleaning and pressure wash operations) under those plans, together with Prohibition A and Provision C.2.a in the city's prior permit. The Provision at issue in the San Jose's test claim requires that San Jose continue those BMPs. It provides examples of the places in which those activities must be performed and lists parking lots, garages, trash areas and gas station fueling areas.

The San Francisco Bay Water Board agrees that Provision C.2.b includes requirements that are more specific regarding the appropriate level of activity to be included in San Jose's BMPs.

2. Provision C.2.c

Provision C.2.c requires in relevant part that Permittees implement appropriate BMPs to prevent the discharge of polluted stormwater and non-stormwater from bridges and structural maintenance activities over water or into storm drains. The provision also requires that Permittees implement BMPs for graffiti removal that prevent non-stormwater and wash water discharges into storm drains.

San Jose contends that Provision C.2.c imposes a higher level of service because the new permit "itemizes requirements, not in Federal Regulations, that did not exist in the Prior Permit".³⁰⁰ San Jose's claim does not provide any detail concerning the specific C.2.c requirements that it believes impose a higher level of service.

The Provision includes more specificity regarding the appropriate level of action that is necessary for BMPs than was found in San Jose's prior permit.³⁰¹ San Jose was required under its prior permit to implement control measures and best management practices to reduce pollutants in stormwater to the maximum extent practicable.³⁰² San Jose's prior permit also required that permittees implement and improve their Management Plan which contained standards for various program elements including "Public Streets, Road and Highways Operations and Maintenance."³⁰³ Provision C.2.b in San Jose's prior permit required that Permittees implement measures described in their annual revisions to their Management Plan.³⁰⁴

²⁹⁸ City of San Jose, *Urban Runoff Management Plan*, September 2004, p. 35.

²⁹⁹ City of San Jose, *Urban Runoff Management Plan*, March 1, 2006, Attachment 1: Work Plans, FY 06-07, p. 25, PSR-1; City of San Jose, *Urban Runoff Management Plan*, March 1, 2007, Attachment 1: FY 07-08 Work Plans, pp. 23-24, PSR-1; City of San Jose, *Urban Runoff Management Plan*, March 1, 2008, Attachment 1: FY 08-09 Work Plans, pp. 23-24, PSR-1; City of San Jose, *Urban Runoff Management Plan*, February 24, 2009, Attachment 1: FY 09-10 Work Plans, pp. 23-24, PSR 1.

³⁰⁰ San Jose Test Claim Narrative, page 15.

³⁰¹ Santa Clara County 2001 permit.

³⁰² *Id.*, Provision C.2.a.

³⁰³ *Ibid.*.

³⁰⁴ *Ibid.*

San Jose complied with that requirement in relevant part by submitting Work Plans to the Board that detailed the activities that it was doing to comply with the permit. Upon submission those Work Plans became enforceable under Provision C.2.b of San Jose's prior permit.³⁰⁵ San Jose's annual Workplans confirm that San Jose was complying with its prior permit by implementing BMPs for maintenance of bridges and structures and graffiti removal.³⁰⁶ To the extent that Provision C.2.c includes requirements that are more specific than are included in San Jose's prior permit, it does not necessarily follow that the provision requires that San Jose provide a higher level of service. The San Francisco Bay Water Board provided further specificity in Provision C.2.c as required under federal law.

3. Provision C.2.e

Provision C.2.e requires in relevant part that Permittees implement and require contractors to implement BMPs for erosion and sediment control during and after construction or maintenance activities on rural roads, particularly in or adjacent to stream channels or wetlands. It requires further that Permittees in some cases develop BMPs for specified activities in connection with erosion and sediment control on rural roads.

San Jose contends that Provision C.2.e imposes a higher level of service because it expands upon requirements found in Provision C.5 of its prior permit. The city states that Provision C.2.e requires BMPs to minimize impacts on streams and wetlands including soil erosion potential as well as slope steepness and stream habitat resources.

The Provision at issue refines the requirements in San Jose's previous permit and work plans. Provision C.5 in that permit required that San Jose develop Performance Standards, annual training and technical assistance needs (*sic*) and annual reporting requirements for specified rural public works construction, maintenance and support activities.³⁰⁷ Those included prevention and control of road-related erosion in connection with road construction, maintenance and repairs in rural areas. It further required that San Jose take actions related to stream channels and streambank stabilization, including management and/or removal large wood debris and live vegetation for stream channels.³⁰⁸

To comply with those requirements in its prior permit, San Jose added a new Performance Standard for Rural Public Works with the goal to minimize water quality impacts resulting from public works maintenance and support activities in rural areas.³⁰⁹ San Jose noted in its 2004 URMP that SOPs and BMPs for rural public works activities were done in FY 2003-04 and that the SOPs would be distributed and reviewed annually.³¹⁰ San Jose's subsequent adopted

³⁰⁵ Santa Clara County 2001 permit, Provision C.2.b.

³⁰⁶ City of San Jose, Urban Runoff Management Plan, March 1, 2006, Attachment 1: Work Plans, FY 06-07, p. 25, PSR 1, p. 29, SDO1; City of San Jose, Urban Runoff Management Plan, March 1, 2007, Attachment 1: FY 07-08 Work Plans, pp. 23-24, PSR 1, p. 27, SDO 1; City of San Jose, Urban Runoff Management Plan, March 1, 2008, Attachment 1: FY 08-09 Work Plans, pp. 23-24, PSR 1, pp. 27-28, SDO 1; City of San Jose, Urban Runoff Management Plan, February 24, 2009, Attachment 1: FY 09-10 Work Plans, pp. 23-24, PSR 1, pp. 27-28, SDO 1.

³⁰⁷ Santa Clara County 2001 permit, Provision C.5

³⁰⁸ *Ibid.*

³⁰⁹ San Jose, URMP, September 2002, Public Streets, Roads, and Highways Operation and Maintenance (PSR) Program Element P.

³¹⁰ San Jose, 2004 URMP's PSR Performance Standard Matrix Table, page 36, PSR#6.

annual work plans detail the activities it was doing to comply with the Permit requirement, which included identified required actions such as annual training on appropriate SOPs/BMPs for City staff that perform rural public works operations and maintenance activities, including incorporation of SOPs/BMPs evaluations into the annual training; requiring City-hired contractors to use appropriate SOPs/BMPs when performing rural public works construction or maintenance; and annually conducting an evaluation of the effectiveness of the rural public works programs to identify items for continuous improvement..³¹¹

Provision C.2.e provides further detail and refinement of the tasks that San Jose was required to do under its prior permit but does not impose a new program or higher level of service.

4. Provision C.2.f

Provision C.2.f requires in relevant part that Permittees prepare, implement and maintain a site specific Stormwater Pollution Prevention Plan (SWPP)³¹² for corporation yards and material storage facilities that are not already covered under the State Water Board's Industrial Stormwater NPDES General Permit. Claimant City of San Jose notes that it already implements SWPPs under its prior permit but asserts that Provision C.2.f creates "specific obligations that must be incorporated into each SWPP".³¹³ San Jose states that the provision at issue requires that each SWPP shall incorporate "all applicable BMPs that are described in the California Stormwater Quality Association's Handbook for Municipal Operations and the Caltrans Storm Water Quality Handbook Maintenance Staff Guide....as appropriate".³¹⁴

The San Francisco Bay Water Board agrees that San Jose was previously required to maintain a SWPPP at each corporation yard. Under the Urban Runoff Management Plan that implemented San Jose's prior permit, San Jose was required to maintain a SWPPP in each of its corporation yards.³¹⁵ Provision C.2.f continues the same requirement.

Provision C.2.f provides more specificity on the contents of the required SWPPs. It references two handbooks that are widely recognized by stormwater managers throughout California. The handbooks include a compilation of BMPs used in California. Provision C.2.f provides San Jose and other Permittees with considerable latitude and flexibility to exercise professional judgment in deciding which BMPs to implement. The Provision provides maximum flexibility in that the requirement to use these handbooks is limited to incorporate "applicable" BMPs "as appropriate". San Jose has substantially the same flexibility to select BMPs under

³¹¹ City of San Jose, Urban Runoff Management Plan, March 1, 2005, Attachment 1: Work Plans, FY 05-06, p. 25, PSR 6; City of San Jose, Urban Runoff Management Plan, March 1, 2006, Attachment 1: Work Plans, FY 06-07, p. 27, PSR 1-6; City of San Jose, Urban Runoff Management Plan, March 1, 2007, Attachment 1: FY 07-08 Work Plans, p. 26, PSR 6; City of San Jose, Urban Runoff Management Plan, March 1, 2008, Attachment 1: FY 08-09 Work Plans, p. 26, PSR 6; City of San Jose, Urban Runoff Management Plan, February 24, 2009, Attachment 1: FY 09-10 Work Plans, p. 26, PSR 6.

³¹² A SWPPP identifies potential sources of pollutants in stormwater discharges and establishes BMPs in the form of structural and non-structural controls and procedures that will be put in place to minimize the potential for pollutants to be carried away in stormwater runoff. Those controls provide the flexibility to address varying sources of pollutants at different categories of industrial facilities, including municipal corporation yards.

³¹³ San Jose Test Claim, Narrative, p.16.

³¹⁴ *Ibid.*

³¹⁵ City of San Jose, Urban Runoff Management Plan, September 2004, p. 17.

Provision C.2.f than it had under the prior permit. Provision C.2.f thus does not require a new program or a higher level of service.

C. Provision C.2 is required by federal law.

The City of San Jose argues that Provision C.2 requirements are not federally mandated. San Jose has set forth its position on this issue as a single general argument that addresses all of the provisions it challenges within Provision C.2. We have responded in the same manner and have additionally specific reasons that we believe the individual provisions within Provision C.2 are federally mandated. This section is intended to supplement the general discussion above of federal laws that applied to the San Francisco Bay Water Board's adoption of the Permit.

The City of San Jose asserts that the Permit "defines" how San Jose must operate under the Permit and that the Permit imposes BMPs rather than allowing San Jose to develop its own performance standards with input from its own community. The San Francisco Bay Water Board agrees that the Permit provides more specificity than past permits. As discussed in great detail above the Board followed a different permitting approach in issuing the Permit than it had used for past MS4 permits. Those prior permits required that permittees develop specific implementation details over the course of the five year permit term without significant public review and comment. The permits provided that those later developed requirements were enforceable permit provisions.

The San Francisco Bay Water Board staff modified its approach to stormwater permitting following two court decisions in 2003 (one of which was a trial court decision and thus was not precedential).^{316 317} Taken together those cases emphasized the importance of ensuring that there was adequate opportunity for public review and comment prior to approval of implementation specifics and modifications to MS4 permits. The Water Board developed the current permitting approach to ensure that its MS4 permits would fully comply with federal legal requirements concerning public review and comment. Because the Permit includes implementation details in the permit rather than in plans developed by Permittees subsequent to permit issuance, it ensures that there is adequate public review of and comment on all permit requirements.

CWA section 403(p)(3)(B) provides three separate but related requirements for discharge permits issued to the local governments that operate MS4s. First, the CWA requires that stormwater permits must require that permittees effectively prohibit non-stormwater discharges into storm sewers.³¹⁸ The San Francisco Bay Water Board acted as required under that law when it included Provision C.2 in the Permit. The Provision requires that Permittees take actions to effectively prohibit the discharge of non-stormwater in connection with some municipal activities into its storm sewers.

Second, MS4 permits must require controls that will result in reducing the pollutants that discharge from the MS4 to waters of the United States to the MEP.³¹⁹ The San Francisco Bay

³¹⁶ *Environmental Defense Center, supra*, 344 F.3d 832.

³¹⁷ *San Francisco Baykeeper v. Regional Water Quality Control Board, San Francisco Bay Region* (2003) San Francisco Superior Court No. 500527, Order Granting Petition for Writ of Mandate and Statement of Decision.

³¹⁸ CWA § 402(p)(3)(B)(ii).

³¹⁹ CWA § 402(p)(3)(B)(iii).

Water Board appropriately used its discretion in establishing the MEP standard to require more specificity in the Permit than was included in San Jose's prior permit. The added specificity is consistent with EPA expectations that successive generations of permits will be strengthened and refined to be more effective.³²⁰ The general discussion of the MEP standard above is applicable here and supports the conclusion that Provisions C.2 does not exceed federal law.

Last, stormwater permits must include such other provisions as the permitting agency determines to be appropriate for the control of pollutants.³²¹

In complying with those CWA mandates when it established the requirements in Provision C.2, the San Francisco Bay Water also implemented the requirements of numerous federal regulations that implement the CWA. Provision C.2 as a whole implements the broad and specific legal authorities cited in the Permit's Fact Sheet.³²² These federal laws and regulations support the inclusion of the challenged C.2 provisions in the Permit. As discussed above, even if the provisions are more specific than San Jose's prior permit or than the federal regulations cited above, the San Francisco Bay Water Board appropriately used its discretion to require more specificity in establishing the MEP standard and in implementing the other requirements in CWA section 402(p)(3)(B).

1. Additional discussion of federal requirements concerning specific Provision C.2 requirements

a. Provision C.2.c

In addition to the broad and specific authorities discussed above, Provisions C.2.c is further supported by 40 CFR 22.26(d)(2)(iv)(A)(1). It requires that a proposed management program (which by inference becomes part of a MS4 permit upon approval by the permitting authority) include a description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants in discharges of stormwater. Provision C.2.c was required to implement that regulation.

b. Provision C.2.f

In addition to the broad and specific authorities discussed above, Provisions C.2.f is further supported by 40 CFR 122.26(d)(2)(iv)(A)(5). It requires that a proposed management program (which by inference becomes a part of a MS4 permit upon approval by the permitting authority) include a description of a "program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges." Municipalities use corporation yards to store equipment and vehicles which may result in the discharge of waste during those storage or maintenance activities. The cited regulation supports the inclusion of Provision C.2.f under federal law.

³²⁰ Letter from Alexis Strauss, U.S. EPA to Tam Doduc, State Water Board and Dorothy Rice, State Water Board, *supra*.

³²¹ *Id.*

³²² Santa Clara County 2001 permit, p. App. I-19

Conclusion

For the reasons set forth above the Commission should deny the Test Claims. The Claimants have not established that the challenged Provisions of the Permit impose new programs or higher levels of service. All Provisions reflect federal requirements under the Clean Water Act for municipal stormwater permitting. The Permit, including the Provisions challenged in the Test Claims, reflects the federally mandated, federal minimum standard of reducing pollutants to the "maximum extent practicable". To the extent that any of the challenged Provisions exceed the MEP standard, they are independently required by federal law or properly included as requirements appropriate to control pollutants. Furthermore, Claimants can pay for any costs associated with the requirements by levying service charges or fees. Finally, to the extent that any portion of the claims would otherwise qualify for subvention, the associated costs are *de minimis* and therefore do not warrant subvention.

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

Sincerely,



Dorothy Dickey
Senior Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812
Telephone: 510-622-2490
Fax: 510-622-2457
Email: ddickey@waterboards.ca.gov

Attachments

cc. Service List, Exhibit A to Proof of Service

PROOF OF SERVICE

I, Sue Ma, declare that I am over 18 years of age and not a party to the within action. I am employed in Alameda County at the San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, 14th Floor, Oakland, CA, 94612. On May 17, 2011 I served the within documents:

San Francisco Bay Regional Water Quality Control Board Response to:

- Municipal Regional Stormwater Permit--San Mateo County, 10-TC-01, City of Brisbane, Claimant
- Municipal Regional Stormwater Permit--Alameda County, 10-TC-02, City of Alameda, Claimant
- Municipal Regional Stormwater Permit--Santa Clara County, 10-TC-03, Santa Clara County, Claimant
- Municipal Regional Stormwater Permit--Municipal Operations (C.2), 10-TC-05, City of San Jose, Claimant

by electronic mail: I caused a true and correct copy of the document(s) to be transmitted by electronic mail compliant with section 1010.6 of the California Code of Civil Procedure to the Commission on State Mandates, 980 Ninth Street, Suite 300, Sacramento, CA 95814, by uploading a true copy thereof to the CSM Dropbox at the Commission on State Mandates' web site to be posted and for 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 as provided in California Code of Regulations, Title 2, section 1181.2, subd. (c)(1)(E).

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on May 17, 2011, at Oakland, CA.



Sue Ma